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Who cares for the child?

Regulating custody and access in family and migration law in the Netherlands, the European Union and the Council of Europe

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"But one thing I do know. As long as people choose to engage in family life, as long as people stay on the move, and as long as the nation remains the chief unit of political organization, intimate strangers will continue to confront us with tensions and contradictions inherent to the regulation of human mobility."

Sarah van Walsum, Intimate Strangers 2012

Contents

1 Introduction **1**

1.1 Research framework 2

1.1.1 Relationship between the individual, the family and the state 3

1.1.2 Which international law is relevant for regulating parent-child relationships? 5

1.1.3 Protection of custody and access rights in Dutch family law and migration law 8

1.1.4 What is the subject matter when comparing family and migration law? 9

1.2 Research aim 11

1.2.1 Courts' approach 11

1.2.2 Council of Europe 12

1.2.3 European Union 13

1.2.4 The Netherlands 14

1.3 Research questions and structure of the thesis 15

1.4 Methodological remarks 18

1.5 Terminology 19

2 Parent-child relationships in case law of the European Court of Human Rights: family and migration law cases compared **21**

2.1 Introduction 22

2.1.1 Sub-questions 23

2.1.2 Methodology 25

2.2 Right to respect for family life in family and migration cases 27

2.2.1 Family life within the scope of Article 8 ECHR 27

2.2.2 Establishing family life in family cases 28

2.2.3 Establishing family life in migration cases 32

2.2.4 Comparing family and migration law cases 34

2.3 Positive and negative obligations under Article 8 ECHR 34

2.3.1 Positive and negative obligations in family law 36

2.3.2 Positive and negative obligations in migration law 36

2.3.3 Comparing family and migration law cases 38

2.4 Margin of appreciation 39
2.4.1 Margin of appreciation in family law cases 40
2.4.2 Margin of appreciation in migration law cases 41
2.4.3 Comparing the margin of appreciation in family and migration cases 43
2.5 Obligations for the state under Article 8 ECHR in family law cases 43
2.5.1 Right of parent and child to live together 43
2.5.2 Access rights: the right of parent and child to mutually enjoy each other's company 52
2.6 Obligations for the state under Article 8 ECHR in migration law cases 57
2.6.1 Right of parent and child to live together 58
2.6.2 Access rights: the right of parent and child to mutually enjoy each other's company 76
2.7 Concluding remarks: comparing the state's obligations to protect family life in family and migration law cases 85

3 Regulating of parent-child relationships in free movement and Ruiz Zambrano-like cases 91
3.1 Introduction 92
3.1.1 Methodology 93
3.2 Parent-child relationships in EU law 95
3.3 Assessment by the CJEU 98
3.3.1 Proportionality test 98
3.3.2 Right to family life in free movement and *Ruiz Zambrano*-like cases 99
3.4 Residence rights for non-EU family members of EU citizens in free movement cases 101
3.4.1 Residence rights in order to enable the right to provide cross-border services 102
3.4.2 Child's right to education and the ensuing residence rights for his or her carer 103
3.4.3 Directive 90/364 and the dependent Union citizen 106
3.4.4 Derived residence rights for children of migrant or former migrant workers 107
3.4.5 Derived residence rights for non-EU and non-self-sufficient primary carers 109
3.4.6 Derived residence rights for cross-border commuters 110
3.4.7 Concluding remarks: free movement cases 111
3.5 EU residence rights for stationary Union citizens and their TCN family members? 111
3.5.1 'Law-making' by the CJEU: the introduction of a new doctrine 112

3.5.2 Dependency between a Union citizen and third-country national as the decisive factor 115
3.5.3 Connection between *Ruiz Zambrano* situations and Union citizen's freedom of movement 117
3.5.4 CJEU further explains the element of dependency 118
3.5.5 Mere presence of parent with Union citizenship not relevant 120
3.5.6 Expulsion of parents with criminal record must be proportional 121
3.5.7 Right to family life relevant for the expulsion of carer parents of stationary EU citizen child 124
3.5.8 Concluding remarks on Article 20 TFEU 126
3.6 Concluding remarks 127

4 Parent-child relationships in Dutch family and migration law 131
4.1 Introduction 132
4.1.1 Methodology 133
4.2 Parent-child relationships in Dutch family law 135
4.2.1 Parent-child relationships in Dutch filiation law 135
4.3 Custody in Dutch family law 136
4.3.1 Who has custody? 137
4.3.2 Primacy of joint custody after divorce or separation 138
4.3.3 Settling custody disputes: strict criterion for ending joint custody 140
4.4 Right to access in Dutch family law 142
4.4.1 Who has a right to access? 142
4.4.2 Access disputes 143
4.4.3 Reasons for denying access 144
4.5 Obligation to give actual meaning to the exercise of parental custody or access 146
4.6 Intersection of family and migration law cases from the perspective of the family court 147
4.7 Conclusion: family law 148
4.8 Parent-child relationships in Dutch migration law 149
4.8.1 Establishment of parent-child relationships in Dutch migration law 151
4.8.2 Comparing parents and children in family and migration law 154
4.9 Custody and access in Article 8 ECHR cases 155
4.9.1 Marginal assessment by the Council of State in Article 8 ECHR cases 155
4.9.2 Elements in the balancing exercise on the basis of Article 8 ECHR 156
4.9.3 Custody in Article 8 ECHR migration cases 160
4.9.4 Access in Article 8 ECHR migration cases 163

4.10 Custody and access in free movement and Article 20 TFEU cases 167
4.10.1 Council of State's interpretation of Directive 2004/38 168
4.10.2 Custody in Article 20 TFEU cases 169
4.10.3 Access in Article 20 TFEU cases 172
4.11 Conclusion: migration law 172
4.12 Concluding remarks 173

5 Concluding remarks: regulating parent-child relationships in the Council of Europe, the EU and the Netherlands 177
5.1 Introduction 178
5.2 Family and migration law at the ECtHR: Best interests of the child vs. behaviour of parent and state as the decisive element for the outcome of a case 178
5.2.1 Similar starting point in family and migration law 179
5.2.2 Family relationship is never decisive in migration law cases 180
5.2.3 Incompatibility of state decisions, inaction by the state and legitimate expectations of migrants as the basis for a violation of Article 8 ECHR 181
5.2.4 Consequences of ECtHR decisions for the Netherlands 182
5.3 CJEU: Strong protection of Union citizens' family rights falling within the scope of Union law 182
5.3.1 Narrow definition of family members, but broad protection of family rights 183
5.3.2 Family rights for stationary, economically inactive Union citizens and their primary carers 184
5.3.3 Family rights are relevant when Ruiz Zambrano criterion is invoked 184
5.3.4 Consequences of CJEU decisions for the Netherlands 185
5.4 The Netherlands: Different perspective on the meaning of parent-child relationships in family and migration law 186
5.4.1 Approach in Dutch family law 186
5.4.2 Best interests of the child vs. behaviour of migrant parent 186
5.4.3 Best interests of the child vs. behaviour of the Dutch or legally residing parent 187
5.4.4 Custody as a means to serve the child's best interests vs. custody as a legal competence of parents 187
5.4.5 Assessments of facts vs. theoretical approach 188
5.5 Relationship between the Dutch and international courts 188
5.5.1 Dutch law and the ECtHR 189
5.5.2 Dutch law and the CJEU 190
5.6 Courts' approach in regulating tensions between individuals, families and states 191

Acknowledgements 195
Bibliography 199
Summary 225
Annex I: Case law of the European Court of Human Rights 230
Annex II: Case law of the Council of State 236

Chapter 1

Introduction

This thesis concerns the way in which parent-child relationships – and, more specifically, custody and access rights – are regulated in both family and migration law and at different levels of jurisdiction (the Netherlands, the EU and the Council of Europe). In both family and migration law, various situations can arise in which parents and minor children are separated or at risk of being separated. Such separations may be the consequence of decisions made by the family members themselves, as in the case of divorce or after a relationship breakdown, but may also be state-inflicted, as in the case of out-of-home placements, detention or immigration measures. A separation or possible separation may create tensions between the interests of parents, children and the state. Parents' own autonomy rights permit them to divorce and separate while this may damage their children's development.[1] And, in the case of out-of-home placements, for example, parents who have voluntarily consented to the placement may nevertheless want to maintain custody, whereas the state may consider this not to be in the child's interests if there is no prospect of the child returning to the parents in the near future.[2]

Law and courts play an important role in mediating these tensions. This thesis aims to compare the approach of family and migration law courts in regulating custody and access in cases involving a separation (or possible separation) between parents and their minor children. The notion of 'regulating' as used here concerns the way in which courts – through its case law – effectuate the family relationship between parents and children. At a national level, family courts are the courts specifically aimed at regulating custody and access, while migration courts deal with applications concerning residence rights. At the international level, however, the same court may be either a family law or a migration law court, depending on what the parties have requested.

Before outlining the research questions and the structure of this thesis, I will set out the framework for the research.

1.1 Research framework

Firstly, I will clarify the complex relationship between the individual, the family and the state that is at the heart of this research. This is in order to show that while law always plays an important role in mediating tensions between individuals, families and the state, it may also create tensions between these parties (1.1.1). Secondly, I will describe the international law regulating the parent-child relationship that is under scrutiny in this research. International and EU law have given rise to a great body of case law in which the regulating

1 Douglas and Barton 1995, p. 29.
2 Court of Appeal Zwolle 14 April 2016, no. 200.182.819/01, ECLI:NL:GHARL:2016:2968.

of parent-child relationships has been given meaning, while also significantly influencing the domestic regulation of family relationships. In order to understand how parent-child relationships are regulated in the Netherlands it is therefore important also to consider how parent-child relationships are regulated in international and EU law (1.1.2). Thirdly, I will address how the tensions between individuals, families and states that come to the fore in international law are mediated in national family and migration law and by national family and migration law courts (1.1.3). As any comparison of family law and migration law requires me to distinguish comparable situations, the final part of this section discusses the underlying premise of this thesis, which applies to both fields of law and is consequently the focus of the comparison between family and migration law (1.1.4).

1.1.1 Relationship between the individual, the family and the state

"Families are made up of individuals who, while mutually dependent and linked to each other by a shared sense of origin and destiny, also aspire to autonomy and individuality".[3] The way in which meaning is given to family relationships is first and foremost left to the family members themselves, while tensions between the individual and the family are also negotiated by the family members. Besides family members, the state, too, plays an important role in regulating family relationships, whereby the state is not neutral in regulating these relationships, but has interests of its own.[4] There are various reasons for the state to regulate family relationships, and in particular the relationship between parents and children, in its domestic laws. The state has an interest in the development of children as functioning members of society and in ensuring that children, as future citizens, receive the care and education they need to become productive members of society.[5] In other words, adequate care and education of children are prerequisites for a society's development.[6] Closely related to this interest is the interest of the state in shaping its citizens' national identity.[7] Lastly, the state has a moral interest in protecting vulnerable members of society, such as children. The state is thus interested in seeing that parents do not harm their children and that children can develop as individuals with interests of their own.[8] Not all parents, however, are able or willing to care for their children to this extent.

Because of the perceived importance of the family to the state, the state has always tried to regulate both the form and functions of families.[9] As Nussbaum stated:

3 Van Walsum 2010b, pp. 3-4.
4 Van Walsum 2010b, p. 4.
5 Wald, p. 801 and Van Walsum 2005, p. 187. See also the preamble of the Convention on the Rights of the Child.
6 Van Walsum 2005, p. 185.
7 Van Walsum 2010b, p. 4.
8 Wald, p. 801 and Van Walsum 2005, p. 187.
9 Wald 1985, p. 799, Nussbaum 2000, pp. 262-263 and Cere 2009, pp. 63-78. As Olsen holds regulation may in fact also entail non-regulation, since the state constantly defines and redefines the family and adjusts and readjusts family roles and therefore the state continuously affects the family, Olsen 1985, p. 842.

> *The state constitutes the family structure through its laws, defining which groups of people can count as families, the privileges and the rights of family members, defining what marriage and divorce are, what legitimacy and parental responsibility are, and so forth. (…) the state is present in the family from the start (…) it is the state that says what this thing is and controls how one becomes a member of it. (…) The family is shaped by law in a yet deeper and more thoroughgoing way, in the sense that its very definition is legal and political.*[10]

Hence, laws prescribe who may form a family, the rights and obligations of family members towards each other, and the substantive and procedural rules for dissolving families.[11] Given the public interest in regulating families, the state imposes many imperative laws; these set the boundaries of private autonomy within family relations.[12] The law plays an important role in deciding who can be a parent and under what circumstances.[13] While EU countries, for example, have steadily increased the legal protection available to same-sex partners, parenting rights for such couples remain more controversial.[14]

Just as in family law, the state also has an interest in regulating the family within the field of migration law. Shaping national identity, for example, also plays a significant role in this field of law.[15] As Abram stated, "Who and how many may join a national community and share in its life and resources are matters of legitimate public concern".[16] The right of states to control immigration is therefore considered a key element of national sovereignty.[17] Yet in cases of cross-border family relations, this sovereign power to control the border can collide with the interests of individual migrants or with the family interest. When citizens and legally residing migrants enter into family relationships with foreigners, they often appeal to the state for permission for these foreigners to enter the state's territory. And, just as in family law, the importance attributed to family members being able to live together is also recognized in migration law. Family law rights likewise apply to families confronted with migration law. The question regularly confronting the state when applying immigration law in cases involving maintaining a particular family bond is whether that family has sufficient links to the specific society.[18] If this is not immediately evident, individuals' right to live with their family members and the state's interests in controlling immigration can be irreconcilable.[19]

10 Nussbaum 2000, pp. 262-263, see also Cere 2009, pp. 63-78.
11 Wald, p. 799. Although families may also exist that are not legally recognized (for example bigamous marriages).
12 Boele-Woelki, K. & Burri, S, p. 2.
13 Macedo and Young 2003, p. 1.
14 Nikolina 2017, p. 101-113.
15 Van Walsum 2005, p. 185.
16 Abram 1995, p. 409.
17 Abram 1995, p. 409, Van Walsum 2010b, p. 4.
18 Bonjour 2009, pp. 15-16.
19 Bonjour 2009, p. 16.

1.1.2 Which international law is relevant for regulating parent-child relationships?

The above-mentioned importance attributed to the family and to family unity is acknowledged in various areas of EU and international human rights law. In this next section I will examine the norms that make comparison of national and international family law possible.

Under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the family is generally considered the natural and fundamental group unit of society that is entitled to the widest possible protection by society and the state.[20] Article 17 of the International Covenant on Civil and Political Rights lays down the right to respect for family life, while this right is also explicitly protected in Article 8 of the European Convention on Human Rights ('ECHR'),[21] in various EU directives and in the Charter of Fundamental Rights of the European Union ('the Charter'). The Charter also recognizes the rights of the child.[22] Lastly, the desire to preserve family unity and, more specifically, to preserve parent-child relationships is expressly provided for in the Convention on the Rights of the Child. This Convention points, in the preamble, to the position of children within the family unit and states that the family unit is the natural environment for the growth and well-being of all its members, but particularly for children. The preamble also mentions that, for the full and harmonious development of their personality, children should grow up in a family environment. Besides the general human right to respect for family life, as laid down in Article 16 of the Convention on the Rights of the Child, the Convention provides more specific rights relating to family unity.[23] Under Article 7(1), children have the right to know and be cared for by their parents, while Article 8(1) states that children have the right to preserve their family relations as recognized by law, without unlawful interference. Under Article 9(1), meanwhile, children have the right not to be separated from their parents against their will, except when such separation is necessary and in their best interests. The Convention on the Rights of the Child also contains several Articles addressing the right to family reunification.[24] Hence, the assumption in international human rights and EU law is that it is beneficial for children to grow up in a family environment.

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20 Art. 16(3) Universal Declaration of Human Rights, New York 10 December 1948, Trb. 1969, 99, Art. 10(1) The International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, UNTS Vol 999, 3, Treaty Series 1969, 100, entry into force for the Netherlands on 11 March 1979 and Art. 23(1) The International Covenant on Civil and Political Rights, New York, 19 December 1966, UNTS Vol 999, Treaty Series 1969, 99, entry into force for the Netherlands 11 March 1979.

21 European Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No 5, Treaty Series 1951, 154, entry into force for the Netherlands on 31 August 1954.

22 Article 24 Charter of Fundamental Rights of the European Union.

23 Convention on the Rights of the Child, New York, 20 November 1989, UNTS Vol 1577, 3, Treaty Series 1990, 46, entry into force for the Netherlands on 2 September 1990.

24 See Article 10 CRC and Article 22 CRC.

The method by which human rights are protected varies from one treaty to another. Although some of the above treaties have set up international monitoring bodies, such as the Human Rights Committee and the Committee on the Rights of the Child, their interpretative activity to date remains limited.[25] The views and decisions of international monitoring bodies such as the above two committees are not, for example, legally binding.[26] The European Court of Human Rights ('ECtHR'), however, has a substantial body of case law in which the nature and scope of the rights in the ECHR have been interpreted.[27] Because the rights in the various conventions are similar, case law of the ECtHR is also informative regarding the interpretation of other treaties.[28] Indeed, the ECtHR has often ruled that the ECHR cannot be interpreted in a vacuum, but must instead be interpreted in harmony with the general principles of international law, with particular account being taken of the rules concerning the international protection of human rights.[29] The ECtHR has interpreted the obligations that Article 8 ECHR imposes on states in the light *inter alia* of the Convention on the Rights of the Child. Lastly, Article 8 ECHR covers both substantive family and migration law, thus enabling a comparison between the two fields of law within the Council of Europe. For these reasons, and as far as this thesis concerns international law, I will examine only family and migration cases before the ECtHR in which Article 8 ECHR is invoked.[30]

Within the EU, family-related entitlements are addressed in various areas. While the EU has a shared competence for developing a common immigration policy, substantive family law (meaning the law that creates rights and obligations for individuals and the state as regards the regulating of family relationships) has to date remained a sole competence of the EU member states themselves.[31] This means that a substantive comparison between migration law cases and cases in family law (i.e. the law specifically addressing the regulation of access and custody) is not possible within Union law. With regard to cross-border family law situations, however, the EU has adopted various legal instruments. The most important of these is Brussels IIbis, which regulates international competence and recognition and the enforcement of foreign decisions on divorce, child custody, access and abduction (wrongful

25 De Vries 2013, p. 103.
26 De Vries 2013, p. 133 and 142.
27 Judgments by the ECtHR are binding only for the member state that is party to the proceedings; see Article 46(1) ECHR and as Ress stated: "there is no obligation arising out of the Convention to make judgments of the ECHR executable within the domestic legal system" (Ress 2005, p. 374). Nonetheless its judgments are authoritative and it has been argued by some authors that the ECtHR judgments have a certain *erga omnes* effect, meaning that they impose obligations on all member states (Barkhuysen & Emmerik 2005, p.15 and Gerards 2011, pp. 29- 30). Ress has stated that there is no *erga omnes* effect but something he calls an "orientation effect", by which he means that nearly all states, even in cases where they were not party to the proceedings, abide in confirming their practice to the reasoning of the judgment (Ress 2005, p. 374).
28 Forder 2005a, p. 21.
29 See for example ECtHR 6 July 2010, Appl. no. 41615/07 (*Neulinger and Shuruk v. Switzerland*), para. 73-78.
30 For a discussion of the case law of the Human Rights Committee within the context of family reunification see Di Pascale 2015, pp. 217-219, De Vries 2013, pp. 133-141 and Van Walsum 2004a, pp.145-146.
31 Baarsma 2011, p. 3-4.

removal/retention). This, however, is limited to harmonizing procedural aspects, as opposed to substantive aspects, of family law measures.

No such restrictions for the analysis of EU law exist in the migration realm. Family reunification within the EU is regulated by three main categories of legislation. The first category is the legislation applying in situations where Union citizens residing or who have resided in another EU member state wish to be reunited with family members from a non-EU state. These situations are covered by Directive 2004/38 on the free movement of EU citizens and their family members. Directive 2004/38/EC forms a single codification of previous EU law, which laid down free movement rights for specific groups of people such as employees, self-employed persons and students. It also contains new provisions, some of which reflect case law of the Court of Justice of the European Union ('CJEU') on the free movement of persons. This thesis also considers case law based on earlier EU free movement legislation, as well as free movement rights that originated outside the scope of Directive 2004/38, given that those rights are also associated with EU free movement law.[32] The second category is the legislation applying in situations where non-EU citizens legally residing in an EU member state wish to be reunited with family members from a non-EU state. These situations are covered by Directive 2003/86 on the right to family reunification of third-country nationals. Finally, there is a category of EU citizens who are resident and have always resided within their own EU member state and who wish to be reunited with a family member from a non-EU state. Although this group is in principle covered only by national legislation, recent CJEU case law may give this group a direct right to family reunification under Articles 20 and 21 of the Treaty on the Functioning of the European Union ('TFEU'), which concerns the right of Union citizens to move and reside freely within EU territory. This right applies if the EU citizen would otherwise be compelled to leave the territory of the EU. In this thesis, the discussion of EU law is limited to free movement case law and case law based on Articles 20 and 21 of the TFEU.

This thesis does not discuss Directive 2003/86 on the right to family reunification.[33] In the case law based on the Family Reunification Directive, the parent-child relationship is simply assumed, with none of the cases during the period under review dealing specifically with the question of the circumstances in which family ties should be protected and how close family ties must be in order to qualify for protection.[34] Hence, this thesis examines

32 For example, case law based on the Regulation concerning the freedom of movement of workers (Regulation (EU) No 492/2011 and Regulation (EEC) No 1612/68), see Wray & Hunter 2014, p. 64.

33 The right to family reunification on the basis of Directive 2003/86 has been extensively discussed elsewhere, see amongst others: Berneri 2017 and Klaassen 2015.

34 An example is the *Chakroun* case, wherein the CJEU established first that a minimum income could be required by member states in cases of family reunification but only as an indication; Individual circumstances have to be considered by the national authorities. Second, the CJEU ruled that national authorities are not allowed to introduce distinctions in the requirements for family reunification or family formation. So, while the CJEU interpreted Directive 2004/86 the CJEU itself did not look at the individual circumstances and the specific relationship between the family members were not addressed (CJEU 4 March 2010, C-578/08, ECLI:EU:C:2010:117 (*Chakroun*).

only EU legislation that concerns family reunification of EU citizens and third-country family members.

Although a substantive comparison between family and migration law on the basis of EU law is not possible, this thesis will nevertheless discuss EU migration law, given that this law has direct effect in the Dutch legal order and much of Dutch migration law is consequently EU law. In order, therefore, to understand Dutch migration law, it is important to have knowledge of EU law. Thereby, a discussion of EU law also provides an important addition to the discussion of Dutch migration law because, as this thesis will show, the CJEU adopts a different approach to the regulating of family relationships than the Dutch migration court.

1.1.3 Protection of custody and access rights in Dutch family law and migration law

The way in which conflicting interests of individuals, families and states are mediated on an international and European level affects how domestic law and domestic courts mediate the tensions to which these conflicting interests give rise. International human rights law, as mentioned above, has profoundly influenced the way in which custody and access rights are regulated in national legislation. Custody and access are principles of private law and, more specifically, part of family law. Family relationships in families where at least one family member does not have the right to reside in the Netherlands are regulated not only by family law, but also, and perhaps more pervasively, by migration law. Immigration measures – in particular the expulsion or non-admission of a family member – have a substantial impact on the ability to exercise custody and access rights. Nevertheless, the purpose of migration law is to regulate the extent to which a state's territory may be entered by non-nationals rather than being aimed at regulating custody and access or the underlying principle of protecting family unity. Hence, migration law regulates custody and access rights only incidentally.

However, while protecting the integrity of the family is not migration law's paramount purpose, it does explicitly aim to do so in certain circumstances. Just as the regulating of custody and access in Dutch family law has been influenced by international law, the Netherlands similarly does not have sole jurisdiction over matters of family reunification.[35] International and EU law impose limitations on the Dutch state's sovereignty in the field of migration law.[36] When regulating migration, states must respect the individual rights of

35 Van Walsum, 2009b, p. 229 and Benhabib and Resnik 2009, p. 10.

36 As Benhabib and Resnik point out: "(…) in addition to constraining sovereignty, these conventions also support sovereignty, in that they all rely on the sovereign state to give meaning to their agreements and to decide how to comply with the rights defined", see Benhabib and Resnik 2009, p. 10.

migrants, avoid splitting up families and defend national interests.[37] And whereas family law is in principle aimed at regulating relationships between individuals, there are likewise various situations in family law – parallel to separations between family members as a result of immigration measures – where family members are separated. As said earlier, this may be as a result of parents getting divorced or separated, but it can also result from a decision by the state, such as when a family member is detained or child care measures (out-of-home placements) are imposed. In such cases, conflicts may arise concerning the degree of control that parents should be allowed to exercise over their children, the range of responsibility claimable by the state, and the conditions under which the state may regulate the upbringing and education of children or remove children from their parents' care.[38]

Whenever family members are at a risk of being separated, both fields of law assign an important role to the Dutch state, partly on the basis of international and EU law, to protect the relevant individuals' family relationships. The state's duty to respect this right to family life includes the obligation not to arbitrarily interfere with such relationships.

1.1.4 What is the subject matter when comparing family and migration law?

At first sight, family law and migration law may appear to have different points of departure and to serve different interests. As explained above, the starting point of family law is the regulating of family relationships, whereas migration law concerns the regulating of residence rights. Although the extent to which migration law affects custody and access occurs more or less incidentally, family law, too, has been seen to include many situations of separations.

The underlying assumption in this thesis is that, despite the different position of custody and access in family law and migration law, and the different position of the national authorities, including the courts, the assessment of the interests of parent and child in maintaining their relationship in the event of a possible or actual separation is unlikely to vary depending on the field of law in which a case is situated. This assumption is based on the vast amount of research within the field of primarily developmental psychology that already dates back to 1952, and is now widespread, that has shown that the most important conditions for a child's upbringing are stability and continuity in living conditions and

37 Van Walsum 2010, p. 1.
38 Macedo and Young 2003.

stability in the attachment to the primary caregivers.[39] Attachment is visible in all cultures.[40] Children need to know that their parents will take care of them and will continue to do so until the children are independent.[41] Thereby, children's sense of time differs from that of adults; they are less able to sustain emotional relationships at a distance over time and while the role of the attachment figure changes with the age of the child, this factor does not cause a decreased need for an attachment figure, but instead causes a shift from the importance of proximity to the availability of a caregiver.[42] A close parent-child relationship is a protective factor against stressful and potentially traumatic experiences for children.[43] Research has shown that every separation between parents and children, or a big change in the parent-child relationship, represents a risk factor for children's future development.[44] These ideas have also affected thinking about parenthood.[45] Parental rights are in to a large degree justifiable in order to enable parents to fulfil their duties and obligations to the child.[46] Nonetheless, from a legal point of view, the parental responsibility to care can to a large extent be exercised at the parents' own discretion.

The freedom of parents to bring up children and live with them without interference and the stability and continuity in living conditions and stability in the attachment to the primary caregivers play a role in each case of a separation between parents and children, irrespective of the field of law that is applicable in that particular situation. This thesis will therefore focus on situations where parents and children are separated or at risk of being separated since, in those cases, the interests of the individuals concerned are similar in both family and migration law. It is in such situations, therefore, that ways in which parent-child relationships are regulated can be compared.

39 Robertson, J. & Bowlby, J, Responses of young children to separation from their mothers. *Courrier of the International Children's Centre* (Paris, *II,* 1952), pp. 131-140. Bowlby, later joined by Ainsworth, is generally considered the founder of attachment theory. He has published an influential trilogy on attachment theory. The first volume was *Attachment* in 1969, the second was *Separation* in 1973 and the third volume was *Loss* in 1980. Many have confirmed and further elaborated on this theory in later research, see amongst others: Wolfsen report 2016, Juffer 2010, pp. 1 -17, IJzendoorn 2008, Engels, Finkenauer, Meeus & Dekovic 2000, Spruijt and De Goede 1997, Bretherthon 1995, McCormick & Kennedy 1994, Lapsley, Rice & Fitzgerald, 1990, Armsden & Greenberg, 1987 and Coopersmith 1967. See as far as it concerns the recognition of this theory in the field of law for example: Barton and Douglas 1995, pp. 4-5 and more recently Juffer 2010, pp. 1 -17, Tj. W. Strubbe, Hechtingsstoornis en juridiserend handelen, FJR 2012, afl. 11, pp. 91 – 101 and M. Angius, Family life in spagaat, FJR 2015, afl. 3, pp. 54-59.

40 IJzendoorn 2008, IJzendoorn & Bakermans-Kranenburg 2010, p. 10 and see also the joint statement of a number of researchers as written down by Jessica L. Borelli: Separation is never ending. Attachment is a human right, via https://www.psychologytoday.com/us/blog/thriving/201806/separation-is-never-ending-attachment-is-human-right.

41 Wolfsen report 2016, p. 40, Singer 1998.

42 Barton and Douglas 1995, p. 4 and Kerns & Brumariu 2016, pp. 349-365.

43 Wolfsen report 2016, p. 40 and see P.C.M. Luijk. *Infant attachment and stress regulation: A neurobiological study.* Dissertation: Leiden University.

44 Wolfsen report 2016, p. 40 and Juffer 2010, p. 1-17.

45 Barton and Douglas 1995, p. 4.

46 Barton and Douglas 1995, p. 27.

1.2 Research aim

This thesis aims to compare the approach of both national and international courts in regulating custody and access. As mentioned above, the notion 'regulation' concerns the effectuation of the family relationship by courts through its case law. National and international courts may be family law or migration law courts, with family courts being the courts specifically responsible for regulating custody and access, and thus concerned with the integrity of the family, and migration courts being the courts dealing with applications concerning residence rights and thus also concerned with the integrity of borders. In the event of a possible or actual separation between family members, parents and children have a similar interest in maintaining their family bond in both family law and migration law and at both a national and international level.[47] Nonetheless, as this thesis will show, family law and migration law courts can come to very different conclusions in seemingly comparable cases.

This thesis will therefore examine the approach adopted by international and national courts – in which investigation international courts do not solely provide the normative framework for national courts as regards the regulation of parent-child relationships, but are the subject of scrutiny itself – when regulating parent-child relationships in order to understand how courts come to such different conclusions. Courts may, for example, take a different starting point when mediating tensions between individuals, families and the state. The courts' point of departure may be the best interests of the child or respect for parental autonomy or, in the case of migration courts, the right of states to control immigration. In order to explore the different approaches taken by the courts I will assess various hypotheses, as discussed below. The focus in this respect will be on the argumentation used by the different courts; in other words, on the line of reasoning that courts follow in order to determine whether a certain family relationship should be protected and, if so, under which circumstances.

1.2.1 Courts' approach

All courts hold a certain position in a legal system and are assigned a specific task. As Van Walsum stated, tensions exist on the international level between national sovereignty and the claims of individuals and families regarding their human rights.[48] Within the EU, meanwhile, tensions exist between national sovereignty and the goals of the EU.[49] And, at a domestic level, courts are positioned on the one hand in private law and on the other hand in public law, and consequently have a different perspective on the state's interests

47 See op. cit. footnote 39.
48 Van Walsum 2010, p. 5.
49 Van Walsum 2010, p. 5.

in protecting national sovereignty.[50] Courts consequently have to take account of their institutional embeddedness and the tasks ascribed to them. Below, I will further elaborate on the different hypotheses that I have formulated for the different courts.

1.2.2 Council of Europe

The key objectives of the ECHR are to promote the idea of the rule of law, to guarantee the protection of human rights and to increase unity between the member states. The ECHR sought to give binding legal force to some of the human rights and freedoms laid down earlier in the Universal Declaration of Human Rights. The ECtHR's task, in turn, is to ensure that member states observe the rights laid down in the ECHR and the additional Protocols (Article 19 ECHR), with the ECtHR having jurisdiction in all matters concerning the interpretation and application of the ECHR and the Protocols (Article 32 ECHR).

According to the ECtHR, its judgments not only serve to decide on cases brought before the Court, but also to elucidate, safeguard and develop rules instituted by the ECHR.[51] In this way, the ECtHR aims to contribute to member states' observance of the rights laid down in the ECHR.[52] Barkhuysen clearly substantiates the basic principles developed by the ECtHR for this purpose,[53] referring to how the ECtHR has stressed that the ECHR is intended to protect human dignity, and that finding the right balance between the general interest and the interest in protecting individual human rights is of eminent importance.[54] The ECtHR has often held in this respect that the protection of human rights must be both practical and effective.[55] Barkhuysen brings to the fore that the ECtHR considers the ECHR to be a treaty with a special character, given the special international oversight mechanism in place and – in line with this mechanism – given that the treaty is a constitutional instrument of European public order, where the aim is to strive for greater legal equality with regard to the protecting of human rights.[56] Hence, the ECtHR strives for uniform application of universal human rights. While the right of states to control immigration plays a role in migration law, this is not an issue in family law situations. Hence, even though migration law cases can involve a family relationship that is in principle worthy of protection, the outcome in such cases may be that the interests of the state should prevail. The hypothesis

50 Van Walsum 2010, p. 5 and Van Walsum 2013, pp. 86-100.
51 ECtHR (PC) 18 January 1978, Appl. no 5310/71 (*Ireland v. UK*), par. 154.
52 ECtHR (PC) 18 January 1978, Appl. no 5310/71 (*Ireland v. UK*), par. 154.
53 Barkhuysen 2004, p. 30.
54 See Barkhuysen 2004, p. 30, where he refers to ECtHR 11 July 2002, Appl. no. 28957/95 (*Christine Goodwin v. UK*), par. 90 and ECtHR (PC) 23 July 1968, Appl.no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (*Belgian Linguistics case*), par. 5.
55 ECtHR 9 October 1979, Appl. no. 6289/73 (*Airey v. Ireland*), par. 24
56 See Barkhuysen 2004, p. 30, where he refers to ECtHR 6 February 2003, Appl. no. 46827/99 and 46951/99 (*Mamatkulov and Abdurasulovic v. Turkey*), par. 106 and ECtHR (GC) 23 March 1995, Appl. no. 15318/89 (*Loizidou v. Turkey*), par. 75.

concerning the approach of the ECtHR is, however, that this court's assessment of the interests of the relevant individuals in the protection of custody and access rights in family law cases will not differ from its assessment of that question in migration law cases.

1.2.3 European Union

From the start, one of the main goals of the European Community was to establish a common market. The Treaty of Rome, which established the European Economic Community (EEC), affirmed in its preamble that signatory states were "determined to lay the foundations of an ever closer union among the peoples of Europe", thus specifically affirming the signatory states' objective of political integration. And the way to reach this political integration was through economic integration.[57] The common market initially comprised only the free movement of goods. By now, however, the EEC has transformed into the EU, and the common market now comprises four fundamental freedoms. Unless considered necessary, restrictions on these four freedoms – the free movement of goods, workers, services and capital – are prohibited within the territory of the European Union. And the establishing of an internal market – of which the four freedoms form the pillars – remains one of the primary goals of European integration.[58]

It is the task of the Court of Justice (CJEU) to interpret EU law so as to ensure that it is applied and interpreted uniformly in all member states and to settle disputes between member states, and between member states and EU institutions. Since the four freedoms are the pillars of the EU, the CJEU is a court dealing primarily with the interpretation of regulations aiming to facilitate and sustain mobility within the EU and to facilitate economic activity.[59] CJEU case law often stresses the fundamental character of the four freedoms,[60] with frequent references to fundamental freedoms, a fundamental principle of the Treaty or a fundamental Community provision.[61] The CJEU is thus a court that deals with issues such as member states' compliance with migration regulations and, by now, it has built up an extensive body of case law on free movement. However, while the EU must always respect human rights, it is driven by an economic logic and the CJEU is not a human rights court. Therefore, the hypothesis concerning the CJEU is that this court's approach is focused very much on facilitating mobility and less so on the interests of individuals and families, including the regulation of parent-child relationships, with the EU merely being under an obligation not to act in violation of human rights.[62]

57 Article 2 Treaty of Rome.
58 Article 3(2) and 3(3) of the Treaty on European Union (TEU).
59 See Article 19 TEU.
60 De Vries 2013, p.175.
61 See also De Vries 2013, p. 175 where he refers to the cases of *Schmidberger*, *Angonese*, *Laval* and *Omega*.
62 See also Article 6 TEU, which states that nothing in the Charter shall affect the competences of the EU as defined in the treaties. Thus, human rights act as a 'negative obligation'; see Ahmed and De Jesús Butler 2006, p. 771 and Stalford 2012, pp. 46-47.

1.2.4 The Netherlands

Whereas the tasks of the above international courts set up on the basis of bilateral or multilateral treaties are specifically described in those treaties, the tasks of national courts have not been defined so precisely.[63]

As said earlier, family law forms part of private law, which aims to regulate relationships between individuals. While the court's task in such proceedings is not laid down as such in law,[64] it is generally assumed to be required to assess whether the law, on the basis of conclusive facts, justifies awarding what the parties have requested.[65] To do so, the civil courts need to assess all the issues raised by the parties and to reach a decision on this basis.[66] If, therefore, Article 8 ECHR or EU law are invoked in addition to national legislation, the family court needs to fully assess what the parties have brought to the fore regarding the domestic, international and EU law invoked.

Migration law, on the other hand, is situated in public law. The position of the administrative judge in such cases is partly determined by the judiciary's relationship with the legislator and the executive power.[67] Unlike the legislative and executive branch, the judiciary lacks democratic legitimacy. It is generally assumed that, in order for the executive to fulfil its responsibilities, administrative courts must act with restraint.[68] As a result, administrative courts subject the conformity of the executive's decisions with national legislation, international law (if directly effective) and general principles of good governance to detailed scrutiny, but do not determine the facts of the case or someone's legal position.[69] Instead, these tasks are left to the executive.[70]

States' interests play a major role in the field of immigration law. While relying on the Dutch public interest (i.e. the general interest in migration control, economic welfare and public order), the Dutch state operates a restrictive immigration policy,[71] with the country's administrative courts considering the general interest in controlling migration, promoting economic welfare and protecting public order to constitute legitimate interests.[72] Although this may result in the state's right to protect the public interest prevailing despite the existence of a strong family relationship between parent and child or the desire to build

63 Jansen & Loonstra 2012, p. 5.
64 Jansen & Loonstra 2012, p. 5 and Crommelin 2007, p. 63.
65 See Crommelin 2007, p. 63.
66 Crommelin 2007, pp. 63-66.
67 Hirsch Ballin 2015, pp. 11, 24.
68 Hirsch Ballin 2015, pp. 21-24, 37, Zijlstra 2015, pp. 128-133 and Barkhuysen 2015, p. 1583.
69 Hirsch Ballin 2015, pp. 21-24, 37 and Zijlstra 2015, pp. 128-133.
70 Hirsch Ballin 2015, pp. 21-24, 37 and Zijlstra 2015, pp. 128-133.
71 Bonjour 2009, pp. 16, 31-37, See also: Parliamentary Papers II 2008/2009, 32052, no. 3, p. 2 and Parliamentary Papers II 2007/2008, 30 573, no. 10.
72 Council of State 11 January 2018, no. 201704731/1/V2, ECLI:NL:RVS:2018:73, par. 2.1 and Council of State 4 March 2015, no. 201403808/1/V3, ECLI:NL:RVS:2015:733, par. 3.1.

such a relationship, the administrative courts nevertheless have to assess whether decisions taken by the executive are in conformity with any international and EU law that may be invoked.

Despite the different positions of courts, depending on whether they are situated in either private or public law, and the different margins of appreciation left to the state under international, EU and national legislation, the assumption in this thesis is that where parents and children are separated or at risk of being separated, the interests of the parent and child in maintaining their family bond will be the same in both fields of law. The hypothesis for this chapter is, therefore, that the assessment by the Dutch authorities – including the courts – of individuals' interest in the protection of custody and access rights is unlikely to vary depending on the residence status of one or more of the family members. The existence of these individuals' interests does not mean, however, that the state's interest in controlling immigration does not prevail.

1.3 Research questions and structure of the thesis

As outlined, this thesis will examine the regulating of custody and access in both family law and migration law and at different levels of jurisdiction. As stated above in order to compare the approaches taken by courts, there need to be comparable situations. And as follows from the above this comparison is possible in situations that entail a (possible) separation between parents and children, since the interests of the parent and child in maintaining their family bond will be the same in both fields of law. While this could be understood as a normative statement, it is not meant to act as such. Instead this assumption functions as a hypothesis regarding the approaches taken by courts. Consequently the overview of where this research is situated led to the following main research questions:

> *What is the approach of Dutch family law courts and migration law courts in the assessment of interests in family law and migration law respectively regarding the regulating of parent-child relationships, and is this approach in line with the obligations stemming from international and EU law?*

As follows from the general introduction and the main research question, this thesis extends its scrutiny beyond Dutch family and migration law courts. This thesis does not only aim to analyse the approach of Dutch courts in light of its international obligations but also to examine the approach of the European Court of Human Rights and the CJEU regarding the regulating of parent-child relationships. Thus, the approach of international courts is also under scrutiny as such, not merely as a normative framework for the Dutch courts. This thesis therefore also aims to answer the next research question:

Does the European Court of Human Rights take a different approach to the assessment of interests in family law and migration law regarding the regulating of parent-child relationships?

The notion of 'approach' as used here concerns how courts, as seen in their case law, perceive their task; in other words, are courts in cases concerning custody and access primarily concerned with the relevant individuals' interests in maintaining custody and access rights, or more – or even primarily – concerned with the integrity of the borders? Meanwhile, the notion of 'interests' refers to the interests of family members and the state.

The initial results of the research found that the Dutch courts and the ECtHR indeed adopted a different approach when assessing interests in the two fields of law. These results therefore gave rise to the following research question:

How can this difference in approach by Dutch family law courts and migration law courts and the ECtHR be explained?

Much has been written in literature regarding the approaches taken by the ECtHR and the Dutch courts in different areas of law.[73] Where there is a clash of interests in a case in which the ECtHR and the Dutch courts have to determine the outcome, a balancing exercise takes place between the different interests at stake.[74] Literature mentions various elements that may have consequences for the outcome of this balancing exercise. One such element is whether the situation entails either a negative or a positive obligation; in other words, an obligation for the state to abstain from interfering with a right laid down in the ECHR or an obligation for the state to actively protect an ECHR right. It is generally assumed that a provision in the ECHR is more likely to be found to be violated in situations involving a negative obligation.[75] Another element is the margin of appreciation left to the state, whereby it is generally assumed that a particular provision in the ECHR is more likely to be found to be violated if the court has left a narrow margin of appreciation to the state and

73 See amongst others: Verburg, D,A, and Schueler, B,E, Procedural Justice in Dutch Administrative Court Proceedings (Utrecht Law Review, vol. 10-4, 2014), pp. 56-72, Timmer, A, Toward an Anti-Stereotyping Approach for the European Court of Human Rights (Human Rights Law Review, vol. 11-4, 2011), pp. 707-738, Kilkelly, U, Protecting Children's Rights under the ECHR: The Role of Positive Obligations (Northern Ireland Legal Quarterly, vol. 61-3, 2010), pp. 245-261, Staiano, F, Good Mothers, Bad Mothers: Transnational Mothering in the European Court of Human Rights' Case Law (European Journal of Migration and Law, vol. 15, 2013), pp. 155-182, Gerards, J, Judical Deliberations in the European Court of Human Rights, in N. Huls, M. Adamds & J. Bomhof (eds), The legitimacy of Highest Court's Rulings (The Hague: T.M.C. Asser Press, 2008), pp. 407-436 and Schrama, W.M, The Dutch approach to informal lifestyles: family function over family form? (International Journal of Law, Policy and the Family, vol. 22, 2008), pp. 311–332.

74 Van der Sloot 2016, p. 439.

75 Slingenberg 2014, p. 324, Gerards 2011b, p. 253, Mowbray 2004, pp. 171-175 Forder 1992, p. 631, Lawson 1995b, p. 728 and Alkema 1995, pp. 98-99.

has consequently subjected the matter to strict scrutiny.[76] Lastly, on the basis of literature, a certain discursive predominance in a particular field of law (i.e. a certain guiding principle taken as the starting point for mediating tensions in the event of conflict) may be decisive for the outcome in a particular case. For the purposes of this thesis, the relevant guiding principles may, as said, be the best interests of the child,[77] respect for parental autonomy[78] or the right to control immigration.[79] In the event of tensions between different interests, a court's application of a particular guiding principle may result in a certain interest generally prevailing. This thesis assesses whether the explanations given in literature may also explain the differences in approach adopted by Dutch family law courts and migration law courts and by the ECtHR in the cases scrutinized in this study.

Finally, as mentioned earlier, the Court of Justice is also under scrutiny. Since a comparison between family law on the one hand and migration law on the other hand is not possible for the Court of Justice, given the absence of substantive family law at an EU level, the question to be answered regarding the Court of Justice is:

> *What approach does the Court of Justice adopt with regard to the regulating of parent-child relationships when assessing interests in migration law?*

The thesis is structured as follows. In order to analyse how the decisions of the Dutch courts relate to obligations arising under international and EU law, I will first examine these international and EU obligations before looking at the domestic situation. Chapter 2 therefore focuses on the regulating of parent-child relations by the ECtHR in, on the one hand, family law cases and, on the other hand, migration law cases in which Article 8 ECHR – which provides for the right to respect for family life – was invoked. This chapter aims to identify the approaches taken by the ECtHR in family law cases and in migration law cases when seeking to regulate family relationships between parents and minor children. Chapter 3 then discusses the regulation of parent-child relationships at an EU level, with the aim of identifying the approaches taken by the CJEU in order to regulate the family relationships between parents and minor children in case law concerning free movement and case law based on Articles 20 and 21 TFEU. Chapter 4 addresses the regulating of parent-child relationships in the Netherlands, with the aim of identifying the norms concerning custody and access manifested in Dutch family and migration legislation and case law, as well as the approach adopted by Dutch family and migration courts when regulating family

76 See concerning the ECtHR: Gerards 2010, p. 1, Farahat 2009, p. 262-264, Van Walsum 2009a, p. 303-305 and concerning the Council of State: Boeles 2008, p. 7, Boeles 2005, pp. 120-122. See also, Korte 2007, pp. 45-47, Geertsema 2012, pp. 1507-1508.

77 Stalford 2015, pp. 19-48, Smyth 2013, pp. 21-67, Zermatten 2010, pp. 483 – 499.

78 Scott 2003, pp. 1071 to 1100.

79 Hilbrink 2017, pp. 170-178, 323-335, Cornelisse 2010, pp. 99-119, Spijkerboer 2009, pp. 281-282, 292, Dembour 2003, pp. 63-98.

relationships between parents and minor children in both family and migration law. For each chapter, more specific sub-questions have been formulated, and these are discussed in the introductions to the relevant chapters.

This thesis concludes with a discussion of the most important findings regarding the various courts' approaches to regulating parent-child relationships, as well as a discussion of whether the Dutch courts' approach is in line with their obligations under international and EU law. Lastly, I address the different guiding principles applied by family law and migration law courts when seeking to mediate tensions between individuals, families and states, and the fact that these different guiding principles have major consequences for the protection of custody and access.

1.4 Methodological remarks

Besides the above-mentioned issues concerning the scope, approach and limitations of this research, some final remarks need to be made. The first and most important is that the methodology used in this thesis varies for the ECHR, the EU and domestic law. Hence, the various chapters of this thesis each contain a more detailed discussion of the specific methodology applied.

Next it should be noted that this thesis first discusses family law and then compares and contrasts it with migration law. This thesis has been written particularly for a migration law audience; whereas many aspects of family migration have been researched at length, the consequences for the ability to exercise custody and access have so far received only limited attention in scholarly debate.[80] Similarly, little attention has been paid to comparing the two fields of law.[81] This thesis takes the status quo in family law as the starting point for comparing the two fields of law. The reason for choosing this starting point is that family law is specifically aimed at regulating custody and access and hence sets the standard regarding the regulating of custody and access.

In seeking to answer the various questions posed, this thesis has made use of legislation and the vast amount of literature available on the protection of family relationships in both family and migration law. However, the main focus has been on case law and the

80 For exceptions, see Boeles et al 2014, pp. 211-215, Cardol 2013, 'Ruiz Zambrano vanuit familie en jeugdrechtelijk perspectief', A&MR, no. 08, pp. 376-382, Cardol 2007, De betekenis van het Internationale Verdrag inzake de Rechten van het Kind voor gezinshereniging', Migrantenrecht, no. 1+2, pp. 37-43, Cardol 2005, 'Het belang van het kind in het vreemdelingenrecht', Migrantenrecht, no. 2, pp. 52-55, Hooghiemstra & Wijers (ed.), Allochtone gezinnen, juridische positie, Den Haag: Nederlandse Gezinsraad 2005, pp. 16-35, 46-48 and Forder 2005a, pp. 21-115.

81 But see Van Walsum 2012, p. 9, Van Walsum 2009a, pp. 298-299, 303-305, Van Walsum 2008 and Forder 2005a, pp. 21-115.

arguments raised by the different courts. It is important to note here that the focus on case law and the approach adopted by courts means the emphasis is on 'problematic situations', i.e. cases that required the involvement of a court. As far as migration law is concerned, this means that, for cases where the state immediately granted a right to reside on the basis of Article 8 ECHR or EU law, no further information is available on what the parent-child relationship precisely entailed and what the circumstances were that made the state positively affirm the request of the individuals concerned. Further research at the Immigration and Naturalization Services would be required to compare those cases with the court cases in which the Dutch authorities refused to grant a right to reside in order to protect parent-child relationships. It should also be noted that the Dutch part of the research is based on case law published on rechtspraak.nl, and that it is up to the Dutch courts to assess whether a particular case is interesting enough to publish on this forum. No further information is available on the criteria the courts use for this purpose or on how many cases remain unpublished.[82]

1.5 Terminology

In family law, and more specifically filiation law, different terminology is used to refer to different types of parents, with the law also attributing different legal consequences to the different types of parenthood. It is therefore important to distinguish between the following notions:

- Legal parent: the parent with whom the child has a legal family relationship;
- Biological parent: this can be the natural father of the child, but also the provider of gametes (the donor). A gamete donor can be male or female;
- Birth mother: the woman who gave birth to the child. This is not necessarily the biological mother since the child may be biologically related to a female donor;
- Social parent/*de facto* parent: the person who is actually caring for and raising the child, for example a stepparent or foster parent. These relationships are also referred to as parent-like relationships/*in loco parentis*.

In order to enhance readability, references in this thesis to 'parent' mean the legal parent. Where another type of parenthood is at issue, this is made explicit. It should also be noted that legal parenthood does not necessarily mean that this parent has custody rights. Where a situation concerns a legal parent without custody rights, this is likewise made explicit. It should also be pointed out that even if a legal parent has custody rights, that parent may not necessarily exercise those rights *de facto* and thus may not actually play a role in the child's life. Where this is the case, this is likewise made explicit in this thesis.

82 See: "Besluit selectiecriteria uitsprakendatabank Rechtspraak.nl 2012".

Chapter 2

Parent-child relationships in case law of the European Court of Human Rights: family and migration law cases compared

2.1 Introduction

In the family case of *Eberhard and M.*, access between Mr Eberhard and his daughter was being obstructed by his ex-wife[83] in contravention of existing access arrangements. On several occasions Mr Eberhard had requested the authorities to enforce his visitation rights. Although fines of between €25 and €145 had been imposed on the ex-wife, those fines had never been enforced. In this case, the ECtHR assessed whether the domestic authorities had done enough to allow Mr Eberhard and his daughter to continue enjoying each other's company after Mr Eberhard and his wife divorced. The ECtHR noted that even if the fines were able to compel the ex-wife to comply with the access arrangements, they had never actually been enforced.[84] The ECtHR also noted that the attempts to organize supervised meetings failed due to the ex-wife's refusal to cooperate, that no measures were taken in response to her lack of cooperation and that the lack of cooperation had no consequences for her.[85] No other measures were taken by the authorities to create the conditions necessary for enforcing the order in question, be they coercive measures against the ex-wife or preparatory steps for contact between M. and her father, even though access was in her best interests.[86] The ECtHR consequently held Article 8 ECHR to be violated.

In the migration case of *Mbengeh*, Mr Mbengeh had been deported to Gambia after a criminal conviction for a serious drug offence.[87] In this case, the ECtHR assessed whether the deportation entailed a violation of the right to respect for family life. The ECtHR noted that Mr Mbengeh's wife and son (who was ten years old) could not realistically follow him to Gambia. The ECtHR also noted that the father and son had always lived together since the latter's birth and, therefore, that Mr Mbengeh's deportation had and would continue to have a disruptive effect on his son's life. The ECtHR also held, however, that contact could be maintained from Gambia by telephone, and that nothing prevented Mr Mbengeh's wife and son from travelling to Gambia to visit. As regards the family's argument that they did not have the means to travel, the ECtHR noted that while it did not wish to underestimate the difficulties that the family may encounter, the seriousness of the crime meant that the ECtHR held Article 8 ECHR not to be violated.

Irrespective of their outcomes, these two cases have a different perspective regarding the ability to exercise parental rights. Whereas the ECtHR's ruling in the family case focuses on practical and effective access in order to maintain the parent-child relationship, it was found that the parent-child relationship in the case of *Mbengeh* could be maintained by telephone

83 ECtHR 1 December 2009, Appl. no. 8673/05 9733/05 (*Eberhard and M. v. Slovenia*).
84 ECtHR 1 December 2009, Appl. no. 8673/05 9733/05 (*Eberhard and M. v. Slovenia*), par. 135.
85 ECtHR 1 December 2009, Appl. no. 8673/05 9733/05 (*Eberhard and M. v. Slovenia*), par. 135.
86 ECtHR 1 December 2009, Appl. no. 8673/05 9733/05 (*Eberhard and M. v. Slovenia*), par. 136.
87 ECtHR 24 march 2009, Appl. no. 43761/06 (*Mbengeh v. Finland),* admiss.

or through holiday visits. This chapter examines the approach taken by the ECtHR in regulating family relationships between parents and minor children in family law cases on the one hand and migration law cases on the other hand. As this chapter will show, the ECtHR imposes obligations on states in order to regulate parent-child relationships on the basis of Article 8 ECHR. This chapter examines whether different obligations are imposed on states in the two fields of law and, if so, to what extent. The ECtHR has held in various cases that the right to respect for family life encompasses both parental custody and access rights and has stated that parents and children have the right to live together and mutually enjoy each other's company.[88] While, in contrast to family law cases, migration cases are not aimed at regulating access and custody as such, decisions concerning non-admission or expulsion (of a parent or child) may nevertheless lead to a separation between parents and children, and therefore inevitably have consequences for the ability to exercise parental rights, and thus the right to live together and mutually enjoy each other's company.

In order to analyse whether different obligations are imposed on states in the two fields of law, largely comparable situations need to be recognized in the case law of the ECtHR. This chapter focuses on situations in which parents and children are separated or at risk of being separated, irrespective of the cause of this separation. Parents and children may be separated because the parents have never actually been in a relationship or co-habited, because parents get divorced or separated, because a parent or child is detained or because of care orders (child protection measures) or immigration measures. While the manner in which content is given to family relationships is firstly left to the family members themselves, the state has an important role to play in regulating the different interests at stake in the two fields of law in the event of a separation or possible separation. This chapter sheds light on which of the interests at stake generally prevail in cases where tensions exist between family members or between family members and the state.

2.1.1 Sub-questions

Article 8 ECHR grants everyone the right to respect for private and family life. According to the ECtHR, the essential objective of Article 8 is to protect the individual against arbitrary interference by the public authorities.[89] Article 8 reads as follows:

88 ECtHR 22 June 1989, Appl. no. 11373/85 (*Eriksson v. Sweden*), ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*), ECtHR 27 October 1994, Appl. no. 18535/91 (*Kroon and others v. the Netherlands*).

89 Kleijkamp 1999, p. 27 and ECtHR 23 July 1968, Appl.no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (*Belgian Linguistics case*), par. 7.

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

This provision possesses a dual structure common to other substantive provisions of the ECHR: the first paragraph defines the scope of the protected right, while the second paragraph states the grounds on which member states may legitimately interfere with the enjoyment of such a right.[90]

By guaranteeing the right to respect for family life, Article 8 ECHR presupposes the existence of a family. Establishing whether family life exists in a particular case is therefore the first step in the assessment of any claim under Article 8 ECHR. When family life is held to exist, the next stage is to determine whether the right to family life has been interfered with. If the ECtHR concludes that there has indeed been interference, it then assesses whether this interference was legitimate on the basis of Article 8, paragraph 2. Hence, any interference needs to be in accordance with the law, to pursue a legitimate aim and to be necessary in a democratic society. If, on the other hand, no interference is found, the ECtHR has to establish whether the state has a positive obligation to provide protection under Article 8. It does this on the basis of the 'fair balance' test. While much can be said about the distinction between negative and positive obligations, what is important here is that, in both types of cases, the ECtHR weighs the different interests at stake, namely those of the parent(s), the child and the state. In this way, it sets out the factors in the case that are relevant for determining the margin available to the state, i.e. the level of intensity of the ECtHR's judicial review.

Over the years the ECtHR has developed a great body of case law on the basis of Article 8 ECHR. Different categories of cases within family law and migration law have been brought before the ECtHR, including cases concerning child protection measures (out-of-home placements) or expulsions after a criminal conviction.[91] And, in each of those categories, ECtHR case law has established factors for examining whether Article 8 ECHR has been violated.[92]

90 Almeida, p. 1.
91 Gerards 2011b, pp. 163.
92 Gerards 2011b, pp. 163-166.

This chapter analyses the above-mentioned steps taken by the ECtHR in both fields of law in order to identify any differences in the ECtHR's assessment, with the following sub-questions being analysed:

1. In which circumstances is family life between parents and children taken to exist in family law cases on the one hand and migration law cases on the other?
2. Under which circumstances are custody and access protected in family law on the one hand and migration law on the other?

In order to answer these sub-questions I will first look at the circumstances under which the ECtHR takes family life between parents and children to exist in family law cases and then examine whether the criteria applied by the ECtHR for determining the existence of family life between parents and children are the same in migration law cases as in family law cases. Where the issue concerns the circumstances under which custody and access are protected, literature shows that characterizing a particular situation as either comprising a positive or a negative obligation may have consequences for the outcome of a case.[93] Hence, this chapter will examine whether the ECtHR has a different approach regarding the characterization of positive and negative obligations in migration cases when compared with family cases, and whether this may explain the different outcomes. In addition, literature has also shown that the margin of appreciation left to states in a particular situation may have consequences for the outcome of a case.[94] I will therefore consider whether the ECtHR's approach in migration cases differs from its approach in family cases, and thus whether the ECtHR applies a different intensity of judicial review (i.e. margin of appreciation) in migration cases compared with family cases, and whether this, in turn, may explain the different outcomes. Lastly, I will examine the obligations that the ECtHR imposes on states in family cases in order to protect the right to respect for family life, as well as examining the factors used by the ECtHR to determine whether Article 8 ECHR has been violated, and examining whether the same obligations are imposed, and the same factors are used, in migration cases as in family cases.

2.1.2 Methodology

For the purposes of this study, both fields of law include only cases relating to family relationships between parents and minor children – more specifically, children who were minors at the time of the ECtHR ruling.

Both the scope of Article 8 and the obligations imposed on states in the field of family law in situations where parents and children are separated or at risk of being separated have

93 Slingenberg 2014, p. 324 & Gerards 2011b, p. 253, Forder 1992, p., Lawson 1995a, p. Lawson 1995b, p. Mowbray 2004, pp. 171-175.
94 Gerards 2010, p. 1.

been extensively discussed in literature, both national and international.[95] The family law part is largely, therefore, based on literature. In order, however, to check the findings in existing literature, a search was conducted in the HUDOC database. The search terms applied were 'custody' AND/OR 'access' in combination with Article 8 ECHR. The case law showed that, in family law, the general principles applied by the ECtHR largely stem from case law dating back to the late 1970s. Therefore, the family law part is still very much based on early case law. A time limit was set for the purposes of this research, with only cases completed by 1 January 2017 being examined. Family law includes a group of cases involving the application of family law and aimed at regulating custody and access, but which also involve a cross-border element, namely cases concerning child abduction. These cases are considered to fall within the domain of international family law. As the right to remain in a member state is not an issue in these situations, these cases are discussed in the family law part of the research rather than under migration law.

The migration law part is likewise based on existing literature. While much has been written on the protection of family unity in migration law, migration law is not aimed at regulating custody and access. Consequently this literature does not often specifically address custody and access.[96] The fact that measures in a migration context are not aimed at regulating custody and access also means that, for migration cases, it was not useful to base searches on the terms 'custody' OR 'access' as these words are not always explicitly mentioned in the case law. For migration cases, therefore, the search string applied in HUDOC was '(child OR son OR daughter OR enfant OR fille OR fils) AND (migration OR migrant OR alien OR étranger OR non-nationaux)' in combination with Article 8 ECHR. Here, too, a time limit was set, with only cases from 1 January 2005 to 1 January 2017 being included. This time limit ensured that all the relevant cases could be taken into account, with the period after 2005 being a period in which many developments concerning the application of the rights of the child occurred.[97] However, account was also taken of cases dating back to before 2005 and that, from references made by the ECtHR, still appeared to be leading cases or cases important for the understanding of later case law. Certain migration cases were excluded, specifically those in which no proportionality assessment was made; in other words, cases in which the ECtHR did not assess the different interests at stake.[98] NB: Translations of French judgments are by the author.

95 See amongst others Schrama & Antokolskaia 2015, Vlaardingerbroek and others 2014, Wortmann & Duijvendijk-Brand 2018, Scherpe 2016, Vol. 1 to 4 inclusive, Boele-Woelki 2005.

96 But see footnote 80.

97 Reneman 2011.

98 These include cases where the foreign national was not, or no longer subjected to (the threat of) physical removal from the country, see amongst others ECtHR 8 July 2014, Appl. no. 80545/12 (*Girmay v. Sweden*) and ECtHR 8 October 2013, Appl. no. 41208/11(*Messad et Touahria c. Belgique*), which have been introduced after the time limit (ECtHR 20 January 2015, Appl. no. 52843/07 (*Danawar v. Bulgaria*)) or in which not all domestic remedies have been exhausted (ECtHR 27 August 2013, Appl. nos. 40524/10 & 41993/10 (*Mohammed Hassan and others v. the Netherlands*)). Cases in which all members of the family were not admitted or expelled are also left out because in that situation there is

2.2 Right to respect for family life in family and migration cases

Before analysing ECtHR case law, I will first set out the structure of this chapter. I will begin by discussing the criteria used by the ECtHR to establish whether family life within the scope of Article 8 ECHR exists in both fields of law. In doing so, I will compare the approach of the ECtHR in family and migration law cases (2.2). I will then discuss the ECtHR's characterization of situations as either entailing a positive or a negative obligation, with the ECtHR's approach in family and migration cases likewise being compared (2.3). In the next part I will examine the margin of appreciation that the ECtHR leaves to states in family and migration cases. Again, the approach of the ECtHR in the two fields of law will be compared (2.4).

I will subsequently explore the substantive obligations that the ECtHR imposes on states in the two fields of law. With regard to custody and access, two obligations – the right to live together and the right to mutually enjoy each other's company – are of particular importance. I will first discuss how the ECtHR interprets these two obligations in family cases (2.5) and migration cases (2.6). Lastly, the ECtHR's approach to interpreting these two obligations in family and migration cases will be compared (2.7).

2.2.1 Family life within the scope of Article 8 ECHR

The question of whether family life is present in a particular case has become an important criterion for determining whether certain rights and obligations in the area of family or migration law exist or may arise. Numerous ECtHR judgments on Article 8 have led to legislative changes or innovations in national case law.[99] Given the purpose of this study, only the existence of family life between a minor child and his or her parent(s), carer or near relatives will be considered here.

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no actual risk of separation of family members, see for example ECtHR19 March 2015, Appl. no. 70055/10 (*S.J. v. Belgium*) & ECtHR 25 March 2014, Appl.no. 21392/09 (*Mohamed c. France*) and ECtHR 1 June 2010, Appl. no. 29031/04 (*Mawaka v. the Netherlands*). This is slightly different in cases where not all of the family members are in possession of the same nationality. Still, in those cases the ECtHR merely looks at whether it is possible, even if this means a certain investment of the individuals involved to exercise family life in the country of origin of one of the family members, and not at the substantial family life of the applicants, see amongst others ECtHR 25 June 2013, Appl. no. 11243/13 (*Muradi and Alieva v. Sweden*) & ECtHR 05 July 07, Appl. no. 17575/06 (*Grigorian and others v. Sweden*). Finally, there is a group of cases in which a violation of Article 8 ECHR has been found on the ground that the national measure was not in accordance with the law. It concerns national security cases in which the decision to expel has been based on secret information not made available to the applicants (or the domestic courts), and who therefore did not enjoy the minimum degree of protection against arbitrariness, see amongst others ECtHR 12 February 2013, Appl. no. 58149/08 (*Amie and others v. Bulgaria*), ECtHR 10 May 2012, Appl. no. 45237/08 (*Madah and others v. Bulgaria*), ECtHR 26 July 2011, Appl. no. 41416/08 (*M. and others v. Bulgaria*), ECtHR 12 July 2011, Appl. no. 12919/04 (*Baltaji c. Bulgarie*) and ECtHR 15 February 2011, Appl. no. 33118/05 (*Geleri c. Roumanie*).

99 Gerards, Haeck, Hert and others 2013, p. 534.

After discussing the criteria for determining the existence of family life in family cases (2.2.2) I will examine the criteria for determining the existence of family life in migration cases (2.2.3). Subsequently these criteria will be compared in order to see whether the ECtHR interprets the existence of family life in migration cases differently from in family cases.

2.2.2 Establishing family life in family cases

While, according to Kleijkamp, "At the time the ECHR was drafted, 'family life' was thought of as representing a 'legitimate family', meaning a marriage – the legal relationship between husband and wife – and legitimate children,"[100] the ECtHR has often held that the ECHR is a living instrument and must be interpreted in the light of present-day conditions.[101] The living instrument principle has thus played a part in widening the scope of Article 8,[102] with the ECtHR holding that the ECHR is intended "to guarantee rights that are not theoretical or illusory but rights that are practical and effective".[103] With these notions in mind, it is not surprising that family life within the meaning of Article 8 has been given a broad interpretation in ECtHR case law and that nowadays an increasing number of other relationships may also constitute family life.

As the terms in the ECHR have been given an autonomous meaning by the ECtHR, the notion of the protection of family life does not depend on its classification in domestic law, but instead on the meaning the terms are given at a European level. Consequently, 'family life' does not necessarily have the same meaning at a European level as it does at a domestic level. Legal criteria are not, however, decisive in themselves. The ECtHR considers that "the question of the existence or non-existence of 'family life' is essentially a question of fact depending on the existence of close personal ties".[104] Determining whether family life exists thus requires consideration of biological, legal (whether, for example, the parents are or have been married) and social facts (for example, the intensity and character of the relationship between parent and child).[105] The ECtHR held that:

100 Kleijkamp 1999, p. 28 and Forder 2016.

101 See for example ECtHR 25 April 1978 Appl. no. 5856/72 (*Tyrer v. UK*), par. 31 and ECtHR 23 March 1995, Appl.no. 15318/89 (*Loizidou v. Turkey*) par.71.

102 See Burbergs 2015, p. 319-320, where she discusses the *Christine Goodwin v. UK* case, in which the ECtHR ruled that "the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals" led to the obligation to legally recognize the post-operative gender of transsexuals (ECtHR 11 July 2002, Appl. no. 28957/95, par. 85).

103 ECtHR 9 October 1979, Appl. no. 6289/73 (*Airey v. Ireland),* par. 24 and more recent ECtHR 30 October 2012, Appl. no. 57375/08 (*P. and S. v. Poland*), par. 99.

104 ECtHR 13 December 2007, Appl. no. 39051/03 (*Emonet v. Zwitserland*), par. 33.

105 Forder 1995, p. 180, Kleijkamp 1999, p. 31.

> *…when deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.*[106]

Therefore, whether family life is held to exist depends entirely on the individual circumstances. However, ECtHR case law on Article 8 sheds light on the ties generally assumed to constitute family life.

2.2.2.1 Parent-child relationships

Irrespective of whether the child is born in or outside marriage, family life exists between a mother and her child from the moment of the child's birth.[107] For a father, however, the situation is more complicated since mere biological paternity is not in itself sufficient to constitute the existence of family life. Further legal or factual elements are needed to demonstrate whether the relationship between the biological father and the child has sufficient constancy and substance to create family ties.[108] Although the ECtHR has held that, as a rule, cohabitation may be a requirement for such a relationship, there may exceptionally be other factors serving to demonstrate that a relationship has sufficient constancy to create *de facto* family ties.[109] The ECtHR held that:

> *Relevant factors in this regard include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the natural father both before and after the birth.*[110]

Factors that could be considered in this respect include whether the father has sought legal recognition of his parental rights[111] and whether the father has been or has shown a desire to be in contact with the child.[112]

Article 8 ECHR not only protects existing family life, but also covers the potential relationship that could develop between a child and its natural father.[113] The ECtHR considered that Article 8:

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106 ECtHR 20 June 2002, Appl. no. 509963/99 (*Al-Nashif v. Bulgaria*), par. 112.
107 ECtHR 13 June 1979, Appl. no. 6833/74 (*Marckx v. Belgium*), par. 31.
108 ECtHR 1 June 2004, Appl. no. 45582/99 (*L. v. the Netherlands*), par. 37.
109 ECtHR 27 October 1994, Appl. no. 18535/91 (*Kroon and others v. the Netherlands*), par. 30.
110 ECtHR 19 June 2003, Appl. no. 46165/99 (*Nekvedavicius v. Germany*), admiss., p. 9.
111 ECtHR 24 February 1995, Appl. no. 16424/90 (*McMichael v. UK*), par. 90.
112 ECtHR 1 June 2004, Appl. no. 45582/99 (*L. v. the Netherlands*), par. 39 and ECtHR 19 June 2003, Appl. no. 46165/99 (*Nekvedavicius v. Germany*), admiss., p. 9.
113 Gerards, Haeck, Hert and others 2013, p. 543.

> *…where the circumstances warrant it, must extend to the potential relationship which may develop between a natural father and a child born out of wedlock. Relevant factors in this regard include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the natural father to the child both before and after the birth.*[114]

The protection of potential family life between a child and the natural father is most notable in cases where the fact that family life has not yet been established (or fully established), whether for practical or legal reasons, is not attributable to the father.[115] A violation of Article 8 was found in the case of *Keegan v. Ireland*, where the father complained that Irish law permitted his child to be placed for adoption, thus leading to bonding between the child and the adoptive parents, without his knowledge or consent.[116] And in a case in which it ruled against Germany, the ECtHR considered that the reason why the father did not yet have any contact with his biological children was because their mother and their legal father, who were entitled to decide on the twins' contacts with other persons, refused his requests to allow contact with them. Under German law, the father could neither acknowledge paternity nor contest the legal father's paternity in proceedings in order to become the children's legal father. Consequently the fact that there was not yet any established family relationship between the father and his children could not, in the ECtHR's view, be held against him.[117]

Family life is also taken to exist between parents and their minor children born during a marriage or a stable relationship from the moment of the child's birth.[118] Family life may arise in this context even if the parents are no longer living together or their relationship has ended.[119]

In cases concerning the relationship between an adoptive parent and an adopted child, the ECtHR has held that, as a rule, these relationships are of the same nature as family relations protected by Article 8.[120]

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114 ECtHR 19 June 2003, Appl. no. 46165/99 (*Nekvedavicius v. Germany*), admiss.
115 ECtHR 15 September 2011, Appl. no. 17080/07 (*Schneider v. Germany*), par. 81.
116 ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*).
117 ECtHR 21 December 2010, Appl. no. 20578/07 (*Anayo v. Germany*), par. 60.
118 ECtHR 21 June 1988, Appl. no. 10730/84 (*Berrehab v. the Netherlands*), par. 21 and ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*), par. 44 and ECtHR 27 October 1994, Appl. no. 18535/91 (*Kroon and others v. the Netherlands*), par. 30.
119 ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*), par. 44 and De Vries 2013, p. 105.
120 ECtHR 22 June 2004, Appl. nos. 78028/01 and 78030/01 *(Pini and others v. Romania*), par. 140.

2.2.2.2 Near relatives and de facto family life

Family life includes ties between near relatives, such as those between grandparents and grandchildren, since those relatives may play a considerable part in the child's life.[121] The ECtHR also holds *de facto* family ties to fall under the scope of Article 8. As this thesis is limited to parent-child relationships, only a few of the relationships with near relatives and *de facto* relationships are mentioned, namely those similar to the relationship of a parent to a child (*in loco parentis*). In the case of *Nazarenko*, Mr Nazarenko's paternity was terminated and he was excluded from his daughter's life after it had been revealed that he was not the child's biological father.[122] The ECtHR found that since Mr Nazarenko and his daughter had believed themselves to be father and daughter for many years, he had raised and provided care for his daughter for many years and there was a close emotional bond between them, their relationship amounted to family life and the state should have made it possible for the family ties between Mr Nazarenko and his daughter to be maintained.[123] With regard to reconstituted families, the ECtHR found that the relationship between a child and his social father, who was living with the child's biological mother, could amount to family life within the scope of Article 8 ECHR.[124]

In cases concerning the relationship between a child and his/her foster parents, the contents of family life may depend on the nature of the fostering arrangements, with the ECtHR taking various factors into account, specifically the time spent together, the quality of the relationships and how the adult relates to the child.[125] Intended parents may also fall within the scope of Article 8 ECHR, as confirmed by the ECtHR in a case concerning parents who had a child through a surrogate pregnancy[126] and where the child and the father had biological links. The ECtHR applies the same criteria to intended parents as to foster parents, as shown in a case where the court held that the intended parents genuinely wished to look after the child as his parents from the moment of his birth and had taken action to ensure an effective family life.[127]

121 ECtHR 9 June 1998, Case no. 40/1997/824/1030 (*Bronda v. Italy*), par. 51, ECtHR 2 November 2010, Appl. no. 14565/05 (*Nistor v. Romania*), par. 71 and ECtHR 21 January 2015, appl. no. 107/10 (*Manuello and Nevi v. Italy*), par. 47.

122 ECtHR 16 July 2015, Appl. no. 39438/13 (*Nazarenko v. Russia*).

123 ECtHR 16 July 2015, Appl. no. 39438/13 (*Nazarenko v. Russia*), par. 58.

124 ECtHR 12 July 2001, Appl. no. 25702/94 (*K. and T. v. Finland*), par. 150.

125 ECtHR 22 April 1992, Appl.no. 12366/86 (*Rieme v. Sweden*), par. 73, ECtHR 27 April 2010, Appl. no. 16318/07 (*Moretti and Benedetti v. Italy*), par. 48 and ECtHR 17 January 2012, Appl. no. 1598/06 (*Kopf and Liberda v. Austria*), par. 37.

126 ECtHR 8 July 2014, Appl. no. 29176/13 (*D. and others v. Belgium*), admiss.

127 ECtHR 8 July 2014, Appl. no. 29176/13 (*D. and others v. Belgium*), admiss.

2.2.2.3 Broken ties and continuation of family life

Although subsequent events may break family ties that deserve protection under Article 8, this happens only in exceptional circumstances.[128] The natural family relationship is not terminated by reason of the child being taken into public care, the imprisonment of one of the parents, the natural parents being divested of their parental rights or the child being adopted, given that, in principle, it is in the interests of a child to preserve the ties with his or her biological parents.[129] Even if a legal link between the parent and child no longer exists in national law, the ECtHR still considers such ties worthy of protection.[130]

Yousef v. the Netherlands concerned a father who had lived with his daughter and her mother for a year, but then moved to the Middle East for two and a half years, during which time contact was limited to a few letters to the mother.[131] After returning to the Netherlands, he saw his daughter every two weeks, but, although he made numerous requests to this effect, the mother refused him permission to recognize his daughter. After the mother became terminally ill, the daughter went to live with the mother's family. The ECtHR held that as he had co-habited with his daughter and her mother for a certain period and continued to have contact with his daughter after her mother had died, family life still existed.[132] The fact that the father had not been in touch with his daughter for an earlier period of two and half years did not mean that those ties could be considered to be broken.

2.2.3 Establishing family life in migration cases

2.2.3.1 Parent-child relationships

In cases concerning the notion of family life within the scope of Article 8, more specifically the relationship between parents and minor children, the ECtHR applies the same criteria in migration cases as in family law cases. Family life between a mother and her child is regarded as existing from the moment of the child's birth. The ECtHR does not even always deem it necessary to assess the actual quality of the relationship. In the case of *Nunez v. Norway*, for example, the ECtHR stated that:

> *At the outset the Court finds it clear that the relationship between the applicant and her daughters constituted "family life" for the purposes of Article 8 of the Convention, which provision is therefore applicable to the instant case.*[133]

128 ECtHR 21 June 1988, Appl. no. 10730/84 (*Berrehab v. the Netherlands*), par. 21, ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*), par. 44.
129 ECtHR 22 April 1992, Appl. no. 12366/86 (*Rieme v. Sweden*), par. 54 and ECtHR 8 January 2013, Appl. no. 37956/11 (*A.K. and L. v. Croatia*), par. 49 & 51.
130 ECtHR 8 January 2013, Appl. no. 37956/11 (*A.K. and L. v. Croatia*), par. 48.
131 ECtHR 5 November 2002, Appl. no. 33711/96 (*Yousef v. the Netherlands*).
132 ECtHR 5 November 2002, Appl. no. 33711/96 (*Yousef v. the Netherlands*), par. 51.
133 ECtHR 28 June 2011, Appl. no 55597/09 (*Nunez v. Norway*), par. 65.

In cases concerning the relationship between a father and his child, the ECtHR likewise applies the same principles as in family law cases and, indeed, also refers to those family law cases.[134] The belief that family life is taken to exist between parents and their minor children born of marriage or a stable relationship from the moment of the child's birth was first held in a migration case, namely the case of *Berrehab v. the Netherlands*.[135] In the case of *Al-Nashif*, the ECtHR provided a clear summary of this principle:

> *… it follows from the concept of family on which Article 8 is based that a child born of a marital union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life" which subsequent events cannot break save in exceptional circumstances. Insofar as relations in a couple are concerned, "family life" encompasses families based on marriage and also de facto relationships.*[136]

As the above-cited *Al-Nashif* case makes clear, *de facto* relationships in migration cases may also amount to family life. In the period under review, however, no migration cases were found concerning near relatives or *de facto* family relationships.[137]

2.2.3.2 Broken ties and continuation of family life

In migration cases, the ECtHR also holds that while subsequent events may break family ties that deserve protection under Article 8, this applies only in exceptional circumstances. The case of *Gül v. Switzerland* concerned a Turkish father who had left his son behind in Turkey thirteen years previously.[138] The ECtHR considered that after Mr Gül obtained a residence permit in Switzerland, he had repeatedly asked the Swiss courts to allow his son to join him and had visited Turkey on several occasions. Even the fact that Mr Gül had not lived with his son since the latter was three months old was not enough to assume the family bond was broken.

The fact that one of the parents has been or is to be deported also does not mean that family life is broken. In the case of *Boughanemi v. France* the father had not recognized the child

134 ECtHR 17 February 2009, Appl. no. 27319/07 (*Onur v. UK*), par. 44, in which the ECtHR refers to ECtHR 27 October 1994, Appl. no. 18535/91 (*Kroon and others v. the Netherlands*), par. 30, ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*), par. 45 and ECtHR 13 January 2004, Appl. no. 36983/97 (*Haas v. the Netherlands*), par. 42. See for other examples: ECtHR 18 January 2009, Appl. no. 10606/07 (*Joseph Grant v. UK*), par. 30-31 and ECtHR 11 April 2006, Appl. no. 61292/00 (*Useinov v. the Netherlands*), admiss.

135 ECtHR 21 June 1988, Appl. no. 10730/84 (*Berrehab v. the Netherlands*), par. 21.

136 ECtHR 20 June 2002, Appl. no. 509963/99 (*Al-Nashif v. Bulgaria*), par. 112.

137 There have been a few cases that concerned near relatives or *de facto* relationships that have been struck off the list, see ECtHR questions on 29 October 2007 and struck off the list 1 July 2008, Appl.no. 7137/07 (*Dinić v. the Netherlands*), which concerned the relationship between grandmother and granddaughter and ECtHR questions on 22 December 2010 and struck off the list 31 May 2011, Appl. no. 5470/09 (*P.T.B. and others v. UK*), which concerned the relationship between a foster mother and her two foster children.

138 ECtHR 19 February 1996, Appl. no. 23218/94 (*Gül v. Switzerland*).

until ten months after the child was born, and he had done so only after a deportation order against him had been issued.[139] The French government argued that Mr Boughanemi had not shown that he provided for his son, contributed to his education or enjoyed parental rights. According to the ECtHR, however, neither the belated nature of the formal recognition nor the applicant's alleged conduct in regard to the child constituted such an exceptional circumstance as to break the natural family ties.[140] In *C. v. Belgium,* meanwhile, the ECtHR held that neither the fact that the father was imprisoned and subsequently deported nor that his son was then taken in by the father's sister who lived in Luxembourg constituted such exceptional circumstances as to break the natural family bond between a biological father and a child.[141]

2.2.4 Comparing family and migration law cases

In both types of cases, the ECtHR uses the same criteria to determine whether sufficiently close and personal ties exist between the individuals involved.[142] While the existence of such ties depends on the particular circumstances of the case, the ECtHR can readily be said to assume a family tie between parents and minor children. In both types of cases, too, family ties are not considered to be broken except in very exceptional circumstances.

2.3 Positive and negative obligations under Article 8 ECHR

The development whereby the ECtHR held that the provisions of the ECHR may also impose positive obligations on states fits well with the idea that the ECHR is "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".[143] Originally, the provisions of the ECHR were relevant only in the relationship between an individual and the state (the 'vertical effect' of the ECHR provisions). Nowadays, however, the ECtHR has stated that positive obligations "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves".[144] The state may thus be under a positive obligation to ensure that individuals have rights vis-à-vis other individuals. Consequently, the ECtHR has ruled that the provisions of the ECHR can be applied in a legal dispute between two private parties and has thus recognized the so-called 'horizontal effect' of the provisions of the ECHR.

139 ECtHR 24 April 1996, Appl. no. 22070/93 (*Boughanemi v. France*), par. 33.
140 ECtHR 24 April 1996, Appl. no. 22070/93 (*Boughanemi v. France*), par. 35, see also *Headley and others v. UK* (ECtHR 1 March 2005, Appl. no. 39642/03, admiss.)
141 ECtHR 7 August 1996, Appl. no. 21794/93 (*C. v. Belgium*), par. 25.
142 However, this finding is probably different where it does not concern the nuclear family. These relationships fall outside the scope of this thesis but where it concerns the relationship between (young) adults, the ECtHR requires in migration law cases that there exist "more than normal emotional ties", see Aarrass 2010, p. 177 and see for example ECtHR 9 October 2003, Appl. no. 48321/99 (*Slivenko v. Latvia*).
143 ECtHR 26 March 1985, Appl. no. 8978/80 (*X. and Y. v. the Netherlands*), par. 23.
144 ECtHR 26 March 1985, Appl. no. 8978/80 (*X. and Y. v. the Netherlands*), par. 23.

According to established case law, in situations involving a negative obligation – and thus where interference is at issue – it must be assessed whether that interference complies with the criteria in the second paragraph of Article 8. In order not to be arbitrary (the 'necessity test'), the interference needs to be in accordance with the law and should be necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, or for the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.[145] Where a case involves a positive obligation, the ECtHR confines itself to the task of determining whether a fair balance has been struck between the interests of the state on the one hand and the interests of the individual on the other hand (the 'fair balance' test).[146]

Although a distinction is made between positive and negative obligations, the precise boundaries between positive and negative obligations are far from clear.[147] While the Court stated in *Marckx v. Belgium* that paragraph 2 of Article 8 is not applicable in the event of a positive obligation,[148] the Court later held that, in order to determine whether a positive obligation exists, consideration had to be given to the need for a fair balance between the general interests of the community and the interests of the individual. In striking this balance, the aims mentioned in Article 8 paragraph 2 are certainly of relevance.[149] Nowadays, the distinction has become even more blurred and the Court often completely refrains from determining whether a positive or negative obligation is at stake and merely states:

> *… that the boundaries between positive and negative obligations do not lend themselves to precise definition and that both applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.*[150]

Although the distinction between the two types of obligations is vague, something can nevertheless often be phrased as either a failure to do something or to take appropriate measures, or as an interference with someone's rights, while in some cases both positive and negative obligations are at stake.[151] And the ECtHR still appears to attach importance to characterizing a situation as entailing either a positive or negative obligation. In the following section I will first discuss the ECtHR's characterization of situations as entailing

145 Gerards 2011b, pp. 140-166.
146 Gerards 2011b, pp. 233-236.
147 See also Connelly 1986, Forder 1992, Lawson 1995a, Lawson 1995b and Boeles et al. 2014, p. 203.
148 ECtHR 13 June 1979, Appl. no. 6833/74 (*Marckx v. Belgium*), par. 31.
149 ECtHR 17 October 1986, Appl. no. 9532/81 (*Rees v. UK*), par. 37.
150 ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*), par. 49.
151 Connelly 1986, Forder 1992, Lawson 1995a, Lawson 1995b and Boeles et al. 2014, p. 203 and see ECtHR 11 July 2000, Appl. no. 29192/95 (*Ciliz v. the Netherlands*), par. 61-63.

either a positive or negative obligation in family cases (2.3.1), followed by its characterization of positive and negative obligations in migration cases (2.3.2). Subsequently I will compare the ECtHR's approach in family and migration cases (2.3.3).

2.3.1 Positive and negative obligations in family law

The distinction between positive and negative obligations in family law remains visible in a variety of cases. While care orders are considered to constitute an interference with the right to family life and thus a negative obligation,[152] cases concerning the right of parents and children to maintain family life after a separation between the parent and child, irrespective of whether this is caused by divorce, separation or detention, are cases in which states are regarded as having a positive obligation.[153] In some cases, however, the perspective from which a case will be assessed is less clear. While the ECtHR put the distinction in perspective in the filiation cases of *Keegan* and *Kroon*, it explicitly stated in the case of *Ahrens* that the decision to reject Ahrens' request to legally establish his paternity of the child in question constituted an interference.[154] Hence, although the perspective from which a case will be analysed by the ECtHR is not always clear, the above shows that the ECtHR attaches a certain relevance to the type of obligation at issue.

2.3.2 Positive and negative obligations in migration law

In migration cases, the distinction between the two types of obligations is visible when comparing expulsion cases after legal residence has ended (these are ordinarily characterized as an interference, and thus as entailing a negative obligation)[155] with first admission cases, where the individual wanting to reside with a family member who resides legally in a member state's territory is still abroad (these cases are generally characterized as entailing a positive obligation). This was first established in the case of *Abdulaziz, Cabales and Balkandali*, in which three women who were permanently settled in the UK complained about the state's refusal to grant their husbands permission to reside with them in the UK.[156] The women's request can be phrased in terms of either a negative or a positive obligation. The negative obligation entails the question of whether the refusal to grant permission amounts to an interference with the applicants' family life, while the positive obligation entails the question of whether the state is under an obligation to secure the applicants' family life in the UK. In essence, the request is the same, namely a request for the right to remain in the UK.

152 ECtHR 23 September 1994, Appl. no. 19823/92 (*Hokkanen v. Finland*).

153 ECtHR 22 June 1989, Appl. no. 11373/85 (*Eriksson v. Sweden*), par. 58 and ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*), par. 50, ECtHR 11 July 2000, Appl. no. 29192/95 (*Ciliz v. the Netherlands*) and ECtHR 16 October 2006, Appl. no. 18668/03 (*Lagergren v. Denmark*), admiss.

154 ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*), par. 49, ECtHR 27 October 1994, Appl. no. 18535/91 (*Kroon and others v. the Netherlands*), par. 31 & ECtHR 22 march 2012, Appl. no. 45071/09 (*Ahrens v. Germany*), par. 60.

155 See for example ECtHR 2 April 2015, Appl. no. 27945/10 (*Sarközi and Mahran v. Austria*) & ECtHR 6 january 2015, Appl. no. 30541/12 (*Vlas et autres c. Roumanie*).

156 ECtHR 28 May 1985, Appl. no. 9214/80; 9473/81; 9474/81 (*Abdulaziz, Cabales & Balkandali v. UK*).

The ECtHR stated that in cases concerning not only family life but also immigration, a state has the right to control the entry of non-nationals into its territory and that Article 8 does not impose a general obligation on a state to respect a married couple's choice of the country of their matrimonial residence and to accept non-national spouses for settlement in that country.[157] In the above case, the ECtHR did not find a violation of Article 8. The ECtHR did not consider the effects of the refusal on the applicants' family life, but instead chose to look at it in terms of a positive obligation.[158] In cases where a negative obligation is at stake, the right to control immigration likewise plays a role. In those cases, the ECtHR has held that states have the right to control the entry, residence and expulsion of aliens.[159] The ECtHR has held that Article 8 ECHR does not guarantee the right of an alien to enter or to reside in a particular country. Consequently states have the right to expel an alien if this is necessary in order to protect public order.[160]

There are also situations in which it is less predictable whether the ECtHR will view the case in terms of a positive or negative obligation. These cases often involve situations where the individual wanting to reside with a family member who legally resides in the territory of a member state is already present in the territory of the host member state. Such a person may have had a residence permit that was later revoked or may never have had any residence rights. In those cases, ECtHR sometimes avoids speaking out and deems it irrelevant to specify the type of obligation at stake,[161] while sometimes characterizing the situation as entailing a positive obligation[162] and sometimes a negative obligation.[163] As in family cases, the reason why the ECtHR decides in a certain way is not always clear.

It has just been established that, in both family and migration law cases, the characterization of whether an act or omission by the state entails a positive or a negative obligation continues to remain visible. While there are various situations in which the perspective from which the ECtHR will assess the case is largely predictable, there are also situations in which this is less obvious. The logical next question, therefore, is whether this characterization as either positive or negative has consequences for the ECtHR's substantive assessment of whether Article 8 has been violated in a specific case.

157 ECtHR 28 May 1985, Appl. no. 9214/80; 9473/81; 9474/81 (*Abdulaziz, Cabales & Balkandali v. UK*), par. 67-68.
158 This choice has been criticized by amongst others Connelly 1986, p. 590-591, Forder 1992 and Lawson 1995a and 1995b.
159 ECtHR (GC) 13 December 2012, Appl. no. 22689/07 (*de Souza Ribeiro v. France*), par. 77.
160 ECtHR (GC) 13 December 2012, Appl. no. 22689/07 (*de Souza Ribeiro v. France*), par. 77.
161 See amongst others ECtHR 6 July 2006, Appl. no. 13594/03 (*Priya v. Denmark*), ECtHR 26 April 2007, Appl. no. 16351/03 (*Konstantinov v. the Netherlands*), ECtHR 12 February 2009, Appl. no. 2512/04 (*Nolan and K. v. Russia*),
162 ECtHR 16 October 2014, Appl. no. 43553/10 (*Adeishvili (Mazmishvili) v. Russia*).
163 ECtHR 11 February 2010, Appl. no. 11870/03 (*Zakayev and Safanova v. Russia*) and ECtHR 5 June 2012, Appl. no. 55822/10 (*Shakurov v. Russia*), ECtHR 28 January 2014, Appl. no. 48205/13 (*Bolek and others v. Sweden*).

As described earlier, the ECtHR has held that the boundaries between positive and negative obligations do not lend themselves to precise definition and that the two principles are similar. However, despite the ECtHR often having stressed the similarity of the two principles, it has also often been held that the distinction is not entirely without consequences. Both Gerards and Slingenberg have argued that, with regard to negative obligations, it is up to the individual to prove that the measure at issue falls within the scope of Article 8.[164] Once, however, it has been established that this is the case, it is up to the state to show that the measure at issue meets the criteria of Article 8 paragraph 2. It is then the state that has to prove that the interference with a human right was legitimate. With regard to positive obligations and the application of the fair balance test, it not only rests upon the applicant to demonstrate that his situation falls within the scope of Article 8, but it is also unclear as to whether the applicant additionally has to show that the state is under a positive obligation to protect his family rights.[165] The distinction may thus have consequences for the burden of proof. Another point that has often been mentioned is that, in the case of positive obligations, there is a wider margin of appreciation for states, as the ECtHR itself has also said.[166] However Gerards also points to cases that show that even if a positive obligation is at stake, this does not necessarily mean that states have a wide margin of appreciation.[167]

2.3.3 Comparing family and migration law cases

With regard to positive obligations in the field of family law, states have a margin of appreciation, but certainly not always a wide margin. An example can be found in the previously mentioned filiation case of *Kroon*, where the ECtHR found there to be a positive obligation at stake, namely the state's obligation to allow full legal ties to be formed between father and child.[168] However, despite qualifying the obligation as a positive obligation, the ECtHR held that respect for family life required the biological and social reality to prevail over a legal presumption, and the state accordingly had little room to manoeuvre.[169]

In the field of migration law, on the other hand, it has often been argued that, ever since the *Abdulaziz* judgment, the ECtHR has been reluctant to find that a state has violated a positive obligation to accept non-national family members for settlement in its territory.[170] As Mowbray put it, "by acknowledging the traditional right in international law of states to regulate immigration – a key element of the sovereignty of states – the ECtHR has broadened the immunity of states where Article 8 is concerned".[171] Hence, applicants

164 Slingenberg 2014, p. 324 & Gerards 2011b, p. 253.
165 Slingenberg 2014, p. 324 & Gerards 2011b, p. 253.
166 Forder 1992, p., Lawson 1995a, p. Lawson 1995b, p. Mowbray 2004, pp. 171-175 and ECtHR 3 February 2009, Appl. no. 31276/05 (*Women on Waves v. Portugal*), par. 40.
167 Gerards 2011, p. 255.
168 ECtHR 27 October 1994, Appl. no. 18535/91 (*Kroon and others v. the Netherlands*), par. 36.
169 ECtHR 27 October 1994, Appl. no. 18535/91 (*Kroon and others v. the Netherlands*), par. 40.
170 Mowbray 2004, pp. 171-175. See also Boeles et al. 2014, p. 203 and De Vries 2013, p. 107.
171 Mowbray 2004, pp. 172-183.

must demonstrate exceptional circumstances if they wish the ECtHR to find that a fair balance has not been struck. However, there have also been cases in which the ECtHR left a narrower margin for the state, cases where the ECtHR found that a case should be viewed from the perspective of a failure to comply with a positive obligation, and cases concerning first admission where the ECtHR did not find it relevant to establish which type of obligation was at stake.[172]

In summary, the distinction between negative and positive obligations does not appear to have much influence on the margin of appreciation left to states, and thus on the outcome of the proceedings, in family cases. This is less clear for migration cases. However, in this field, too, the distinction between negative and positive obligations does not always appear to have much influence on the margin left to states. In both fields of law, the question of whether the margin is wide or narrow depends on a variety of factors. The factors that literature regards as being of relevance in establishing the margin for states in a particular case are discussed below.

2.4 Margin of appreciation

The primary responsibility for securing compliance with the ECHR is vested in the national authorities, while it is chiefly the subsidiary role assigned to the ECtHR that has led to the development of the margin of appreciation doctrine.[173] As Gerards stated, this doctrine enables the ECtHR to vary the intensity of its scrutiny of national measures and policy decisions, thus allowing it to be deferential in some cases, while being strict in others.[174] The margin of appreciation can thus be used to negotiate between the interests concerned with national and international decision-making on the one hand, and the interests in providing sufficient protection of individual rights on the other.[175] In this way, the margin of appreciation serves as a tool to mitigate the impact on state power owing to the wide scope that has been assigned to the provisions, including Article 8, of the ECHR.[176]

Where the state is granted a wide margin of appreciation, the review will be less intense, whereas the facts of the case will be subject to strict scrutiny in the event of a narrow margin. The ECtHR has provided various reasons as to why the margin should be either wide or

172 See amongst others ECtHR 7 July 2006, Appl.no. 13594/03 (*Priya v. Denmark*), admiss., ECtHR 14 February 2012, Appl. no. 26940/10 (*Antwi v. Norway*), par. 103, ECtHR 3 April 2012, Appl. no. 1722/10 (*Biraga and others v. Sweden*).
173 ECtHR 23 July 1968, Appl.no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (*Belgian Linguistics case*), ECtHR 7 December 1976, Appl. no. 5493/72 (*Handyside v. UK*), par. 48. See also Kleijkamp 1999, p. 48-49 and Gerards 2011, p. 104.
174 Gerards 2010, p. 1.
175 Gerards 2010, p. 1.
176 See also Slingenberg 2014, p. 321.

narrow.[177] These include the ECtHR's view that the national authorities are better placed to judge the question at hand,[178] the nature of the right involved (i.e. whether a particularly important facet of an individual's existence or identity is at stake)[179] and whether there is common ground between the laws of the member states concerning the issue before the ECtHR.[180] The ECtHR has held that if factors in a case may point to both a wide and narrow margin, the applicable margin of appreciation will depend on the context of the particular case.[181]

Next, I will discuss the margin of appreciation that is left to the state in family cases (2.4.1) and migration cases (2.4.2) and then compare the approach of the ECtHR in these two fields (2.4.3).

2.4.1 Margin of appreciation in family law cases

In family law cases, different circumstances as to why the margin should be either wide or narrow can be recognized. The ECtHR has held that family law is a sensitive field, in which regard should be given to the diversity of practices in the different member states.[182] The perceptions as to the appropriateness of intervention by public authorities in the care of children vary in the member states, depending on factors such as traditions relating to the role of the family, state intervention in family affairs and the availability of resources for public measures in this particular area.[183] According to the ECtHR, the national authorities are consequently in a better position to examine all the circumstances of a particular case. The ECtHR has therefore taken the position that it is not the Court's role to put itself in the place of the competent national authorities in regulating custody and access issues.[184] It has often also mentioned the nature of the issues and the interests at stake as an argument for granting the state a wide margin. In the case of *Johansen v. Norway,* which concerned child protection measures, a combination of these arguments was used, with the ECtHR stating that:

> *… the Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public*

177 De Vries 2013, p. 110-111, Gerards 2011, p. 107-113.
178 ECtHR 7 December 1976, Appl. no. 5493/72 (*Handyside v. UK*), par. 48.
179 ECtHR 26 April 1979, Appl. no. 6538/74 (*The Sunday Times v. UK*), par. 59 and ECtHR 4 December 2007, Appl. no. 44362/04 (*Dickson v. UK*), par. 78.
180 ECtHR 10 April 2007, Appl. no. 6339/05 (*Evans v. UK*), par. 77.
181 ECtHR 8 July 2003, Appl. no. 36022/97 (*Hatton and others v. UK*), par. 97.
182 ECtHR 18 December 1986, Appl.no. 9697/82 (*Johnston and others v. Ireland*), par. 55.
183 ECtHR 26 February 2002, Appl. no. 46544/99 (*Kutzner v. Germany*) par. 66.
184 ECtHR 23 September 1994, Appl. no. 19823/92 (*Hokkanen v. Finland*), par. 55. ECtHR 8 July 2003, Appl. no. 30943/96 (*Sahin v. Germany*), par. 64 and ECtHR 8 July 2003, Appl. no. 31871/96 (*Sommerfeld v. Germany*), par. 62.

> *measures in this particular area. However, consideration of what is in the best interest of the child is in any event of crucial importance. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned (…), often at the very stage when care measures are being envisaged or immediately after their implementation. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the public care of children and the rights of parents whose children have been taken into care, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (…).*
> *The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. (….) Thus, the Court recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care.*[185]

Here the ECtHR concluded that the state should be granted a wide margin with regard to the state's initial decision to take a child into care. Nonetheless, it also simultaneously stressed that the best interests of the child are in any event of crucial importance. The ECtHR continued as follows:

> *A stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.*[186]

Thus, whereas the Court acknowledges that although the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care, this margin is narrowed when it comes to further restricting parental rights. Hence, the weight assigned to the fundamental nature of the parent-child relationship means that the ECtHR strictly scrutinizes situations involving a risk of permanent damage to the parent-child relationship.

2.4.2 Margin of appreciation in migration law cases

In migration law cases, too, the state is assigned a wide margin of appreciation. In *Abdulaziz, Cabales and Balkandali v. UK*, which concerned a positive obligation, the ECtHR stated that it could not ignore that where a case concerned immigration, a state has the right to control the entry of non-nationals into its territory. In cases that concern a negative

185 ECtHR 7 August 1996, Appl. no. 17383/90 (*Johansen v. Norway*), par. 64.
186 ECtHR 7 August 1996, Appl. no. 17383/90 (*Johansen v. Norway*), par. 64 and see also ECtHR 17 July 2012, Appl. no. 64791/10 (*M.D. v. Malta).*

obligation, the ECtHR has stated that the Convention also does not, in principle, prohibit states from regulating the entry and length of stay of aliens.[187] However, in cases concerning the expulsion or non-admittance of parents or children, such expulsion or non-admittance would also restrict parental rights and access, with possibly irreversible consequences. And, indeed, in cases concerning either expulsion or non-admittance and involving children, the ECtHR has held that their interests play an important role, as in *Jeunesse v. the Netherlands*, in which the ECtHR held that:

> *The Court fourthly considers that the impact of the Netherlands authorities' decision on the applicant's three children is another important feature of this case. The Court observes that the best interests of the applicant's children must be taken into account in this balancing exercise (…). On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (…). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents.*[188]

And in the case of *El Ghatet v. Switzerland* the ECtHR stated, with reference to various family law cases, that:

> *(…) the task to assess the best interests of the child in each individual case is primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned (…). To that end they enjoy a certain margin of appreciation, which remains subject, however, to European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power (…). In line with the principle of subsidiarity, it is not the Court's task to take the place of the competent authorities in determining the best interests of the child, but to ascertain whether the domestic courts secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests, which must be sufficiently reflected in the reasoning of the domestic courts (…). Domestic courts must put forward specific reasons in light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it (…). Where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements of Article 8 of the Convention.*[189]

187 ECtHR 21 June 1988, Appl. no. 10730/84 (*Berrehab v. the Netherlands*), par. 28.
188 ECtHR 3 October 2014, Appl. no. 12738/10 (*Jeunesse v. the Netherlands*), par. 118.
189 ECtHR 8 November 2016, Appl. no. 56971/10 (*El Ghatet v. Switzerland*), par. 47. The ECtHR here referred to ECtHR

Thus, migration cases provide a wide margin of appreciation for the state. Although the ECtHR requires states to enable it to supervise domestic decisions, it leaves the primary responsibility with the state.

2.4.3 Comparing the margin of appreciation in family and migration cases

As in family cases, migration cases also, in principle, allow a wide margin of appreciation for the state. And, just like in family cases involving children, the ECtHR also attaches importance to children's interests in migration cases. Yet while the ECtHR makes it explicit in family cases that the scrutiny is stricter in situations where the parent-child relationship could be permanently damaged, it makes no mention of this in migration cases.

2.5 Obligations for the state under Article 8 ECHR in family law cases

The ECtHR has imposed far-reaching obligations on states under Article 8 ECHR. Two of these obligations are of major importance with regard to protecting the family unity. In cases where the family unity is still intact and both parents share custody rights, the ECtHR has recognized the right of the parent and child to live together. In cases where the family has never lived together or no longer lives together as a unity owing to divorce or separation, the ECtHR has recognized the right of the parent and child to mutually enjoy each other's company. Thus, parents and children have a right to access. This section discusses the right to live together (2.5.1) and to mutually enjoy each other's company (2.5.2) in family cases, while migration cases are discussed in 2.6.

2.5.1 Right of parent and child to live together

As mentioned above, the ECtHR has held that the right to live together falls within the scope of family life within the meaning of Article 8. The right to live together encompasses three different obligations for states, the first of which encompasses an obligation for states not to separate parents and children. The ECtHR has held that the possibility of their continuing to live together is a fundamental consideration.[190] Secondly, the state is, in principle, obliged to enable the ties between parents and their children to be preserved.[191] Lastly, the right to live together also means that states have an obligation, in the event of a separation, to reunite parents and children as soon as possible.[192] In family law cases, these obligations for the state have been thoroughly interpreted and divided into three categories

6 July 2010, Appl. no. 41615/07 (*Neulinger and Shuruk v. Switzerland)* and ECtHR 26 November 2013, Appl. no. 27853/09 (*X. v. Latvia*).

190 ECtHR 10 February 2015, Appl. no. 77818/12 (*Penchevi v. Bulgaria*), par. 59.

191 ECtHR 21 September 2006, Appl. no. 12643/02 (*Moser v. Austria*), par. 64.

192 The ECtHR held in *Maire v. Portugal* that: "*Article 8 includes a parent's right to the taking of measures with a view to his being reunited with his child and an obligation on the national authorities to take such measures*", 26 June 2003, Appl. no. 48206/99, par. 70.

of cases: those relating to child protection measures; those relating to child abduction and relocation disputes, in which one of the parents has moved or wants to move with the children to another town, state or country, and those in which one of the parents has been detained. Each of these categories is discussed below.

2.5.1.1 Child protection measures: separation as a last resort and in principle only temporarily

In the event of child protection measures being applied, such as a child being taken into public care, the ECtHR has held that:

> *(…) severing family ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances. A relevant decision must therefore be supported by sufficiently sound and weighty considerations in the interests of the child, and it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the parents and the child has been made.*[193]

The ECtHR has laid out a specific framework of principles applying in childcare cases. These principles are not only relevant in the context of public care, but are also valid in situations in which care has been temporarily transferred by the parent(s) as part of a private agreement.[194]

According to the ECtHR, taking a child into care should be regarded as a temporary measure and should be discontinued as soon as circumstances permit, while all measures implementing temporary care should be consistent with the ultimate aim of reuniting parents and their children.[195] Consequently, there should be prior consideration of the possible alternatives to separation.[196] If there is a less interventionist way of protecting the child, that way should be preferred. It is not enough, in this respect, simply to show that a child could be placed in an environment more beneficial for his upbringing.[197] Similarly, limited financial resources may never be the sole reason for imposing child protection measures.[198] In *Kutzner*, two children had been placed in foster homes because of their

193 ECtHR 18 December 2008, Appl. no. 39948/06 (*Saviny v. Ukraine*), par. 49.

194 ECtHR 23 September 1994, Appl. no. 19823/92 (*Hokkanen v. Finland*), par. 55, ECtHR 18 October 2011, Appl. no. 13786/04 (*Lyubenova v. Bulgaria*), par. 59 and ECtHR 22 May 2012, Appl. no. 61173/08 (*Santos Nunes v. Portugal*), par. 76.

195 ECtHR 26 February 2002, Appl. no. 46544/99 (*Kutzner v. Germany*), par. 76.

196 ECtHR 26 October 2006, Appl. no. 23848/04 (*Wallová and Walla v. the Czech Republic*), par. 74 and ECtHR 18 December 2008, Appl. no. 39948/06 (*Saviny v. Ukraine*), par. 52.

197 ECtHR 12 July 2001, Appl. no. 25702/94 (*K. and T. v. Finland*), par. 173, ECtHR 26 February 2002, Appl. no. 46544/99 (*Kutzner v. Germany*), par. 69 and or a more recent example see ECtHR 13 March 2012, Appl. no. 4547/10 (*Y.C. v. the UK*), par. 134.

198 ECtHR 21 September 2006, App. no. 12643/02 (*Moser v. Austria*), ECtHR 26 October 2006, Appl. no. 23848/04 (*Wallová and Walla v. The Czech Republic*), ECtHR 21 June 2007, Appl.no. 23499/06 (*Havelka and Others v. the Czech Republic*), ECtHR 18 December 2008, Appl. no. 39948/06 (*Saviny v. Ukraine*), App. no. 39948/06, ECtHR 08 January 2013, App. no. 37956/11 (*A.K. and L. v. Croatia*), ECtHR 18 June 2013, App. no. 28775/12 (*R.M.S. v. Spain*),

parents' limited intellectual capacity. The ECtHR held that while there were legitimate concerns about the children's development and it accepted that the children could grow up in a more beneficial environment, the parents should have been given more support so that the children could have remained with them.[199] Therefore, additional reasons, such as the child being exposed to violence or abuse,[200] sexual abuse[201] or a state of alarming health or psychological imbalance of the parents,[202] are needed for a child to be legitimately placed in care.

Where the decision to take a child into public care is explained by a need to protect the child from danger, it should be established that this danger actually exists.[203] The ECtHR has provided a variety of factors that may lead to a decision to remove a child, such as where remaining in the care of the parents would result in the child suffering abuse or neglect, educational deficiencies or lack of emotional support, or where the child's placement in public care is necessary as a result of the child's physical or mental health.[204]

Once a child has been taken into public care, the state is under a positive obligation to make serious and sustained efforts to facilitate the reuniting of the child with the natural parents, and until then should also enable regular contact between them.[205] For this reason, the ECtHR held that Sweden violated Article 8 ECHR in the case of *Eriksson,* in which the daughter, who was six years old at the time of the Court's ruling, had lived with foster parents since shortly after she was born:

> *…it appears that under Swedish law Mrs Eriksson did not, after the lifting of the care order, have any enforceable visiting rights while the prohibition on removal was in force. Furthermore, and in particular on account of the restrictions on access, she was in fact denied the opportunity to meet with her daughter to an extent and in circumstances likely to promote the aim of reuniting them or even the positive development of their relationship. In this situation she has not been able to have the prohibition on removal lifted. The resulting stress on the relations between the applicants and the uncertainty with regard to Lisa's future have already continued for more than six years, causing*

ECtHR 6 October 2015, Appl. no. 58455/13 (*N.P. v. the Republic of Moldova*) and ECtHR 16 February 2016, Appl. no. 72850/14 (*Soares de Melo v. Portugal*).

199 ECtHR 26 February 2002, Appl. no. 46544/99 (*Kutzner v. Germany*), par. 69-75.

200 ECtHR 10 March 2005, Appl. no. 56024/00 (*Dewinne v. Belgium*), admiss. and ECtHR 13 December 2005, Appl. no. 573/06 (*Zakharova v. France*), admiss.

201 ECtHR 9 May 2003, Appl. no. 52763/99 (*Covezzi and Morselli v. Italy*), par. 104.

202 ECtHR 19 February 2002, Appl. no. 57376/00 (*Bertrand v. France*), admiss. and ECtHR 1 July 2004, Appl. no. 64796/01 (*Couillard Maugery v France*), par. 261.

203 ECtHR 12 July 2001, Appl. no. 25702/94 (*K. and T. v. Finland*), par. 168 and ECtHR 8 April 2004, Appl. no. 11057/02 (*Haase v. Germany*), par. 99.

204 ECtHR 18 December 2008, Appl. no. 39948/06 (*Saviny v. Ukraine*), par. 50.

205 ECtHR 18 December 2008, Appl. no. 39948/06 (*Saviny v. Ukraine*), par. 52.

> *great anguish to both applicants.*[206]

The positive duty to take measures to facilitate family reunification as soon as reasonably feasible begins to weigh on the competent authorities, with progressively increasing force, from the start of the period of care.[207] Where possible, the state should also keep siblings together.[208]

However, the duty to take measures to facilitate reunion is not absolute, but instead always has to be balanced against the duty to consider the best interests of all concerned, and in particular the interests of the child.[209] The ECtHR held that:

> *(…) the reunion of a parent with a child who has lived for some time with other persons may not be able to take place immediately and may require preparatory measures being taken to this effect. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned will always be an important ingredient. Whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 (art. 8) of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (...). What is decisive is whether the national authorities have taken all necessary steps to facilitate reunion as can reasonably be demanded in the special circumstances of each case.*[210]

Hence, with regard to a state's duty to facilitate the reunion between parents and children, the state should take account of all the child's needs. The child's return may be refused – temporarily or permanently – if the child has bonded with foster parents for a prolonged period of time. In the case of *Z.J.,* the children were not placed in public care, but the father had voluntarily agreed to allow a cousin of his deceased wife to become the legal guardian of his six-months-old twins because he was unable to take care of them while at the same time working and supporting his three other children. He maintained his parental rights and was able to see them when he wished. This changed, however, following conflicts between him and the guardian. Although he started several proceedings with the aim of having the children returned to him, by the time he started these proceedings the twins were five-and-

206 ECtHR 22 June 1989, Appl. no. 11373/85 (*Eriksson v. Sweden*), par. 71, ECtHR 27 November 1992, Appl. no. 13441/87 (*Olsson v. Sweden no. 2*), par. 90 and ECtHR 23 September 1994, Appl. no. 19823/92 (*Hokkanen v. Finland*), par. 55.
207 ECtHR 12 July 2001, Appl. no. 25702/94 (*K. and T. v. Finland*), par. 178.
208 ECtHR 12 July 2001, Appl. no. 25702/94 (*K. and T. v. Finland*), par. 178.
209 ECtHR 12 July 2001, Appl. no. 25702/94 (*K. and T. v. Finland*), par. 178.
210 ECtHR 23 September 1994, Appl. no. 19823/92 (*Hokkanen v. Finland*), par. 58.

a-half years old and had been living with the guardian for most of their lives. The domestic court temporarily refused his request as it held that an immediate return would not be in the best interests of the children. The ECtHR stated that while acknowledging the father's right to live with his children but temporarily refusing his request, the domestic court had placed the children's best interests first, as required by Article 8.[211]

In summary, taking a child into public care is permitted only under very exceptional circumstances relating to the best interests of the child and only as a measure of last resort. If a child is taken into care, the state is obliged to do everything in its power to facilitate reunion and must meanwhile enable regular contact between parents and children. This obligation for the state also exists if the child is not taken into public care, but where the responsibility for caring for the child is transferred under an agreement between the parents and a guardian. States' obligation to facilitate reunion ceases to exist only where reunification would be incompatible with the interests and welfare of the child.

2.5.1.2 Child abduction and relocation disputes: prompt return of the child, unless the child's best interests indicate otherwise

The ECtHR has held that the positive obligation upon states to take measures in order to reunite parents and children do not apply only to cases involving children compulsorily being taken into public care and the imposition of care measures, but also to cases where contact and residence disputes concerning children arise between parents or other members of the children's family. Child abduction cases are generally cases in which one of the parents takes the child to the territory of another state without the prior permission of the other parent, who also had custody rights regarding that child. However, other relocation disputes are also possible, such as when a parent arranges to go on holiday with the children or wishes to relocate with them within the territory of the state.

The ECtHR held in the *Ignaccolo-Zenide* case that:

> *(…) the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action.*[212]

The ECtHR then noted that the ECHR must be applied in accordance with the principles of international law. Accordingly, the ECtHR found that, in child abduction cases, the

211 ECtHR 29 April 2014, Appl. no. 60092/12 (*Z.J. v. Lithuania*), par. 103.

212 ECtHR 25 January 2000, Appl. no. 31679/96 (*Ignaccolo-Zenide v. Romania*), par. 94. The ECtHR referred to its case law on alternative care and child protection measures, namely *Eriksson v. Sweden* (ECtHR 22 June 1989, Appl. no. 11373/85) par. 71, *Olsson v. Sweden no. 2* (ECtHR 27 November 1992, Appl. no. 13441/87, par. 90) and *Hokkanen v. Finland* (ECtHR 23 September 1994, Appl. no. 19823/92, par. 55).

positive obligations regarding the reuniting of a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the Hague Convention').[213] In a later case, the ECtHR noted that the Convention on the Rights of the Child of 20 November 1989 ('CRC') must also be taken into account.[214] With reference to those treaties, and principles of international law in general, the ECtHR held that the presumption is in favour of the child's prompt return to the parent who was left behind. The ECtHR has explained that:

> *That rule is supported by serious considerations of public order: the "abductor" parent who took the child to another state should not be permitted to benefit from his or her own wrong, should not be able to legalise a factual situation brought about by the wrongful removal of the child, and should not be permitted to choose a new forum for a dispute which has already been resolved in another country. Such presumption in favour of return is supposed to discourage this type of behaviour and to promote "the general interest in ensuring respect for the rule of law".*[215]

In *Neulinger and Shuruk*, however, which has since become a leading case, the ECtHR stressed that the child's best interests should be a primary consideration, which, depending on their nature and seriousness, may override those of the parent to whom the child should in principle be returned or those of public order, thus allowing the situation that arose after a wrongful removal to be legalized.[216] According to the ECtHR, the principle of the child's best interests comprises two aspects. On the one hand, it is considered in the best interests of the child for the child to maintain ties with his or her family, except where the family has proved particularly unfit. This is because severing those ties would mean cutting a child off from his or her roots. On the other hand, the best interests of the child also require the child to be able to develop in a sound environment.[217] A parent cannot be entitled under Article 8 to have measures taken that would harm the child's health and development, which means that the child's return can never be ordered automatically or mechanically.[218] The child's best interests will depend on a variety of individual circumstances. The ECtHR has held that particular account should be taken of the child's age and level of maturity, the presence or absence of the parents, and the child's environment and experiences.[219] And these individual circumstances must be assessed in each and every case.[220]

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213 ECtHR 25 January 2000, Appl. no. 31679/96 (*Ignaccolo-Zenide v. Romania*), par. 95.
214 ECtHR 26 June 2003, Appl. no. 48206/99 (*Maire v. Portugal*), par. 72.
215 ECtHR 11 December 2014, Appl. no. 22909/10 (*Hromadka and Hromadkova v. Russia*), par. 152.
216 ECtHR 6 July 2010, Appl. no. 41615/07 (*Neulinger and Shuruk v. Switzerland*), par. 134, see also ECtHR 26 October 2010, Appl. no. 25437/08 (*Raban v. Romania*), par. 28, ECtHR 12 July 2011, Appl. no. 14737/09 (*Šneersone and Kampanella v. Italy*), par. 85 and ECtHR 26 November 2013, Appl. no. 27853/09 (*X. v. Latvia*), par. 95-96.
217 ECtHR 6 December 2007, Appl. no 39388/05 (*Maumousseau and Washington v. France*), par. 67
218 ECtHR 6 July 2010, Appl. no. 41615/07 (*Neulinger and Shuruk v. Switzerland*), par. 138 and ECtHR 11 December 2014, Appl. no. 22909/10 (*Hromadka and Hromadkova v. Russia*), par. 151-152 & 160.
219 ECtHR 6 July 2010, Appl. no. 41615/07 (*Neulinger and Shuruk v. Switzerland*), par. 138 and ECtHR 11 December 2014, Appl. no. 22909/10 (*Hromadka and Hromadkova v. Russia*), par. 152.
220 ECtHR 6 July 2010, Appl. no. 41615/07 (*Neulinger and Shuruk v. Switzerland*), par. 138.

The ECtHR noted in *Neulinger and Shuruk* that, in order to assess compliance with Article 8, account has to be taken of developments that have occurred since the domestic court ordered the child's return. According to the ECtHR:

> *If it is enforced a certain time after the child's abduction, that may undermine, in particular, the pertinence of the Hague Convention in such a situation, it being essentially an instrument of a procedural nature and not a human rights treaty protecting individuals on an objective basis. Moreover, whilst under Article 12, second paragraph, of the Hague Convention, a judicial or administrative authority before which the case is brought after the one-year period provided for in the first paragraph must order the child's return, this is not so if it is demonstrated that the child is now settled in his or her new environment.*[221]

Thus, as Ruitenberg argued, it appears that while the underlying premise in the Hague Convention is that it is, in principle, in the best interests of the child to return, the criterion for return seems to have shifted in ECtHR case law from "the return should not be contrary to the interests of the child" to "the return must be in the best interests of the child".[222]

Once it has been established that a child's removal was indeed wrongful, different positive obligations rest upon a state. A state should set up the necessary legal framework to ensure a prompt response to international child abduction at the time the events in question take place. This promptness relates to investigating the child's whereabouts, the decision-making processes and the actual return.[223] A state should also take all the measures that could reasonably be expected to enable the parent and child to maintain and develop family life with each other.[224] This is different only in cases where the other parent has proved particularly unfit.

221 ECtHR 6 July 2010, Appl. no. 41615/07 (*Neulinger and Shuruk v. Switzerland*), par. 145.

222 Ruitenberg 2015, p. 270. Ruitenberg also discusses how the *Neulinger and Shuruk* case has been criticized for its focus on the best interest of the child in combination with the *ex nunc* assessment because, according to some authors, this contravenes the meaning of the Hague Convention since, as a result, the "abductor" parent gets rewarded for delaying tactics, i.e. bad conduct, see p. 271-271, where she refers to a case comment by S.F.M. Wortmann (NJ 2010, 644). It has also been held that the Neulinger and Shuruk judgment will have consequences for relocation issues. As argued by Prof. Linda Silberman and Prof. Martin Lipton: "Neulinger gives comfort to an abducting parent – maybe one who has been refused the right to relocate – by endorsing the possibility of relocating "unilaterally" and insisting upon the right to remain" (A Brief Comment on Neulinger and Shuruk v. Switzerland (2010), European Court of Human Rights, The Judges' Newsletter on International Child protection Vol. XVIII 2012).

223 Ruitenberg 2015, p. 276.

224 ECtHR 6 December 2007, Appl. no 39388/05 (*Maumousseau and Washington v. France*), par. 67 and ECtHR 11 December 2014, Appl. no. 22909/10 (*Hromadka and Hromadkova v. Russia*), par. 170-172.

Just as the ECtHR has held in childcare cases, the obligations upon states are not absolute. Indeed, the ECtHR noted that:

> *(…) the reunion of a parent with his or her child may not be able to take place immediately and may require preparation. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always important ingredients.*[225]

States are obliged to equip themselves with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on them by Article 8 and other international agreements they have chosen to ratify.[226] While national authorities must do their utmost to facilitate the cooperation of all concerned, any obligation to apply coercion in this area must be limited in the light of the best interests of the child.[227] However, the possibility of coercion cannot be entirely ruled out. The ECtHR held that:

> *(…) when difficulties appear, mainly as a result of a refusal by the parent with whom the child lives to comply with the decision ordering the child's prompt return, the appropriate authorities should then impose adequate sanctions in respect of this lack of cooperation and, whilst coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives.*[228]

The adequacy of any measures taken is to be judged by the swiftness of their implementation. The ECtHR has consistently stressed that the domestic proceedings require urgent handling as the passage of time can have irremediable consequences for relations between the child and the parent with whom he or she does not live.[229]

The decisive issue is thus whether a fair balance between the competing interests at stake – those of the child, of the parents, and of public order – has been struck. The interests of the child are, however, paramount. The state is thus obliged to do all that can be reasonably expected in order to facilitate the child's prompt return and to enable family life to be maintained.

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225 ECtHR 25 January 2000, Appl. no. 31679/96 (*Ignaccolo-Zenide v. Romania*), par. 94 and ECtHR 26 June 2003, Appl. no. 48206/99 (*Maire v. Portugal*), par. 71.

226 ECtHR 26 June 2003, Appl. no. 48206/99 (*Maire v. Portugal*), par. 76.

227 ECtHR 29 April 2003, Appl.no. 56673/00 (*Iglesias Gil and A.U.I. v. Spain*), par. 50.

228 ECtHR 6 December 2007, Appl. no 39388/05 (*Maumousseau and Washington v. France*), par. 83 and ECtHR 26 June 2003, Appl. no. 48206/99 (*Maire v. Portugal*), par. 76.

229 ECtHR 25 January 2000, Appl. no. 31679/96 (*Ignaccolo-Zenide v. Romania*), par. 102, ECtHR 26 June 2003, Appl. no. 48206/99 (*Maire v. Portugal*), par. 74.

2.5.1.3 Family life after detention: measures aimed at reuniting parents and children

In cases where one (or both) of the parents has been detained, the ECtHR applies the same criteria as in cases related to childcare or child abduction and relocation disputes. The ECtHR has held that, in those cases, it is the ECtHR's task to examine the state's conduct in the procedures concerning visitation rights in order to reunite parents and children. And, as the ECtHR has said, states must put remedies in place to enable the decision-making on the child's possible return to the parent to be completed within a very short time after the parent's prison term has ended, to end the delays that may occur in the proceedings concerning the return and to take appropriate action to safeguard the relationship between the child and the applicant.[230] These considerations are not valid only in the context of international abduction of children, but also in other situations where the authorities' conduct or inactivity in a procedure affects the private or family life of the applicants.[231]

In the case of *Eriksson,* Mrs Eriksson's daughter was placed in foster care because Mrs Eriksson had been sentenced to imprisonment. After her detention ended, Mrs Eriksson made numerous attempts to gain access and terminate the care order. Even, however, after the care order had been lifted and Mrs Eriksson's ability to take care of children and offer them a safe home was no longer in any doubt, she still had no enforceable visiting rights while the prohibition on removing the daughter from the foster home was in force. The state's failure to enable Mrs Eriksson and her daughter to meet to an extent and in circumstances likely to promote the aim of reuniting them was found to amount to a violation of Article 8.

In the case of *Bergmann*, Mr Bergmann became the father of a child while serving a prison sentence.[232] Custody of the child was awarded to the mother who, for several years, prevented the father and the child from meeting, despite this being provided for in an interim measure. This ultimately led to a Regional Court finding that since the affective relationship between the applicant and his son had broken down, the two were to have no contact. The ECtHR held that although circumstances were difficult, the domestic authorities had provided virtually no support, mediation or educational support to enable Mr Bergmann to reconnect with his son. That there were no emotional ties between Mr Bergmann and his son did not relieve the state of its duty to preserve Mr Bergmann's parental rights. According to the ECtHR, the state should have taken appropriate measures in this respect, such as making family therapy compulsory or ordering meetings between the applicant and his son to take place in a specialized structure.[233]

230 ECtHR 27 October 2011, Appl. no. 8857/08 (*Bergmann v. Czech Republic*), par. 45.
231 ECtHR 27 October 2011, Appl. no. 8857/08 (*Bergmann v. Czech Republic*), par. 46.
232 ECtHR 27 October 2011, Appl. no. 8857/08 (*Bergmann v. Czech Republic*).
233 ECtHR 27 October 2011, Appl. no. 8857/08 (*Bergmann v. Czech Republic*), par. 62.

Where, therefore, a parent has been detained, states have a positive obligation to assist in establishing or re-establishing family ties between parent and child and seeking to reunite them as soon as possible. Just as the ECtHR has stressed in childcare and child abduction cases, this obligation upon states also applies in cases where the other parent refuses to cooperate. It is thus only when the interests of the child are incompatible with reunification between parent and child that this obligation ceases to exist.

2.5.2 Access rights: the right of parent and child to mutually enjoy each other's company

The ECtHR has often held that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such mutual enjoyment of each other's company amount to an interference with the right to respect for family life. Article 8 protects the child's right to maintain contact with both parents and also the parents' rights to maintain contact with the child. There are various reasons why one or both parents may be separated from the child, with the most common of these being after the break-up of a marriage or relationship, or when parents have never actually been in a relationship. In addition, if child protection measures have been imposed and a child has been taken into public care, the parent and child have the right to maintain contact. Lastly, the right to maintain contact is also relevant in cases where one (or both) of the parents is detained.

2.5.2.1 Continuation of family life after divorce, separation or child protection measures: all possible measures to facilitate contact by a non-custodial parent with his or her children

The ECtHR stated in *Eriksson* and *Keegan* that the mutual enjoyment by a parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down.[234] In later cases, the ECtHR held that a positive obligation exists to ensure that family life between parents and children can continue after divorce.[235] However, states are not only obliged to facilitate access arrangements between parents and children in cases where family ties already exist, but, under Article 8, are also obliged to establish whether access between the natural father and his child, where the two are still strangers to each other, is in the best interests of the child.[236]

234 ECtHR 22 June 1989, Appl. no. 11373/85 (*Eriksson v. Sweden*), par. 58 and ECtHR 26 May 1994, Appl. no. 16969/90 (*Keegan v. Ireland*), par. 50.

235 ECtHR 11 July 2000, Appl. no. 29192/95 (*Ciliz v. the Netherlands*) and ECtHR 16 October 2006, Appl. no. 18668/03 (*Lagergren v. Denmark*), admiss.

236 ECtHR 27 June 2000, Appl. no. 32842/96 (*Nuutinen v. Finland*) par. 128 and ECtHR 21 December 2010, Appl. no. 20578/07 (*Anayo v. Germany*), par. 67-71.

In cases where the issue at stake is a right of access between parents and children, the ECtHR applies the same principles as discussed earlier for childcare cases and relocation disputes. This makes sense, given that access and custody rights are closely related: effective access arrangements play a key role in the reunification between parents and children who have been separated. However, the ECtHR also attaches great importance to effective access arrangements when it has been established that parent(s) and children do not or will no longer actually live together.

Cases involving access arrangements often entail problems concerning the enforcement of those arrangements. These enforcement problems are generally a result of obstruction by the residential parent. In cases concerning the enforcement of decisions in the sphere of family law, the ECtHR has repeatedly found the decisive issue to be whether the national authorities have taken all necessary steps to facilitate the enforcement that can reasonably be demanded in the specific circumstances of each case.[237] Thus national authorities should do everything possible to facilitate contact by a non-custodial parent with his or her children. Proceedings related to access orders require urgent handling in this respect as the passage of time can have irremediable consequences for relations between the child and the non-custodial parent.[238]

In *Gluhaković* the ECtHR stressed that, given that the ECHR requires its provisions to be interpreted and applied in such a way as to make their stipulations practical and effective, the national court should have ensured that Mr Gluhaković was able to exercise his right to contact with his daughter effectively. In this particular case, this meant that the national court should have taken Mr Gluhaković's work schedule into account and made sure the father and child had a suitable location in which to meet.[239] In *Cengiz Kiliç* the father complained about his inability to exercise his access rights in relation to his son during divorce proceedings. The ECtHR noted that, during the divorce proceedings, Mr Kiliç submitted no fewer than ten requests to maintain his personal relationship with his son or informing the domestic court that his right had been hampered by the child's mother and that, as a result of the mother's action, Mr Kiliç had no or only very limited contact with his child for up to two years. According to the ECtHR, the domestic court should have tried to reconcile the parties and facilitate voluntary enforcement of the court's decisions.[240] While referring to Committee Recommendation of the Council of Ministers of Europe No. R (98) 1 on family mediation, the ECtHR specifically noted the lack of civil mediation in the national judicial system, and that this option would have been desirable as a means

237 ECtHR 15 January 2015, Appl. no. 62198/11 (*Kuppinger v. Germany (No. 2)*), par. 101.
238 ECtHR 6 December 2011, Appl. no. 16192/06 (*Cengiz Kiliç v. Turkey*), par. 125.
239 ECtHR 12 April 2011, Appl. no. 21188/09 (*Gluhaković v. Croatia*), par. 62, 68, 69 & 73.
240 ECtHR 6 December 2011, Appl. no. 16192/06 (*Cengiz Kiliç v. Turkey*), par. 130.

to promoting cooperation between the parties involved.[241] The final example is the case of *Kuppinger (No. 2)*, in which the mother was found to be accountable for the failed contact between Mr Kuppinger and his son. The ECtHR noted that although it had no knowledge of the mother's financial situation, the overall administrative fine of €300 appeared rather low, given that provisions in domestic law allowed for a fine of up to €25,000 to be imposed for each individual incidence of non-compliance. The ECtHR doubted whether this sanction could reasonably have been expected to have a coercive effect on the child's mother.[242]

However, just as in cases concerning the reunification of parent and child, the national authorities' obligation to take measures to facilitate a non-custodial parent's contact with his or her children after divorce is not absolute.[243] Especially in cases where the two are still strangers to one another. In *Nuutinen*, for example, the father claimed that the domestic authorities had failed to make sufficient efforts to enforce the access orders with regard to his daughter, with the result that he and his daughter had never been able to meet. The ECtHR held that:

> *Such access may not be possible immediately and may require preparatory measures being taken to this effect. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned will always be an important ingredient. Whilst national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them. What is decisive is whether the national authorities have taken all necessary steps to facilitate access as can reasonably be demanded in the special circumstances of each case.*[244]

According, however, to the ECtHR, a measure as radical as total severance of contact can be justified only in exceptional circumstances, given that, for most children, there will be no doubt that their interests will best be served by efforts to sustain links with their natural families.[245] And although coercive measures against children are not desirable, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the child lives.[246] In cases where a child refuses contact with the other parent, states

241 ECtHR 6 December 2011, Appl. no. 16192/06 (*Cengiz Kiliç v. Turkey*), par. 132.
242 ECtHR 15 January 2015, Appl. no. 62198/11 (*Kuppinger v. Germany (No. 2)*), par. 105.
243 ECtHR 12 April 2011, Appl. no. 21188/09 (*Gluhaković v. Croatia*), par. 57.
244 ECtHR 27 June 2000, Appl. no. 32842/96 (*Nuutinen v. Finland*), par. 128.
245 ECtHR 8 July 1987, Appl. no. 9840/82 (*B. v. UK*), par. 76-77.
246 ECtHR 15 January 2015, Appl. no. 62198/11 (*Kuppinger v. Germany (No. 2)*), par. 103.

are consequently obliged to examine the child's reasons for doing so.[247] Hence, there is an obligation for states to combat parental alienation caused by the behaviour of the other parent. In a case where two children aged five and nine refused to see their mother, the ECtHR held that:

> *The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life (…) Thus, restrictions on contact rights call for stricter scrutiny than restrictions on other parental rights (…). The Court therefore considers that in cases such as the present one, where the children resist contact with one parent, Article 8 of the Convention requires States to try to identify the causes of such resistance and address them accordingly. It is an obligation of means, not of result, and may require preparatory or phased measures (…). The cooperation and understanding of all concerned will always be an important ingredient (…). However, since the authorities must do their utmost to facilitate such cooperation, the lack of it is not a circumstance which can by itself exempt them from their positive obligations under Article 8 (…). Rather, it requires of the authorities that they take measures to reconcile the conflicting interests, keeping in mind the best interests of the child as a primary consideration (…). Only after such measures have been exhausted are the domestic authorities to be considered to have complied with their positive obligations under Article 8 of the Convention.*[248]

The ECtHR should thus strike a fair balance between the interests of the child (and the child's *de facto* family life) and those of the parents and the general interests (in ensuring respect for the rule of law).

2.5.2.2 Family life with detained parent(s): strict scrutiny of restrictions on family visits

The ECtHR has ruled in several cases on the right of prisoners to remain in contact with their family. These cases concerned restrictions on family visits in prison or the distance between the prison and the family members' homes. The ECtHR held that prisoners generally continue to enjoy all the fundamental rights and freedoms guaranteed under the ECHR[249] and thus also the right to enjoy family life. By its nature, detention is a limitation on private and family life. Nonetheless the ECtHR has often held that the right to respect for family life is essential to prisoners and that prison authorities should therefore assist detainees in maintaining contact with their close family members.[250]

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247 ECtHR 14 March 2017, Appl. no. 36216/13 (*K.B. and others v. Croatia*) and ECtHR 6 April 2017, Appl. no. 66997/13 (*Aneva and Others v. Bulgaria*).

248 ECtHR 14 March 2017, Appl. no. 36216/13 (*K.B. and others v. Croatia*), par. 144.

249 ECtHR 6 October 2005, Appl. no. 74025/01 (*Hirst v. UK (No. 2)*), par. 69.

250 ECommHR 8 October 1982, Appl. no. 9054/80 (*A. v. UK*) admiss.., ECtHR 12 March 1990, Appl. no. 13756/88 (*Ouinas v. France*), admiss. and ECtHR 28 September 2000, Appl. no. 25498/94 (*Messina v. Italy (No. 2)*), par. 61.

In *Ouinas* it was established that the ECHR does not, as such, guarantee a right to be detained in a particular prison, and only in exceptional circumstances can refusing to transfer a prisoner to a prison near his home be held to involve an interference with the right to respect for his family life. Such an exception may be a court decision granting a prisoner the right to see his child. This particular case, however, was declared inadmissible as there was nothing to prevent Mr Ouinas from exercising his right to access in the prison where he was detained, if necessary with the help of prison social services.

In cases concerning restrictions on family visits, the ECtHR has held that a multitude of factors – the risk of collusion or subtraction, witness protection and the need to ensure a smooth running of the investigation – may justify those restrictions.[251] However, the ECtHR has also stressed that those restrictions still need to be based on a pressing social need and remain proportionate to legitimate aims. Therefore states must demonstrate their efforts to strike a fair balance between the above-mentioned factors and the detainee's rights. In particular, the scope and duration of the ban on family visits are factors to be taken into account when determining the proportionality of the measure.[252] According to the ECtHR, the ECHR does not require its member states to make provision for long-term visits.[253] An absolute prohibition on visits, however, can be justified only in exceptional circumstances.[254] And in a case where long-term visits were possible only for those able to pay the visiting fees imposed, the ECtHR also found a violation. These fees were used for various purposes, including prison staff's salaries. The ECtHR ruled that the cost of providing detainees with acceptable conditions for meeting their families should be met by the prison authorities rather than by the detainees or their families.[255]

In the case of *Lavents*, Mr Lavents was initially detained pending trial, but was then placed under house arrest following a heart attack. He was originally ordered to stay in his flat and placed under supervision, but later in the proceedings was re-imprisoned. During his imprisonment, he was prohibited from receiving visits from his wife and daughter during three periods. The ECtHR held that the prohibition on receiving visits from his wife and daughter during those periods, the longest of which lasted almost a year and seven months, was an absolute prohibition[256] and noted that Mr Lavents had not sought to engage in any form of collusion or to hinder the investigation of his case while under house arrest, during which time he had had unlimited contact with his family.[257] The ECtHR thus held that

251 ECtHR 28 November 2002, Appl. no. 58442/00 (*Lavents v. Latvia*), par. 141.
252 ECtHR 28 November 2002, Appl. no. 58442/00 (*Lavents v. Latvia*), par. 141.
253 ECtHR 4 December 2007, Appl. no. 44362/04 (*Dickson v. UK*), par. 81.
254 ECtHR 28 November 2002, Appl. no. 58442/00 (*Lavents v. Latvia*), par. 141, ECtHR 15 June 2006, Appl. no. 61005/00 (*Kornakovs v. Latvia*), par. 134, ECtHR 15 June 2006, Appl. no. 64846/01 (*Moisejevs v. Latvia*), par. 153.
255 ECtHR 15 March 2016, Appl. no. 53120/08 (*Vidish v. Russia*), para. 37-40.
256 ECtHR 28 November 2002, Appl. no. 58442/00 (*Lavents v. Latvia*), par. 142.
257 ECtHR 28 November 2002, Appl. no. 58442/00 (*Lavents v. Latvia*), par. 142.

Article 8 ECHR had been violated. This suggests that if measures of a less intrusive nature are possible, the state should consider imposing those rather than more stringent measures. In the case of *Trosin*, domestic law imposed automatic restrictions on the frequency and length of visits for all life prisoners and did not offer any degree of flexibility in determining whether such severe limitations were appropriate or indeed necessary in each individual case. The ECtHR held that:

> *(…) regulation of such issues may not amount to inflexible restrictions and the States are expected to develop their proportionality assessment technique enabling the authorities to balance the competing individual and public interests and to take into account peculiarities of each individual case.*[258]

In summary, in situations involving the right of parents and children to enjoy access during a prison sentence there is no guarantee as such that prisoners will be placed near their families, and restrictions on family visits are possible for reasons related to the protection of public order. However, where access rights involving children are at stake, states are obliged to enable the ties between the detainee and his or her children to be maintained as much as possible.

2.6 Obligations for the state under Article 8 ECHR in migration law cases

In the field of migration law, there are two common situations in which the rights of parents and children to live together and to mutually enjoy each other's company are at stake, namely situations involving the expulsion of a migrant whose family members are legally resident in a member state, and situations involving the admission of migrants whose family members are legally resident in a member state. Various situations can be recognized within those two categories. Migrants can be expelled after their lawful residence has been terminated on grounds of public order or national security, but also because certain admission requirements are no longer complied with, for example after divorce or separation. As mentioned earlier in this chapter, having established that those cases entail a negative obligation, the ECtHR applies the criteria in paragraph 2 of Article 8 to analyse whether the interference was legitimate: in other words, was the interference in accordance with the law, did it pursue a legitimate aim and was the interference necessary in a democratic society? The ECtHR also deals with admissions of migrants who are still abroad and wish to reside in a member state for family-related reasons. The ECtHR assesses those cases as possibly entailing a positive obligation, to which it then applies the fair balance test.

258 ECtHR 23 February 2012, Appl. no. 39758/05 (*Trosin v. Ukraine*), par. 44.

However, there are some cases that fall in something of a grey area, specifically those involving the expulsion of migrants already residing unlawfully in the member state. The fact that their residence is unlawful could either be because they have always resided illegally or because their residence permit has been withdrawn with retroactive effect. The ECtHR has also held that asylum seekers' right to reside while awaiting the outcome of their proceedings should be considered precarious.[259] How the ECtHR deals with cases in which the migrant is already present in the member state varies.[260]

I will first discuss the right to live together in migration cases; as said, these situations involve families that still live together as a unity. After looking at the right to live together in expulsion cases, I will then discuss admission cases (2.6.1). Subsequently, I will discuss the right to mutually enjoy each other's company. These cases involve families who do not or no longer live together in a family unity, and thus where access rights are at stake. Once again, I will start by examining expulsion cases, where the right to mutually enjoy each other's company is at stake, and then continue with admission cases (2.6.2).

2.6.1 Right of parent and child to live together

According to the ECtHR, the right to respect for family life in Article 8 ECHR does not entail a right to family reunification, while Article 8 ECHR also does not grant an unconditional right for parents and children not to be separated.[261] In migration cases, the ECtHR has held, without exception, that states are entitled to control aliens' entry into and residence in their territory. However, in migration cases where the family unity is still intact, the ECtHR has also stressed the right to live together.[262] And the ECtHR has also ruled that the right to family life as laid down in Article 8 imposes the obligation upon states not to expel an immigrant from their territory or the obligation to allow an immigrant to reside in their territory on the basis of family ties.[263]

2.6.1.1 Expulsion after the termination of lawful residence for public order reasons: general principles

The vast majority of expulsion cases before the ECtHR concern the expulsion of a family member for reasons related to the prevention of disorder and crime or in the interests of

259 ECtHR 31 July 2008, Appl. no 265/07 (*Darren Omoregie and others v. Norway*).

260 There are examples of cases in which the ECtHR did treat them as an expulsion case: ECtHR 16 October 2014, Appl. no. 43553/10 (*Adeishvili (Mazmishvili) v. Russia*) and ECtHR 31 May 2005, Appl. no. 16387/03 (*Davydov v. Estonia*) and see footnote 64-66.

261 ECtHR 28 May 1985, Appl. no. 9214/80; 9473/81; 9474/81 (*Abdulaziz, Cabales & Balkandali v. UK*), par. 67-68 and Boeles et al. 2014, p. 201.

262 ECtHR 31 January 2006, Appl. no. 50252/99 (*Sezen v. the Netherlands*), par. 49, ECtHR 16 April 2013, Appl. no. 12020/09 (*Udeh v. Switzerland*), par. 53, ECtHR 29 July 2010, Appl. no. 24404/05 (*Mengesha Kimfe c. Suisse*, par. 69-72 and ECtHR 29 July 2010, Appl. no. 3295/06 (*Agraw c. Suisse*), par. 51.

263 ECtHR 21 June 1988, Appl. No. 10730/84 (*Berrehab v. the Netherlands*), ECtHR 18 February 1991, Appl. no. 12313/86 (Moustaquim v. Belgium).

national security.[264] Where expulsions are for reasons related to public order, a distinction can be made between the situation in which parents were still together at the time of the deportation order and the situation in which the family unit was no longer intact. Where the family unit was still intact, an expulsion may obviously result in the parent and child no longer being able to continue living together. By contrast, expulsion cases where the family unity was not intact before the expulsion order, and thus where access rights are at stake, will be discussed under the right to mutually enjoy each other's company.

In the case of *Boultif v. Switzerland*, the ECtHR set out the guiding principles for domestic authorities' assessment in expulsion cases,[265] while the final two criteria in the following list were added in *Üner v. the Netherlands*. Since these judgments, the criteria to be taken into account have been as follows:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time that has elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned, the applicant's family situation, such as the length of the marriage, and other factors showing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time of entering into a family relationship;
- whether there are children of the marriage, and, if so, their ages;
- the seriousness of the difficulties that the spouse is likely to encounter in the country to which the applicant is to be expelled;
- the best interests and well-being of the children, in particular the seriousness of the difficulties that any children of the applicant are likely to encounter in the country to which the applicant is to be expelled;
- the solidity of social, cultural and family ties with the host country and the country of destination.[266]

The criteria from *Boultif* and *Üner* make clear that the ECtHR analyses the legitimacy of expulsion decisions on a case-by-case basis. Several criteria are of relevance for the assessment of the parent-child relationship, in particular the requirement to take the applicant's family situation and the best interests and well-being of the children into account.

264 See for an extensive overview of the developments in expulsion cases before the ECtHR Dembour 2003, pp. 64-82, Farahat 2009, pp. 253-269, Dembour 2015, pp. 164-174 and Wojnowska-Radzińska 2015.
265 ECtHR 2 August 2001, Appl. no. 54273/00 (*Boultif v. Switzerland*).
266 ECtHR 18 October 2006, Appl. no. 46410/99 (*Üner v. the Netherlands*), par. 57.

2.6.1.2 General principles in practice

In both admissibility decisions and non-violation rulings, the ECtHR has often emphasized the importance of maintaining existing relationships between parent and child. The ECtHR held in the case of *El-Habach v. Germany*, for example, that:

> *(…) the applicant has three children. With the two older children the applicant communicated by letters and telephone only even before his expulsion. The Court accepts the domestic courts' assessment that this form of communication could be maintained following his deportation. However, the consequences for the relationship with his youngest daughter N. were more serious, as the applicant lived together with his younger daughter N. from her birth on 29 November 2004 until his arrest on 13 October 2006 and then again from October 2009 until his deportation in July 2011. He had thus lived approximately three and a half years and thus more than half of the child's life together with N. Furthermore, he maintained the relationship during the separation by receiving prison visits and had exercised joint parental authority over the child. There is thus no doubt that the applicant enjoyed a close family relationship with his daughter.*[267]

The ECtHR continued by holding that:

> *The Court notes, however, that the administrative court of appeal, in the process of weighing the competing interests, fully appreciated that the applicant's absence would seriously disturb the mutual relationship between the applicant and his child, notwithstanding the possibility of corresponding by letter or telephone (see paragraph 20, above). That court considered, however, that the public interest in his expulsion prevailed.*[268]

Where, therefore, the right of a parent and child to live together is at stake, the ECtHR imposes procedural obligations upon states. As a result, the domestic authorities (being both the decision-making bodies and the domestic courts) should carefully assess the criteria established in *Boultif* and *Üner.*[269]

Nonetheless, while the ECtHR pays attention to the position of the children involved and the consequences the expulsion decision has had or will have on their lives, it seems to focus paramount attention on the questions of how serious the offence was, whether the applicant reoffended and whether family life was possible elsewhere. An example of this

267 ECtHR 22 January 2013, Appl. no. 66837/11 (*El-Habach v. Germany*), admiss.
268 ECtHR 22 January 2013, Appl. no. 66837/11 (*El-Habach v. Germany*), admiss.
269 See for a recent example ECtHR 13 December 2016, Appl. no. 41738/10 (*Paposhvili v. Belgium*), par. 225.

can be seen in *M.E. v. Denmark*,[270] which concerned a Syrian father who entered Denmark at the age of seven and resided there on the basis of an asylum status. At the time of the deportation order, he had two children from previous marriages and a wife with whom he also had a child. The ECtHR first held that M.E. had an extensive criminal record and that the expulsion order was based on very serious offences (he was sentenced to seven years' imprisonment). M.E. also had ties with Syria, where his mother and other family members still lived and where he had stayed for longer periods, and he spoke Arabic. While he had legally resided in Denmark for fifteen years and spoke Danish, the ECtHR held that he was poorly integrated as he had never completed lower secondary school and had not participated in the labour market. The ECtHR then noted that, for various reasons, M.E. had limited contact with his elder two children. As his relationship with his third wife had started after the expulsion order became final, the couple could not have legitimately expected that their relationship or having a child could revoke the expulsion order. Family life in Syria was also possible as his wife could follow him to live there. Accordingly the ECtHR did not find a violation of Article 8.

Where the ECtHR deals with the question of whether family life is possible elsewhere, it takes the age of the children into account. If the children are of an adaptable age, they can be expected to adjust to life in their expelled parent's country of origin. Although the ECtHR does not specify what should be considered an adaptable age, it generally holds young children to be of an adaptable age.[271] But while, in *Shala v. Germany*, the ECtHR ruled that the expulsion would have resulted in the family being split up since the children (aged seven, thirteen, sixteen and seventeen) had been born and had grown up exclusively in Germany and therefore could not be expected to follow their father,[272] in *Haliti v. Switzerland* it held that the children, who were fifteen and eight years old and had been born and had always lived in Switzerland, were of an adaptable age.[273]

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270 ECtHR 8 July 2014, Appl. no. 583641738/10 3/10 (*M.E. v. Denmark*), par. 77- 81. See for a similar reasoning amongst others ECtHR 1 December 2016, Appl. no. 77036/11 (*Salem v. Denmark*), ECtHR 17 April 2014, Appl. no. 41738/10 (*Paposhvili v. Belgium*). Yet, after referral to the Grand Chamber a violation of Article 8 ECHR was found in this case. ECtHR 25 March 2014, Appl. no. 2607/08 (*Palanci v. Switzerland*), ECtHR 22 January 2013, Appl. no. 66837/11 (*El-Habach v. Germany*), admiss., ECtHR 22 January 2013, Appl. no. 15620/09 (*Shala v. Germany*), ECtHR 4 December 2012, Appl. no. 31956/05 (*Hamidovic v. Italy*), ECtHR 4 November 2012, Appl. no. 38005/07 (*Kissiwa Koffi v. Switzerland),* ECtHR 12 June 20112, Appl. no. 54131/10 *(Bajsultanov v. Austria),* ECtHR 23 October 2012, Appl. no. 30112/09 (*F.A.K. v. the Netherlands*), ECtHR 18 January 2011, Appl. no. *20443/08 (Zaluaga and others v UK),* ECtHR 24 march 2009, Appl. no. 43761/06 (*Mbengeh v. Finland*), ECtHR 7 April 2009, Appl. no. 1860/07 (*Cherif and others v. UK*), ECtHR 30 May 2006, Appl. no. 33325/02 (*El-Messaoudi v. France*), ECtHR 30 May 2006, Appl. no. 33736/03 (*Demir v. France*), ECtHR 11 October 2005, Appl. no. 22050/04 (*Tajdirti v. the Netherlands*), ECtHR 31 May 2005, Appl, no. 30673/04 (*McCalla v. UK*) and ECtHR 1 March 2005, Appl. no. 14015/02 (*Haliti v. Switzerland*).

271 See amongst others ECtHR 16 October 2014, Appl. no. 43553/10 (*Adeishvili (Mazmishvili) v. Russia*) and ECtHR 25 March 2014, Appl. no. 2607/08 (*Palanci v. Switzerland*).

272 ECtHR 22 January 2013, Appl. no. 15620/09 (*Shala v. Germany*).

273 ECtHR 1 March 2005, Appl. no. 14015/02 (*Haliti v. Switzerland*), admiss.

Another point often mentioned by the ECtHR is that if family members are unable or choose not to follow the deported person, family life can still be maintained from abroad. An example of this was seen in the case of *Mbengeh v. Finland*, in which the ECtHR found, for this reason, that Article 8 ECHR had not been violated. The ECtHR held that:

> *His wife and son live in Finland, both of whom are Finnish citizens. At the time of the deportation, his son was ten years old. In the circumstances, the Court considers that the applicant has strong ties with Finland. The applicant co-habited with his son since birth and the applicant's deportation has had, and will continue to have, a disruptive effect on the boy's life. It is however also true that contact by telephone could be maintained from Gambia, and there would be nothing to prevent the wife and the son from travelling to Gambia to visit him. As to the argument that the family do not have the means to travel, the Court does not underestimate the difficulties which they may encounter.*[274]

As this case shows, the ECtHR sometimes takes into account that the detention, and thus the behaviour of the parent, has already led to a disruption of family life and that the level of contact can thus also be maintained after detention. In *Paposhvili v. Belgium* the ECtHR stated that:

> *Furthermore, it does not appear from the circumstances of the case that the children have specific needs or that their mother would be incapable of providing them with sufficient care and support were they to remain with her alone, as was the case throughout the years of the applicant's detention.*[275]

When the relationship between parent and child is not very strong or not yet established, states have no duty to find out and take measures to establish whether it is in the children's interests to be reunited with their parent or to enable those ties to develop. This is clearly visible in cases in which the applicant was in a long-term relationship, but the child was born after the criminal conviction or even the deportation order. In those cases, the ECtHR has held that it is not necessary to take the family relationship between parent and child into account, or that no decisive weight can be attached to that family relationship.[276]

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274 ECtHR 24 March 2009, Appl. no. 43761/06 (*Mbengeh v. Finland*), admiss. See also: ECtHR 1 December 2016, Appl. no. 77036/11 (*Salem v. Denmark*), ECtHR 8 December 2009, Appl. no. 19641/07 (*Khan Manwar v. UK*), ECtHR 17 February 2009, Appl. no. 27319/07 (*Onur v. UK*), ECtHR 8 January 2009, Appl. no. 10606/07 (*Joseph Grant v. UK*) and ECtHR 30 May 2006, Appl. no. 33736/03 (*Demir v. France*).

275 ECtHR 17 April 2014, Appl. no. 41738/10 (*Paposhvili v. Belgium*), par. 153. See also ECtHR 22 January 2013, Appl. no. 15620/09 (*Shala v. Germany*), par. 31.

276 ECtHR 28 June 2007, Appl. no. 31753/02 (*Kaya v. Germany*), ECtHR 12 January 2010, Appl. no. 47486/06 (*A.W. Khan v. UK*), par. 44-47, ECtHR 26 January 2010, Appl. no. 7347/08 (*Yesufa v. UK*), admiss and ECtHR 9 June 2015, Appl. no. 16558/07 (*Ramzi v. Romania*), admiss.

2.6.1.3 Keles, Sezen, Omojudi, Hamidovic, Gablishvili, Kolonja and Dzhurayev: violations of Article 8 ECHR

During the period under review the ECtHR found a violation of Article 8 in seven cases related to the expulsion of a member of an intact family. All seven will be discussed here in order to identify what made them stand out. *Keles v. Germany* revolved around a Turkish father who had lawfully resided in Germany for 27 years.[277] At the time of the expulsion order he was married and had four children. The conviction order followed several criminal convictions, mainly for traffic offences. The ECtHR held that while it would not be impossible for Mr Keles or his wife to return to Turkey, the couple's four sons, who were aged between six and thirteen, had been born in Germany or had entered Germany at a very young age, had received all their school education in Germany and would face major difficulties in Turkey. The ECtHR found that while Mr Keles' expulsion was as such possible, the circumstances, including the nature of the offences, meant that unlimited exclusion from German territory violated the applicant's rights to the enjoyment of his private and family life.[278]

Sezen v. the Netherlands concerned a father with Turkish nationality and who had been sentenced to four years' imprisonment for serious drug offences. The ECtHR considered that it was not until four years after the conviction that an expulsion order was imposed, while Mr Sezen had not since reoffended and had found employment. The ECtHR also found that insufficient account had been taken of the interests of Mr Sezen's wife and children and that they could not realistically be expected to follow him. According to the ECtHR, the principal element in this case, however, was:

> *(…) the fact that the applicants' marriage was deemed to have permanently broken down when the couple had merely ceased cohabiting for some six months in 1995/1996 and despite them making it clear to the authorities of the respondent State that cohabitation had been resumed and that there was no question of their marriage having broken down. Dutch law did not permit the first applicant's residence permit to be revoked or an exclusion order to be imposed at the time of his conviction, since he had held a strong residence status at that time (see Yılmaz v. Germany, no. 52853/99, § 48, 17 April 2003). Yet by ruling – four years after that conviction (paragraph 44 above) and notwithstanding the fact that a child had been conceived during the time the spouses were not living together – that the marriage had permanently broken down, the authorities were able to conclude that the first applicant had lost his indefinite right to remain and, subsequently, to refuse him continued residence on the basis of the criminal*

277 ECtHR 27 October 2005, Appl. no. 32231/02 (*Keles v. Germany*).

278 ECtHR 27 October 2005, Appl. no. 32231/02 (*Keles v. Germany*), par. 66. This case confirmed the earlier case of *Yilmaz v. Germany* in which an expulsion order with indefinite duration was found to be in violation with Article 8 (ECtHR 17 April 2003, Appl. no. 52853/99).

> *conviction. By that time the first applicant had served his sentence and, as illustrated by the fact that he obtained gainful employment and that a second child was born to him and his wife, had begun rebuilding his life.*[279]

Omojudi v. UK concerned a Nigerian national who, prior to his deportation, had lived in the UK with his wife, three children and one grandchild.[280] Mr Omojudi was convicted of theft and conspiracy for using a stolen passport in 1989 and sentenced to five years' imprisonment. Nevertheless, and with the authorities having full knowledge of those offences, Mr Omojudi and his wife were granted indefinite leave to remain in the UK from 2005. In 2006, Mr Omojudi was convicted of sexual assault and sentenced to fifteen months' imprisonment. An expulsion order was issued in March 2007 and he was deported to Nigeria on 27 April 2008. The ECtHR attached considerable weight to the fact that he had been granted indefinite leave to remain following his convictions for relatively serious crimes. The ECtHR stated that Mr Omojudi was not a habitual offender, given the sixteen years between his convictions. Therefore the ECtHR took into account only the offences committed after 2005. The ECtHR subsequently assessed his social and family ties, holding that Mr Omojudi and his wife had much stronger ties to the UK than to Nigeria, and attaching great weight to the length of Mr Omojudi's residence. The Court also noted that Mr Omojudi's teenage children were not of an adaptable age and would encounter significant difficulties if they relocated to Nigeria. The ECtHR held that it would be virtually impossible for the eldest child to relocate to Nigeria as he had a young daughter who was born in the UK. Mr Omojudi's wife had consequently chosen to remain in the UK with her children and granddaughter. While the applicant's family could continue to contact Mr Omojudi by letter or telephone, or visit him in Nigeria from time to time, the ECtHR held that the disruption to their family life could not be underestimated. Consequently Article 8 was found to have been violated.

The case of *Hamidovic v. Italy* concerned a Bosnian mother of Roma origin who lived in a travellers' encampment in Rome with her husband and five children.[281] Having initially been lawfully resident between January 1996 and October 1997, Ms Hamidovic applied to have her residence permit renewed, but her request was refused on the ground that she had committed criminal offences, namely theft and pickpocketing on four occasions and begging on two occasions. Following an identity check in July 2005, she was placed in a detention centre and later deported, even though the ECtHR had indicated that the deportation order should be stayed as an interim measure under Rule 39 of the Rules of Court. At the time of this latter ruling she had held a residence permit, but had been separated from her family for over a year. The ECtHR first held that the offences committed could not

279 ECtHR 31 January 2006, Appl. no. 50252/99 (*Sezen v. the Netherlands*), par. 48.
280 ECtHR 24 November 2009, Appl. no. 1820/08 (*Omojudi v. UK*).
281 ECtHR 4 December 2012, Appl. no. 31956/05 (*Hamidovic v. Italy*).

be regarded as serious. The ECtHR then stated that family life elsewhere was unrealistic as the whole family had only lived together in Italy. The applicant could therefore have a legitimate expectation that she would be able to reside in Italy, given that she had previously been granted a temporary residence permit and was now once again in possession of a permit. Lastly, the ECtHR stressed that she had been separated from her family as a result of her expulsion despite the application of an interim measure at that time.

In the case of *Gablishvili*, the expulsion order was based on a law that unconditionally established that any non-Russian national found guilty of the non-medical use of drugs was to be served with an expulsion order.[282] The state took no account whatsoever of the applicant's family life in this respect. The ECtHR first noted that it did not consider drug use to be as serious as other drug-related offences, while also stating that the expulsion of a family member was a most extreme form of interference with the right to respect for one's family life. Consequently, the ECtHR found that the proportionality and reasonableness of an expulsion order had to be determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention.

Kolonja v. Greece revolved around an Albanian of Greek origin who had lived and worked in Greece since 1989.[283] He was married to a Greek woman and had two Greek children. His three brothers had a special ID for foreigners of Greek descent. In 1999, Mr Kolonja was sentenced to seven years' imprisonment for a drug offence and Greece subsequently imposed a permanent re-entry ban on him. The ECtHR first noted that, due to the special status of foreigners of Greek descent and his settlement in Greece, Mr Kolonja could be considered a settled immigrant. The ECtHR then found a violation of Article 8 ECHR, specifically mentioning the life-long ban that had been imposed, but also the fact that he had committed the offence in 1999 and that his behaviour since then suggested that he was unlikely to reoffend, the family ties between Mr Kolonja and his wife and children, the duration of their stay in Greece, the Greek nationality of his family members and the age of his second child. Just as in the case of *Keles*, the ECtHR found a violation because the applicant's exclusion from Greek territory was for unlimited duration.

And finally there was the case of *Dzhurayev and Shalkova v. Russia*, which concerned the expulsion of a father for national security reasons.[284] The entire domestic proceedings had been classified, while the material underlying the expulsion order was also not disclosed to Mr Dzhurayev and his representative. Neither had the domestic courts taken any account of Mr Dzhurayev's family life. The ECtHR consequently ruled that the domestic proceedings had not provided a sufficient basis for examining whether the expulsion order

282 ECtHR 26 June 2014, Appl. no. 39428/12 (*Gablishvili v. Russia*).
283 ECtHR 19 May 2016, Appl. no. 49441/12 (*Kolonja v. Greece*).
284 ECtHR 25 October 2016, Appl. no. 1056/15 (*Dzhurayev and Shalkova v. Russia).*

was proportionate. So just as in the case of *Gablishvili*, the ECtHR made it clear that the proportionality and reasonableness of an expulsion order must be determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention

2.6.1.4 State's actions and inactions are decisive for the outcome of the case

What immediately stands out in all the above cases is that the ECtHR criticized the decision-making process of the various states. In all these cases ECtHR did not agree with the factual assessment of the seriousness of the crimes committed or the weight that should be accorded to them (the fact, for example, that the father had not reoffended). But additional criticism was also raised regarding the choices made by the domestic authorities: in *Keles*, for example, while the children could not realistically follow their father, the expulsion order imposed on the father included a permanent prohibition on re-entering Germany. A similar point came to the fore in *Kolonja*. In *Sezen*, meanwhile, the state was not allowed to revoke the residence permit or impose an expulsion order solely on the basis of the criminal conviction, and therefore did so on the assumption, which the authorities knew not to be true, that the applicant's marriage had broken down. In *Omojudi* the state had granted a permanent resident permit while being fully aware of Mr Omojudi's criminal history. In *Hamidovic*, meanwhile, the state had created legitimate expectations as to the applicant's right to reside and deported her despite an interim measure being in place. Finally, in both *Gablishvili* and *Dzhurayev*, the applicants' family lives were not assessed at all. While the ECtHR also considers the relationship between the family members, and extensively so in certain cases (indeed in *Omojudi* it even took into account the position of Mr Omojudi's eldest son, even though relationships between parents and adult children are not in principle taken into account unless the emotional ties are more binding than normal),[285] interests on the side of the applicant(s) appear not to be decisive. Hence, it is not necessarily the right to family life, including the right of parent and child to live together, that leads to the scales tipping in these types of cases.

2.6.1.5 Expulsion after the termination of lawful residence without public order elements

Only a very few of the cases concerning termination after legal residence during the period under review did not include public order elements. One case in which the ECtHR found a violation of Article 8 ECHR also entailed criticism of the domestic procedure. This case, *Alim v. Russia*, concerned a Cameroonian father with a Russian wife, with whom he had two children. Although he had initially had legal residence (a student visa), he had since lost his right to stay. The ECtHR noted that, after his visa had been revoked, he did not have any reasonable opportunity to regularize his presence in Russia under Russian law.[286]

285 See for example ECtHR 1 March 2005, Appl. no. 14015/02 (*Haliti v. Switzerland*), admiss.
286 ECtHR 27 September 2011, Appl. no. 39417/07 (*Alim v. Russia*), par. 88.

The ECtHR held that the procedural safeguards available to an individual were especially important for determining whether a state had remained within its margin of appreciation. Within the Russian domestic procedure, the fact that the impact of the decisions on the applicant's family life had not been assessed at all meant that the state had overstepped any reasonable margin.[287]

By contrast, the ECtHR did not find a violation of Article 8 ECHR in *Çakir v. Romania*. Although Mr Çakir's residence permit for business purposes had not been prolonged, he had never requested a residence permit on the basis of family ties, even though he had the possibility to do so in order to regularize his stay.[288] The subsequent expulsion order was, therefore, his own responsibility as states are entitled to require migrants to fulfil immigration requirements. The ECtHR also held that it was possible for him to settle in Turkey, given that the children were young and of an adaptable age.[289] The requirement for migrants to comply with immigration regulations was also seen in the case of *Nguyen v. Norway*.[290] Mr Nguyen had entered Norway to reunite with his mother, who had married a Norwegian national and had obtained a residence permit on that basis. Although he obtained a permanent residence permit after a few years, this permit was revoked when it emerged that it had been granted on false grounds, specifically that his mother's marriage had been fraudulent. The Court noted that Mr Nguyen had married his wife after the decision to revoke his permit and therefore they could have known that his stay was precarious. The ECtHR held that although Mr Nguyen could have applied to the Norwegian authorities for a residence permit for family reunification purposes upon arrival from Vietnam in May 2013, he did not do so until September 2013. Mr Nguyen was subsequently granted a permit for family reasons in 2015 and the ECtHR found that the Norwegian authorities had taken his family life into account despite his not being able to live with his child for the first six months of the child's life. The ECtHR also stated that Mr Nguyen had not claimed that his family was unable to keep in contact with him, visit him or even reside with him in Vietnam during the period in question.

Thus, the existence of close bonds between parent and child does not mean that the right to live together automatically outweighs public order. The ECtHR also attaches particular importance to the assessment made by the domestic authorities, both decision-making bodies and domestic courts. If the domestic authorities have carefully examined the compatibility of the applicant's expulsion with Article 8, while also applying the criteria established in the Court's relevant case law, the ECtHR will not find a violation. Only in cases where the domestic authorities have made certain mistakes will the ECtHR find a violation of Article 8 ECHR.

287 ECtHR 27 September 2011, Appl. no. 39417/07 (*Alim v. Russia*), par. 98.
288 ECtHR 13 November 2011, Appl. no. 13077/05 (*Çakir v. Romania*), par. 41.
289 ECtHR 13 November 2011, Appl. no. 13077/05 (*Çakir v. Romania*), par. 43.
290 ECtHR 26 January 2016, Appl. no. 30984/13 (*Nguyen v. Norway).*

2.6.1.6 Admission of parents in order to be able to live together: general principles

Having discussed the right to live together in expulsion cases, I will now examine the right to live together in admission cases, starting with the admission of parents and then the admission of children.

The ECtHR holds that the extent of a state's obligation to admit parents of children who are legally residing within the territory of a member state varies depending on the particular circumstances of the case.[291] In setting out its arguments, the ECtHR always starts by repeating that states have the right to control the entry of non-nationals into their territory as a matter of well-established international law and subject to their treaty obligations, and that Article 8 cannot be considered to impose a general obligation on a state to respect married couples' choice of the country of their matrimonial residence and to authorize family reunion in its territory.[292] The ECtHR has ruled that Article 8 ECHR cannot be considered to guarantee a right to choose the most suitable place to develop family life.[293] The factors taken into account by the ECtHR are the extent to which family life is effectively ruptured, the extent of the ties in the member states, whether insurmountable obstacles stand in the way of the family living in the country of origin of one or more of them, and whether any immigration control factors (for example, a history of breaches of immigration law) or public order considerations weigh in favour of exclusion.[294]

The ECtHR attaches utmost importance to the question of whether family life started at a time when a family member's residence status was precarious.[295] If family life started or developed during a precarious stay, the non-admittance or removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances.[296] The ECtHR has recognized that individuals whose stay within a member state was tolerated while the individual was awaiting a decision on an application for a residence permit have been able to take part in society and form relationships and create a family there.[297] Yet the ECtHR draws a parallel between their situation and the situation of individuals who, without complying with the immigration regulations in force, have confronted the domestic authorities with their presence in the country as a *fait accompli*.[298] In these cases, therefore, the ECtHR has likewise held that it is only in exceptional circumstances that non-admittance or removal of the non-national family member is incompatible with Article 8.

291 ECtHR 1 December 2005, Appl. no. 60665/00 (*Tuquabo-Tekle v. the Netherlands*), par. 43.
292 ECtHR 1 December 2005, Appl. no. 60665/00 (*Tuquabo-Tekle v. the Netherlands*), par. 43.
293 ECtHR 5 April 2005, Appl. no. 43786/04 (*Benamar v. the Netherlands*), admiss.
294 ECtHR 31 January 2006, Appl. no. 50435/99 (*Rodrigues da Silva and Hoogkamer v. the Netherlands*), par. 39.
295 ECtHR 31 January 2006, Appl. no. 50435/99 (*Rodrigues da Silva and Hoogkamer v. the Netherlands*), par. 39.
296 ECtHR 31 January 2006, Appl. no. 50435/99 (*Rodrigues da Silva and Hoogkamer v. the Netherlands*).
297 ECtHR 11 April 2006, Appl. no. 61292/00 (*Useinov v. the Netherlands*), admiss.
298 ECtHR 11 April 2006, Appl. no. 61292/00 (*Useinov v. the Netherlands*), admiss.

The ECtHR does not readily assume such exceptional circumstances to exist.[299] In reaching its decision, the ECtHR takes into account whether family life is possible elsewhere, whether parents and children can remain in touch by telephone or internet, and whether it is reasonable to expect parents already present in the member state to return to their country of origin and to apply for a residence permit from there.[300]

2.6.1.7 Zakayev & Jeunesse: state's inaction necessitates admission of parent

However, there were two cases during the period under review in which the ECtHR found a violation of Article 8 with regard to the admission of a parent. The first of these was the case of *Zakayev and Safanova v. Russia*. Mr Zakayev was removed from Russia, where his wife and four children resided, to Kazakhstan for a breach of immigration regulations. According to the ECtHR, his illegal residence could not be considered a very serious offence as he was only expelled after more than ten years of residence, while the authorities had known about his stay in Russia.[301] Although this stay had not been continuous, this was only because Mr Zakayev had been forced to flee from Chechnya twice. The ECtHR held that his situation could not be equated with someone without legitimate expectations to stay as he was not entirely to blame for his lack of proper documents, given that Chechnya was an area that had witnessed a virtual breakdown of law and order and where state institutions had ceased to function.[302] Thereby Mr Zakayev had at some point attempted to comply with the immigration regulations, which attempt was unsuccessful because of practical difficulties.[303] The ECtHR also noted the very strong family bonds between the parents and children (the parents had lived together and brought up the children together, and both contributed to the common household) and added that the children had already endured severe stress on two occasions as a result of the father's forced migration.[304]

299 No such exceptions were found in: ECtHR 11 April 2006, Appl. no. 61292/00 (*Useinov v. the Netherlands*), admiss., ECtHR 6 July 2006, Appl. no. 13594/03 (*Priya v. Denmark*), admiss. (In this case the couple was legally separated but not divorced, however, according to the ECtHR this was an attempt to enhance the mother's chance of staying and the couple was still married and still lived together), ECtHR 24 June 2006, Appl.no. 25087/06 (*M. v. UK*), admiss., ECtHR 31 July 2008, Appl. no 265/07 (*Darren Omoregie and others v. Norway*), par. 68, ECtHR 14 February 2012, Appl. no. 26940/10 (*Antwi v. Norway*), par. 103, ECtHR 3 April 2012, Appl. no. 1722/10 (*Biraga and others v. Sweden*), par. 59, ECtHR 10 May 2012, Appl. no. 1859/03 (*Olgun v. the Netherlands*), par. 51, ECtHR 28 January 2014, Appl. no. 48205/13 (*Bolek and others v. Sweden*), admiss., ECtHR 25 March 2014, Appl. no. 38590/10 (*Biao v. Denmark*), par. 57-59 (This case has been referred to the Grand Chamber who found a violation of Article 14 jo. 8 ECHR in its ruling on 24 May 2016. However, they did not look at Article 8 ECHR separately), ECtHR 8 April 2014, Appl. no. 47509/13 (*J.M. v. Sweden*), admiss. and ECtHR 9 April 2015, Appl. no. 72780/12 (*Muradeli v. Russia*), admiss.

300 ECtHR 3 April 2012, Appl. no. 1722/10 (*Biraga v. Sweden*), admiss. par. 54 and 57. See also: ECtHR 28 January 2014, Appl. no. 48205/13 (*Bolek and others v. Sweden*), admiss., par. 38 and ECtHR 8 April 2014, Appl. no. 47509/13 (*J.M. v. Sweden*), admiss., par. 43-45. For unclear reasons the ECtHR found that both the *Bolek* and *J.M.* case concerned an interference while the applicants never had legal residence.

301 ECtHR 11 February 2010, Appl. no. 11870/03 (*Zakayev and Safanova v. Russia*), par. 42.

302 ECtHR 11 February 2010, Appl. no. 11870/03 (*Zakayev and Safanova v. Russia*), par. 47.

303 ECtHR 11 February 2010, Appl. no. 11870/03 (*Zakayev and Safanova v. Russia*), par. 47.

304 ECtHR 11 February 2010, Appl. no. 11870/03 (*Zakayev and Safanova v. Russia*), par. 45 and 46.

Jeunesse v. the Netherlands concerned a Surinamese mother who entered the Netherlands on a tourist visa, which she outstayed. In the Netherlands she married a man of Surinamese origin who had acquired Dutch nationality. The couple had three children, all Dutch nationals. Although she had attempted to regularize her stay, she was refused a permit as she should have obtained a provisional residence permit from abroad. Although the ECtHR stated that she had started family life while she was aware of her precarious residence status, it found this case to comprise exceptional circumstances. The Court considered that her husband and children were all Dutch nationals; that the mother had held Dutch nationality at birth, which she lost not by her own choice but owing to an international agreement, and that her position could not thus be considered to be on a par with that of other potential immigrants who had never held Dutch nationality; that the applicant had been in the Netherlands for more than sixteen years and had no criminal record; that the authorities had tolerated her presence for sixteen years, during which period it had been open to the authorities to remove her; that although there were no insurmountable obstacles, the family would experience a degree of hardship if forced to leave the Netherlands; that the mother had the primary and constant care of the children as the father had a full-time job, and finally that insufficient weight had been given to the best interests of the applicant's children in the domestic authorities' decision to refuse her request for a residence permit since they had failed to refer to and assess evidence regarding the practicality, feasibility and proportionality of removal.[305]

Although it was established in both cases that the parents had violated immigration regulations, the ECtHR still found a violation of Article 8. Again this was for reasons related to the state's (in)actions. In both *Zakayev and Safanova* and *Jeunesse*, the ECtHR noted that the authorities had known about the very long periods (ten and sixteen years respectively) of unlawful residence and had failed to act on that knowledge, thus enabling the applicants to form particularly strong ties. The ECtHR noted, in both cases, that while the authorities had drawn this parallel, the applicants' situations could not be equated with that of other potential immigrants: Mr Zakayev was not entirely to blame for his lack of proper documents, while Mrs Jeunesse had initially had Dutch nationality.

2.6.1.8 Kaplan & Paposhvili: admission of parents with a criminal conviction

There were also cases during the period under review and concerning the admission of parents where public order considerations *did* play a role. In those cases, the ECtHR similarly held that there was in principle no right to residence if family life started or intensified during a precarious stay, as well as holding that criminal convictions and detention may demonstrate the absence of close links with the member state of residence and that family

305 ECtHR 3 October 2014, Appl. no. 12738/10 (*Jeunesse v. the Netherlands*), par. 115-120.

members can follow abroad.[306] The ECtHR nevertheless found a violation in *Kaplan and others v. Norway* and in *Paposhvili v. Belgium*.[307] The first concerned the expulsion of a father of three to Turkey. The family had applied for asylum, but their request was rejected. Although the father had been convicted of aggravated assault, Norway took no specific measures to deport him until about six years later, when his expulsion was ordered and his re-entry to Norway was prohibited for indefinite duration. In the meantime his wife and children obtained residence and work permits, for reasons related to the youngest child's chronic and serious degree of autism combined with the fact that the two older children had already been residing in Norway for almost five years. Mr Kamran's re-entry ban was consequently reduced to five years. After his expulsion, his wife and children obtained Norwegian citizenship. Mr Kamran had thus never resided legally in Norway. The ECtHR noted that the reasons for granting a residence permit to Mr Kamran's wife and children were of a kind that the Norwegian immigration authorities were prepared to regard as weighty humanitarian considerations. The Court also noted that while the offence was of a serious nature, the consequences were not so serious, and also emphasized the state's very long period (six years) of inaction before ordering his expulsion. Bearing that inactivity in mind, the ECtHR found no reason to justify why, in contrast to Mr Kamran, the mother was granted a residence permit after a long period of illegal residence. The youngest child had long-lasting and close bonds to both her father and mother, and the ECtHR held that, in the light of the concrete and exceptional circumstances of the case, insufficient weight had been attached to the best interests of the child.

Paposhvili v. Belgium concerned a father who was seriously ill and claimed that his expulsion to Georgia, which was ordered along with a ten-year ban on re-entering Belgium, would result in his separation from his family, who had been granted leave to remain in Belgium and constituted his sole source of moral support.[308] The ECtHR ruled that the Belgian authorities had not examined the degree to which the applicant was dependent on his family, as a result of the deterioration of his health, under Article 8 ECHR and had therefore violated a procedural obligation with which they had to comply in order to ensure the effectiveness of the applicant's right to respect for family life.

Once again, the criticism of the state's choices is visible. In *Kaplan*, besides the long period of inaction, the ECtHR also mentioned that the state had been willing to accept exceptional circumstances regarding the mother but not the father, while their circumstances were not

306 ECtHR 31 May 2005, Appl. no. 16387/03 (*Davydov v. Estonia*), admiss., ECtHR 26 April 2007, Appl. no. 16351/03 (*Konstatinov v. the Netherlands*), admiss., ECtHR 3 November 2011, Appl. no. 28770/05 (*Arvelo Aponte v. the Netherlands*), par. 56-60, ECtHR 24 June 2014, Appl. no. 52223/13 (*Smith v. Ireland*), admiss.

307 ECtHR 24 July 2014, Appl. no. 32504/11 (*Kaplan and others v. Norway*) and ECtHR 13 December 2016, Appl. no. 41738/10 (*Paposhvili v. Belgium*).

308 ECtHR 13 December 2016, Appl. no. 41738/10 (*Paposhvili v. Belgium*). Mr. Paposhvili died while the case was pending before the ECtHR but the ECtHR decided to continue with the case, considering the broader impact this case has.

that different. Meanwhile in *Paposhvili* the consequences of the state's decision to expel the father had not been assessed at all.

2.6.1.9 Admission of children to enable them to live with their parents: general principles

In cases revolving around the admission of a child, the ECtHR takes into account that these cases involve family life that already existed when the parents left for another country, as well as the ages of the children concerned, their situation in their country of origin and the extent to which they are dependent on their parents.[309] The ECtHR has held in such cases that if parents left children behind when they went to settle abroad, they cannot be assumed to have irrevocably decided that those children should remain in the country of origin permanently and to have abandoned any idea of a future family reunion.[310] The ECtHR has also stated that it may be unreasonable to force parents to choose between giving up the position that they have acquired in the member state or accepting that they will not live with their children and to renounce the mutual enjoyment by parent and child of each other's company, which the ECtHR considers to constitute a fundamental element of family life.[311] For this reason, the ECtHR attaches importance to a swift and careful procedure.[312] According to the ECtHR, the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to these interests.[313]

2.6.1.10 General principles in practice

The importance of a swift and careful procedure was seen in the case of *Senigo Longue and others v. France*, in which the ECtHR held that:

> *68. The Court recalls that, in the case of families, the authorities must, in their assessment of proportionality, take into account the best interests of the child. This balance must be safeguarded taking account of international conventions, including the Convention on the Rights of the Child (...). The Court emphasizes that there is a broad consensus – including in international law – that in all decisions concerning children, their best interests must prevail (...).*
> *69. The Court also notes that the International Convention on the Rights of the Child advocates that applications for family reunification should be examined with flexibility and humanity (...). It attaches importance to the fact that the Parliamentary Assembly of the Council of Europe has supported and clarified this objective (...). It also notes in*

309 ECtHR 1 December 2005, Appl. no. 60665/00 (*Tuquabo-Tekle v. the Netherlands*), par. 44.
310 ECtHR 21 December 2001, Appl. no. 31465/96 (*Şen v. the Netherlands*), par. 40.
311 ECtHR 21 December 2001, Appl. no. 31465/96 (*Şen v. the Netherlands*), par. 41 and ECtHR 14 June 2005, Appl. no. 12611/03 (*Magoke v. Sweden*), admiss,
312 ECtHR 10 July 2014, Appl. no. 19113/09 (*Senigo Longue and others v. France*) and ECtHR 8 November 2016, Appl. no. 56971/10 (*El Ghatet v. Switzerland*).
313 ECtHR 8 November 2016, Appl. no. 56971/10 (*El Ghatet v. Switzerland*), par. 46.

> *the EU Directive 2003/86 on family reunification 2003/86 that national authorities are encouraged to give due consideration to the best interests of the minor child (...). Lastly, it notes that several reports denounce practices that hinder family reunification, due to the excessive length of the visa procedure, which can have serious consequences for children separated from their parents (...).*[314]

With reference, for example, to the CRC and the Family Reunification Directive, the ECtHR stated that paramount importance should be granted to the best interests of the children involved.

While the initial decision to leave children behind cannot automatically be considered a permanent decision, parents must have shown that their intention was always to be reunited with their children.[315] And they must act upon that intention immediately after settling in the member state. The ECtHR held in *Magoke v. Sweden* that:

> *The Court further notes that, while the applicant already in March 1995 stated to the Swedish authorities that he intended to bring his children to Sweden in the future, a request to this effect was not made until November 1998, more than four years after his final arrival in the country. The applicant has stated before the Court that there had been no possibility to ask for a permit to bring Esther to Sweden until he had received a residence permit in the country. The Court notes, however, that he was granted a permanent residence permit in Sweden already in September 1997.*[316]

This case also makes clear that parents and children must have had a very close relationship before settling in a member state. Otherwise the ECtHR will hold that they can maintain the degree of family life they previously had:

> *The Court is of the opinion that the refusal by the Swedish authorities to allow entry and residence to Esther does not prevent the applicant from maintaining the degree of family life he had with his daughter prior to his arrival in Sweden. He could, for instance, apply for a tourist visa for her to come and visit him. Although the applicant would now prefer to maintain and intensify their family life in Sweden, Article 8, as noted above, does not guarantee a right as such to choose the most suitable place to develop family life.*[317]

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314 ECtHR 10 July 2014, Appl. no. 19113/09 (*Senigo Longue and others v. France*), par. 68-69.

315 ECtHR 14 June 2005, Appl. no. 12611/03 (*Magoke v. Sweden*), admiss. See also: ECtHR 5 April 2005, Appl. no. 43786/04 (*Benamar v. the Netherlands*), admiss, ECtHR 1 December 2005, Appl. no. 60665/00 (*Tuquabo-Tekle v. the Netherlands*), par. 45-46, ECtHR 30 July 2013, Appl. no. 948/12 (*Berisha v. Switzerland*), par. 54, ECtHR 10 July 2014, Appl. no. 19113/09 (*Senigo Longue and others v. France*), par. 67 and ECtHR 8 March 2016, appl.no. 25960/13 (*I.A.A and others v. UK*), par. 43.

316 ECtHR 14 June 2005, Appl. no. 12611/03 (*Magoke v. Sweden*), admiss.

317 ECtHR 14 June 2005, Appl. no. 12611/03 (*Magoke v. Sweden*), admiss.

The existence of developments leading parents subsequently to request permission for the children to reside with them is irrelevant. This can be seen in the case of *Benamar*, in which a mother had voluntarily left her children behind in the care of the father. After the father passed away, the mother requested a provisional residence permit for her children in order to be able to look after the children herself.[318] This request was refused by the domestic authorities. The ECtHR found that the domestic authorities' refusal to grant a provisional residence permit did not violate Article 8 ECHR. In cases in which parents have violated immigrations laws by letting their children enter illegally, or on a tourist visa that they consequently overstayed, the ECtHR has also not found a violation of Article 8 and has held that parents may not confront a member state with their children's presence in that country as a *fait accompli*.[319] The parents' behaviour during the procedures at the domestic authorities thus needs to be irreproachable.[320]

2.6.1.11 Admission of children of settled refugees

The fact that parents who leave their children behind cannot be assumed to have done so with the idea that this would be a permanent separation applies all the more so in cases where parents did not leave of their own free will, but instead fled their country of origin. The ECtHR found a violation of Article 8 in the case of *Tuquabo-Tekle and others v. the Netherlands*, in which the national authorities had wrongly assumed that there were insufficient ties for the family in question to be eligible for family reunification.[321] The ECtHR held that states were obliged to implement a procedure that took account of the events that had disrupted and disorganized the family life and that had led to a recognized refugee status.[322] As, in those cases, family life elsewhere is often impossible, the ECtHR imposes certain procedural requirements on states. In *Tanda-Muzinga v. France*, for example, the ECtHR noted that:

> *75. (…) family unity is a basic right of the refugee and family reunification is a fundamental element in allowing people who have fled persecution to return to normal life (see UNHCR's mandate). It also recalls that it has recognized that obtaining such international protection constitutes proof of the vulnerability of the persons concerned (...). It notes in this regard that the need for refugees to benefit from a more favourable family reunification procedure than that accorded to other foreigners is the subject of consensus at the international and European level, as is evident from the mandate and UNHCR's activities as well as the standards contained in EU Directive 2003/86 (...). In this context, the Court considers it essential for the national authorities to take*

318 ECtHR 5 April 2005, Appl. no. 43786/04 (*Benamar v. the Netherlands*), admiss, ECtHR 30 July 2013, Appl. no. 948/12 (*Berisha v. Switzerland*), par. 54 and 61.
319 ECtHR 5 April 2005, Appl. no. 43786/04 (*Benamar v. the Netherlands*), admiss.
320 ECtHR 30 July 2013, Appl. no. 948/12 (*Berisha v. Switzerland*), par. 61.
321 ECtHR 1 December 2005, Appl. no. 60665/00 (*Tuquabo-Tekle v. the Netherlands*), par. 45.
322 ECtHR 10 July 2014, Appl. no. 2260/10 (*Tanda-Muzinga v. France*), par. 73.

> *into account the vulnerability and the particularly difficult personal background of the applicant, that they pay close attention to his arguments relevant to the outcome of the case, that they inform him of the reasons against the implementation of family reunification, and finally that they decide on visa applications as soon as possible.*[323]

The ECtHR held that, in the light of standards set in international instruments, the procedure needs to be flexible and humane and the national authorities are encouraged to also consider "further evidence" of the existence of family ties if the refugee is not able to provide official evidence.[324] The ECtHR has also stated that states should take into account the vulnerable position of children.[325] In a series of cases against France, the ECtHR noted in particular the reports on the excessive length of French visa procedures.[326]

With regard to the admission of children of settled refugees, however, it still remains the case that national immigration regulations must be complied with and that parents must have shown that they have made all possible efforts to fulfil those requirements. In *Haydarie v. the Netherlands*, for example, the mother had failed to comply with the requirement for sufficient means of subsistence, as laid down in national immigration legislation, and this was why entry had been denied to her four children. Mrs Haydarie had chosen to take care of her wheelchair-bound sister at home instead of actively seeking gainful employment. The ECtHR therefore did not find a violation of Article 8.[327] This means that the mere fact that it is not possible for the family to settle elsewhere is not enough. Likewise, parents must have shown that their intention has always been to be reunited with their children as soon as possible and must also have behaved irreproachably during the domestic proceedings.[328] Where this is not the case, the impossibility of being reunited will not result in the finding that Article 8 has been violated.

2.6.1.12 Parent bears sole responsibility for admission of children

Thus, the ECtHR takes into account the best interests and the vulnerable position of left-behind children and requires national authorities to put in place careful proceedings for admitting such children and enabling them to live with their parents within the territory of the member state. According to the ECtHR, however, while the best interests of the child are of paramount importance, these interests cannot act as a trump card that automatically requires the admission of all children who would be better off living in a member state.[329]

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323 ECtHR 10 July 2014, Appl. no. 2260/10 (*Tanda-Muzinga v. France*), par. 75.
324 ECtHR 10 July 2014, Appl. no. 2260/10 (*Tanda-Muzinga v. France*), par. 76, see also: ECtHR 10 July 2014, Appl. no. 52701/09 (*Mugenzi v. France*).
325 ECtHR 12 January 2006, Appl. no. 13178/03 (*Mubilanza Mayeka and Kaniki Mitunga v. Belgium*).
326 ECtHR 10 July 2014, Appl. no. 52701/09 (*Mugenzi v. France*) and ECtHR 10 July 2014, Appl. no. 19113/09 (*Senigo Longue and others v. France*).
327 ECtHR 20 October 2005, Appl. no. 8876/04 (*Haydarie v. the Netherlands*), admiss.
328 ECtHR 16 June 2014, Appl. no. 23851/10 (*Ly v. France*), admiss.
329 ECtHR 8 March 2016, appl.no. 25960/13 (*I.A.A and others v. UK*), par. 46.

In order for the ECtHR to find a violation of Article 8, the parents have to have behaved irreproachably. They must also have had a strong bond before settling elsewhere and must have maintained that bond while they were separated. The parents must also have shown that their intention was always to be reunited with the child and to have acted upon that desire immediately, both in requesting a residence permit and in making all possible efforts to fulfil domestic immigration requirements. If parents have not complied with immigration regulations, the ECtHR will not find a violation of Article 8. Likewise, if – for various reasons – the desire to be reunited emerged only some time after settlement in a member state, it is possible for family life to be maintained from abroad. Consequently, it is the behaviour of the parents and the domestic authorities that are decisive for the outcome, rather than the relationship between the parent and child.

2.6.2 Access rights: the right of parent and child to mutually enjoy each other's company

Parents and children have the right to remain in contact even where parents have never lived together as a couple or after divorce or separation. The ECtHR has also recognized this right in migration cases, such as the case of *Berrehab v. the Netherlands*, which revolved around a Moroccan father who lost his residence rights after his divorce, but who remained in regular contact with his daughter, whom he saw four times a week. The ECtHR held that, in practice, the decision not to grant Mr Berrehab continued residence prevented Mr Berrehab and his daughter from maintaining regular contacts with each other, even though such contacts were essential as the child was very young.[330] In the case of *Ciliz v. the Netherlands*, the ECtHR held that the expulsion of Mr Ciliz at a time when the Dutch authorities were still considering his access to his child demonstrated a failure to co-ordinate the various proceedings touching on the applicant's family rights, and that the authorities had not acted in a manner enabling family ties between the applicant and his son to be developed after the parents' divorce.[331] As both these cases concerned law-abiding fathers, they did not involve a public order element. During the period under review, however, there were no cases concerning the termination of lawful residence solely on the grounds of divorce or separation; without exception, all the cases during this period also included elements relating to public order.

2.6.2.1 Expulsion after the termination of lawful residence

In cases where the parents are no longer a couple, and thus where access rights are at stake, the ECtHR likewise hardly ever finds a violation of Article 8 ECHR. In such situations, the ECtHR also applies the *Boultif* and *Üner* principles and brings the same arguments to the fore.

330 ECtHR 28 May 1988, Appl. no. 10730/84 (*Berrehab v. the Netherlands*), par. 23.
331 ECtHR 11 July 2000, Appl. no. 29192/95 (*Ciliz v. the Netherlands*).

In each case the ECtHR looks at the position of the children involved and takes account of the consequences the expulsion decision had or will have on their lives. In *Onur v. UK*, for example, the ECtHR noted that:

> *The applicant's eldest child is currently eight years old. Although she has never lived with the applicant, the Court has already held that their relationship amounted to family life as she had a close relationship with him prior to his deportation, spending on average two to three days a week with him. Nevertheless, without underestimating the disruptive effect that the applicant's deportation has had, and will continue to have, on her life, it is unlikely to have had the same impact as it would if the applicant and his daughter had been living together as a family. Contact by telephone and e-mail could easily be maintained from Turkey, and there would be nothing to prevent his daughter from travelling to Turkey to visit him.*[332]

However, the consequences of a possible expulsion for the relationship between parent and child are not necessarily viewed from the child's perspective. In *Chair and J.B. v. Germany*, for example, the ECtHR held that:

> *65. With regard to the applicant's relationship with his daughter, the Court notes that the daughter was born within a marital union and that the family lived together until the applicant's arrest in January 1999, when the child was one and a half years' old. While contacts between the father and his child were rare in the earlier part of his prison term, the applicant received and paid regular visits to his daughter during the second part of his prison term.*
>
> *66. With regard to the possibility of maintaining the parental relationship with his daughter following his deportation, the Court notes that the child was living with the applicant's wife. As it was uncertain at the relevant time if the applicant's wife would continue the relationship, there was no realistic prospect that she would follow him to Morocco, thus allowing them to maintain the father-child relationship. The Court further considers that the domestic authorities have not established whether the applicant's wife or their daughter speak the Arabic language. Even if the applicant's wife had been ready to join her husband in Morocco, she would inevitably have encountered very serious difficulties, bearing in mind that she had been the main provider of the family (…). It follows that the applicant's expulsion to Morocco necessarily entailed his separation from his daughter.*
>
> *67. The Court appreciates that the applicant's expulsion had far-reaching consequences, in particular for his relationship with his young daughter. (…).*[333]

332 ECtHR 17 February 2009, Appl. no. 27319/07 (*Onur v. UK*), par. 58.
333 ECtHR 6 December 2007, Appl. no 69735/01 (*Chair and J.B. v. Germany*), par. 65-67.

Here, therefore, the ECtHR looked at the consequences of the expulsion solely from the perspective of the father, with little account being taken of what the decision would mean for the daughter.[334] Another case that stands out in this respect is the case of *Lagergren v. Denmark*, in which the ECtHR merely noted what the relationship between the children and Mr Lagergren entailed, without actual assessing the consequences of the deportation order for their relationship:

> *(…) the applicant had access to his children regularly in the eight-month period between the spouses' separation in August 2001 and the applicant's incarceration in March 2002. During the applicant's detention on remand and while serving the prison sentence until he left Denmark on 4 September 2003, he had telephone contact with his children every second week. Subsequent to his expulsion the applicant and his children have been in weekly telephone contact with each other.*[335]

The ECtHR then continued by referring to the seriousness of the crime and held that the interference was supported by relevant and sufficient reasons, while also being proportionate in that a fair balance was struck between the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other hand.

The cases described above also show that, just as in cases where the nuclear family is still intact, the ECtHR attaches paramount attention to the questions of how serious the offence was, whether the applicant reoffended, whether family life elsewhere is possible and whether family life can be maintained from abroad. With regard to the seriousness of the offence, the ECtHR is particularly strict in cases where family life between the parent and child was already limited or where the crime committed has harmed the family life of the applicant, such as in *Cömert v. Denmark*, in which Mr Cömert was expelled after being convicted of sexual offences against his daughter.[336] However more weight is also attached to the seriousness of the offence in situations where family life was not limited or the crime committed had not damaged family life and where the ECtHR accepted that it would be in the child's best interests to be able to continue living in the country of residence with both parents present. In *Sarközi and Mahran v. Austria*, for example, the ECtHR noted that:

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334 See also: ECtHR 2 April 2015, Appl. no. 27945/10 (*Sarközi and Mahran v. Austria*), where the consequences for the child where framed in terms of the legitimate expectations of the mother.

335 ECtHR 16 October 2006, Appl. no. 18668/0 (*Lagergren v. Denmark*), admiss.

336 ECtHR 10 April 2006, Appl. no. 14474/03 (*Cömert v. Denmark*). See also *Husseini v. Sweden*, in which Mr. Husseini was convicted for very serious domestic violence against his former wife and possibly his daughter, which had led his former wife to leave Mr. Husseini and take the children with her to a secret address (ECtHR 13 October 2011, Appl. no. 10611/09 (*Husseini v. Sweden*)) and *Loy v. Germany*, in which Mr. Loy had limited contact with his children after his conviction for violent offences including one that related to a physical attack on the mother (ECtHR17 October 2014, App.no. 15069/08 (*Loy v. Germany*)). Cases where family life was limited according to the ECtHR are the case of *A.H. Khan v. UK* (ECtHR 20 December 2011, Appl. no. 6222/10) and *Fischbacher v. Switzerland* (ECtHR 6 May 2014, Appl. no. 30614/09).

> *(…) the Austrian authorities in their assessment have made ample reference to the applicants' family situation, but came to the conclusion that because of the seriousness of the criminal offences committed by her, the public interest in the first applicant's expulsion outweighed the applicants' personal interest in continuing their family life on Austrian territory.*
> *73. When it comes to the relationship between the applicants, the Court observes that, according to their own statements, which were corroborated by the medical evidence they submitted (…), a significant disruption of their family life had already occurred when the first applicant had to start serving her prison sentence in 2007. The separation of mother and child at that time appears to have caused both of them severe psychological problems. The first applicant's expulsion in 2012 without doubt caused another disruption of their family life. However, after her release from prison, the first applicant could not have reasonably expected to be granted further leave to remain in Austria and continue her family life with her son there, as the exclusion order against her had already been legally binding at that time.*[337]

Where the offences committed were not very serious, but the migrant is a reoffender, the ECtHR will not find a violation of Article 8 ECHR.[338] In such situations the ECtHR also assesses whether family life can be maintained from abroad.[339]

2.6.2.2 Udeh, M.P.E.V. & Nolan and K.: violations of Article 8 ECHR

During the period under review the ECtHR found a violation in only three cases. The first of these cases to be discussed is the case of *Udeh v. Switzerland*, in which Mr Udeh had been convicted of a serious drug offence and one minor offence.[340] He had an ex-wife and two children with whom he had remained in close contact after his divorce. The ECtHR stressed that Mr Udeh had committed only one serious offence and that, after his release

337 ECtHR 2 April 2015, Appl. no. 27945/10 (*Sarközi and Mahran v. Austria*), par. 72-73. Again, just as in the case of *Chair and J.B.*, while the ECtHR recognizes the consequences the expulsion had on the daughter's life, this is phrased in terms of what the mother was allowed to expect. See also: ECtHR 8 March 2005, Appl. No. 15017/03 (*Hussein Mossi and others v. UK*), admiss., ECtHR 10 April 2006, ECtHR 16 October 2006, Appl. no. 18668/0 (*Lagergren v. Denmark*), admiss., ECtHR 18 October 2006, Appl. no. 46410/99 (*Üner v. the Netherlands*), ECtHR 17 February 2009, Appl. no. 27319/07 (*Onur v. UK*), ECtHR 17 February 2009, Appl. no. 27319/07 (*Khan Manwar v. UK*).

338 In *Angelov v. Finland* the ECtHR noted that the applicant had committed thirteen offences during his stay in Finland, both before and after the deportation order. While the ECtHR agreed that the offences were not very serious, the ECtHR held that being repeated, they tended to show Mr. Angelov's clear inclination to disobey the law (ECtHR 5 September 2006, Appl. no. 26832/02, admiss.). Also, in *Chair and J.B. v. Germany* the ECtHR attached great relevance to the opinion of psychological experts, who could not entirely rule out the danger of recidivism (ECtHR 6 December 2007, Appl. no 69735/01). See also: ECtHR 8 January 2009, Appl. no. 10606/07 (*Joseph Grant v. UK*), par. 40.

339 ECtHR 8 March 2005, Appl. No. 15017/03 (*Hussein Mossi and others v. UK*), admiss., ECtHR 10 April 2006, Appl. no. 14474/03 (*Cömert v. Denmark*). ECtHR 5 September 2006, Appl. no. 26832/02, (*Angelov v. Finland*), admiss., ECtHR 16 October 2006, Appl. no. 18668/0 (*Lagergren v. Denmark*), admiss., ECtHR 18 October 2006, Appl. no. 46410/99 (*Üner v. the Netherlands*), ECtHR 8 January 2009, Appl. no. 10606/07 (*Joseph Grant v. UK*), ECtHR 17 February 2009, Appl. no. 27319/07 (*Khan Manwar v. UK*), ECtHR 6 May 2014, Appl. no. 30614/09 (*Fischbacher v. Switzerland*), ECtHR17 October 2014, App.no. 15069/08 (*Loy v. Germany*),

340 ECtHR 16 April 2013, Appl. no. 12020/09 (*Udeh v. Switzerland*).

from prison, his behaviour had been irreproachable. The ECtHR noted that his daughters, who had Swiss nationality, were born in 2003 and that Mr Udeh's removal was likely to result in their being brought up separated from their father as they could hardly be obliged to follow him to Nigeria. The ECtHR stated that it would be in the daughters' best interests to grow up with both parents and, since the parents were divorced, the only way for regular contact to be maintained between the first applicant and his two children was to authorize him to remain in Switzerland. Although Mr Udeh had the opportunity to request temporary or indefinite suspension of the expulsion measure, the ECtHR stated that such a temporary measure could by no means be regarded as replacing the ability of Mr Udeh and his daughters to enjoy their right to live together, which constitutes a fundamental aspect of the right to respect for family life. This argument is remarkable, given that this case actually concerned access rights and not the right to live together: custody of the children had been awarded to the mother, while Mr Udeh had been granted access rights of one afternoon at least every two weeks. This contrasts with the cases of *Üner* and *Onur*, in which the ECtHR held that while the expulsion would have a disruptive effect on the children's lives, it was unlikely to have had the same impact as it would have had if the parent and child had been living together as a family. Hence, in cases where the fathers had far more contact with their children than Mr Udeh, the ECtHR ruled that there were other ways in which those fathers could maintain contact with their children.

The second case, *M.P.E.V. and others v. Switzerland*, concerned the order to expel a father whose asylum application had been rejected and whose wife and minor daughter had been granted temporary residence in Switzerland.[341] The father suffered from post-traumatic stress disorder, depression and schizoaffective disorder. He also had four criminal convictions: three for theft and one for a traffic offence. The ECtHR held that the criminal offences were of a moderate nature and took his poor state of health into account. With regard to the relationship with his daughter, the ECtHR considered that the father had raised her with the mother and continued to be involved in the child's upbringing following their separation, as reflected in the extensive access rights granted to him. The Court further observed that the Swiss authorities had established that sending the daughter back to Ecuador would amount to an "uprooting of excessive rigidity". According to the ECtHR, it could be expected that personal contact between the two applicants would, at the very least, be drastically diminished if the father were forced to return to Ecuador. The ECtHR emphasized that when considering the father's case, the Swiss courts had made no reference to the child's best interests because they did not consider the relationship between the applicants to fall under the protection of "family life" within the meaning of Article 8 of the Convention. The ECtHR therefore found that insufficient weight had been attached to the child's best interests.

341 ECtHR 8 July 2014, Appl. no. 3910/13 (*M.P.E.V. and others v. Switzerland).*

While there is one other case in which a violation was found, namely the case of *Nolan and K. v. Russia,*[342] this third case is slightly different from the other two cases as no criminal offence had been committed. Instead, this case concerned the protection of national security. Mr Nolan was refused re-entry into Russia following a trip abroad, despite having a valid entry visa and despite his 10-month old son, of whom he was the sole custodial parent and whose mother resided in the US, remaining in Russia. The ECtHR noted that:

> *(…) at the material time the applicant was the only parent and legal guardian of his son. At the time of their separation K. was barely ten months old, an age which is both vulnerable and formative for a child. The applicant's and his son's interests obviously consisted in remaining, to the maximum extent possible, in physical proximity and contact or, failing this, to be reunited as soon as practicable.*

The ECtHR held that the interests of national security were put forward as the only justification for refusing re-entry and that the Russian authorities had failed to produce any material or evidence to support their claim that Mr Nolan posed a threat to national security. The ECtHR stressed that states are under a positive obligation to ensure the effective protection of children. According to the ECtHR, the Russian authorities were aware of the applicant's situation as a single parent and that his exclusion from Russia would result in his separation from his son. Nonetheless, they had not informed Mr Nolan of the exclusion decision, thus depriving him of the opportunity to take measures to prepare for his son's departure, and had also not taken any measures to facilitate the son's exit from Russia and their reunion in another country. The ECtHR concluded that the total failure by the Russian authorities to assess the impact that their decisions and actions would have on the welfare of Mr Nolan's son fell outside any acceptable margin of appreciation.

In both *M.P.E.V. and others* and *Nolan and K.*, the state was heavily criticized for the lack of procedural safeguards. In neither case were the best interests of the children assessed in any way, while in each case the criteria established in *Boultif* and *Üner* should have been carefully considered. Why, however, the Court found a violation in *Udeh* is not as clear-cut. What is remarkable is that custody of the children had been awarded to the mother, while Mr Udeh had been granted access rights for one afternoon at least every two weeks. Yet the Court stressed the right of the father and children to live together. This contrasts with the case of *Onur*, in which Mr Onur and his daughter had a close relationship and she spent an average of two to three days a week with him. Nonetheless, the Court held that while the expulsion would have a disruptive effect on the daughter's life, it was unlikely to have had the same impact as it would have had if they had been living together as a family. Consequently no violation was found. This point was also made in *Üner*, where the parents

342 ECtHR 12 February 2009, Appl.no. 2512/04 (*Nolan and K. v. Russia).*

were no longer living together, but had not divorced. As the Court reached a completely different decision in *Udeh*, it was not for reasons related to the ability to enjoy access or the best interests of the child that a violation was found. The distinction between these cases is firstly that Mr Üner and Mr Onur had committed more, and more serious, offences, as well as minor offences, after the deportation order, while Mr Udeh had no further encounters with criminal law after his detention, and secondly Mr Udeh and his wife already had children before he committed his principal offence and, according to the ECtHR, his wife could not have been aware of it at the time when the family relationship was created.[343] Hence, the state's interest in protecting public order no longer existed, and the interests of the wife weighed heavily.

2.6.2.3 Admission to reside in order to be able to maintain contact

There were also a few cases during the period under review that related to the admission of a parent where the parents were divorced or separated and the family unity was thus no longer intact. For an overview of the principles applied by the ECtHR in admission cases, see paragraph 2.6.1.6. The ECtHR found a violation in two of the three cases during the period under review that did not include public order elements.

The first of these cases was *Rodrigues da Silva v. the Netherlands*, which concerned a Brazilian mother who had entered the Netherlands with her former partner. While fulfilling the requirements, she never applied for a residence permit. The couple had a daughter, but later divorced. The Dutch family court awarded custody to the father because they held that it would not to be in the daughter's best interests to move to Brazil. The mother's request for the right to stay with her child was refused. The ECtHR held that the Dutch authorities' claim that the mother and her former husband could have agreed that the daughter would move to Brazil with her mother was untenable since it was the Dutch courts, following the advice of the Dutch child welfare authorities, that had concluded that it was in the daughter's best interests to stay in the Netherlands.[344] The ECtHR also noted that the daughter had a particularly strong bond with her mother and grandparents and less so with her father. Lastly the ECtHR deemed it relevant that lawful residence in the Netherlands would have been possible at some point and therefore held that the case should be distinguished from those involving people who could not have reasonably expected to be able to continue family life in the host country at any time.[345]

The second case, *Polidario v. Switzerland*, was a case at the intersection of family and migration law as it concerned both international child abduction and the refusal of admission for family-related reasons. This case concerned a mother from the Philippines

343 ECtHR 16 April 2013, Appl. no. 12020/09 (*Udeh v. Switzerland)*, par. 50.
344 ECtHR 31 January 2006, Appl. no. 50435/99 (*Rodrigues da Silva and Hoogkamer v. the Netherlands*), par. 41.
345 ECtHR 31 January 2006, Appl. no. 50435/99 (*Rodrigues da Silva and Hoogkamer v. the Netherlands*), par. 43.

who had a child with a Lebanese man who had acquired Swiss nationality. Because she had no right to remain in Switzerland, she had returned to the Philippines with the child. The child then went to spend a holiday with his father, but the latter did not return him to the Philippines. Despite the mother having custody rights and parental authority, her attempts to obtain his return to the Philippines and her requests for leave to remain in Switzerland were unsuccessful. As a result, she had been separated from her son for five years and was only able to see him when she was granted a visa to join the custody proceedings. Custody of the child was then awarded to the father, while the mother was granted access rights, which had to be exercised in Switzerland. The family court noted that while it was in the child's interests to maintain personal relations with his mother, the mother had no opportunity to object to another body of law preventing her from coming to Switzerland to exercise her right of access.[346] She consequently stayed in Switzerland illegally in order to make use of this right until she was granted the right to remain more than two years later. The ECtHR held that the relationship between the mother and her son had been seriously altered in a crucial period[347] and consequently found that the Swiss authorities had not fulfilled their positive obligation to take adequate measures to preserve links between the applicant and her child.

The ECtHR did not find a violation in the third case, *Olgun v. the Netherlands.* This case concerned a Turkish father who had first entered the Netherlands on a one-month visa. He then went back to Turkey, where he got married. He and his wife later entered the Netherlands without a visa and had a son. The couple subsequently divorced and Mr Olgun returned to Turkey, where he remained until he re-entered the Netherlands on a one-month temporary visa, which he outstayed. The ECtHR held that:

> *The inescapable conclusion is that the present case is characterized by multiple breaches of immigration law and that the applicant has not at any time had family life in the Netherlands as a lawful resident. Nor is it apparent that the applicant was ever given any assurances that he would be granted a right of residence by the competent Netherlands authorities; he could therefore not at any time reasonably expect to be able to continue this family life in the Netherland.*[348]

The ECtHR consequently considered whether there were any exceptional circumstances that required Mr Olgun to be allowed to continue to enjoy family life with his son in the Netherlands:

346 ECtHR 30 July 2013, Appl. no. 33169/10 (*Polidario v. Switzerland*), par. 38.
347 ECtHR 30 July 2013, Appl. no. 33169/10 (*Polidario v. Switzerland*), par. 77.
348 ECtHR 10 May 2005, Appl. no. 1859/03 (*Olgun v. the Netherlands),* par. 49.

> *The fact, as stated by the applicant and apparent from the case file of the domestic proceedings, that Ms Ö. had great difficulty taking proper care of E. does not constitute "exceptional circumstances" in this regard. The respondent Party itself took direct responsibility in the matter by placing E. under the supervision of the domestic childcare authorities. The personal involvement of a child's parents in his or her upbringing is normally to be preferred to intervention by public authority, it is true; but there is nothing to suggest that the measure taken in the present case was inadequate to ensure E.'s well-being, still less that the applicant's presence in the Netherlands was indispensable for that purpose.*[349]

The final case to be discussed is the case of *Nunez v. Norway*, in which public order elements did play a role. Mrs Nunez had entered Norway as a tourist.[350] Shortly after her arrival she was arrested on suspicion of shoplifting. She accepted a fine and was expelled from Norway. Despite a re-entry ban, she later returned to Norway on a different passport and under a different name. She then married a Norwegian national and applied for a resident permit, having concealed her earlier stay and previous criminal convictions. She was granted several work permits until she obtained a settlement permit. After she got divorced, she remarried and the couple had two daughters. The police apprehended Mrs Nunez following a tip about her previous stay in Norway under a different name. Her settlement permit was consequently revoked and Norway issued an expulsion order and prohibited her from re-entry for a period of two years. During the procedures against those decisions, Mrs Nunez and her husband separated. Mrs Nunez was made responsible for the daily care of the children, until sole parental responsibilities and daily care were granted to her ex-husband on the grounds that Mrs Nunez was likely to be expelled and that it would be in the best interests of the children to remain in Norway. With regard to Mrs Nunez, the ECtHR concluded that Article 8 had not been violated. With regard to the children, however, the ECtHR did find there to have been a violation, with the children's long-lasting and close bonds with their mother, the decision in the custody proceedings, the disruption and stress that the children had already experienced and the long period that elapsed before the immigration authorities decided to order Mrs Nunez's expulsion and to ban her from re-entry being considered relevant.

Again, all the findings of a violation related to the state's decision-making procedures and not to grounds related to the parent-child relationship. A similar phenomenon as in the *Kaplan* case can be seen in *Rodrigues da Silva*, *Polidario* and *Nunez*. The ECtHR found a violation because the authorities' decision to refuse admission did not sit well with other courts' rulings at a domestic level: in *Rodrigues da Silva* and *Nunez*, a domestic court had established that the

349 ECtHR 10 May 2005, Appl. no. 1859/03 (*Olgun v. the Netherlands*), par. 51.
350 ECtHR 28 June 2011, Appl.no. 55597/09 (*Nunez v. Norway*).

children could not follow their mother abroad, while in *Kaplan* a domestic court had granted residence to the mother but not to the father and had done so for very weighty reasons pertaining to the child. In *Polidario*, meanwhile, the Swiss authorities had firstly failed to take measures to respect the family court's ruling in which parental authority was awarded to the mother; as a result, her efforts to get the child returned to her in the Philippines were unsuccessful. Secondly, after parental authority was subsequently awarded to the father as a result of this Swiss inaction, the Swiss authorities again failed to take measures to respect the family court's ruling and thus to enable the mother to exercise the rights of access granted to her. In *Rodrigues da Silva* the authorities had wrongly equated the mother's unlawful stay with that of people who could not have had any such legitimate expectation, and this issue was also relevant in *Zakayev and Safanova* and *Jeunesse*. In *Nunez*, the authorities were criticized, again just as in the cases of *Zakayev and Safanova*, *Jeunesse* and *Kolonja*, for their long periods of inaction. The fact that a violation of Article 8 was not found for reasons related to the parent-child relationship becomes all the more clear in *Olgun*, in which the ECtHR recognized that it was, in principle, in the best interests of the child to grow up with both parents present and that the mother was not able to raise the child by herself. Yet the fact that Mr Olgun had repeatedly breached immigration regulations and could never have had any legitimate expectations and that the state had never done anything to make him believe he could have had such expectations meant that Article 8 was not violated.

2.7 Concluding remarks: comparing the state's obligations to protect family life in family and migration law cases

In both family law and migration law cases, the ECtHR applies the same criteria in order to establish whether family life exists. And, in both fields of law, the ECtHR still attaches a certain relevance to characterizing a particular situation as either entailing a positive or a negative obligation, while also granting states a wide margin of appreciation in both types of cases. A difference between the two fields is that whereas the ECtHR explicitly mentions that, in family cases, this wide margin may be narrowed if there is a danger of permanent damage to the parent-child relationship, this narrower margin is not mentioned in migration cases where the same danger exists.

As far as the obligations that are imposed on states in order to protect parent-child relationships are concerned and while, contrary to family cases, migration cases are not aimed at regulating custody and access, the ECtHR has recognized the need, in both fields of law, to protect family unity in cases where parents and children are separated or at risk of being separated from their parents. In both fields of law, the ECtHR has held that parents and children have the right to live together (or continue living together) and, where living together is no longer or has never been possible for whatever reason, the right to mutually enjoy each other's company.

Likewise, in both fields of law, the ECtHR has stressed that the domestic authorities involved in the decision-making process have to take all the relevant circumstances into account and should always carefully assess the proportionality and reasonableness of a domestic measure in each and every case. This means that, in both fields, the domestic authorities must have assessed what the relationship between the parents and children in a particular case entails and have taken the best interests of the children into account.

So far the argumentation of the ECtHR appears very similar in both fields of law. When it comes, however, to the ECtHR's reasoning in establishing whether the state has fulfilled its obligation to protect the right to live together or the right to mutually enjoy each other's company, the ECtHR has a very different approach in family law on the one hand and in migration cases on the other hand.

The right to live together entails the right not to be separated, a right to contact in the intervening period in the event of separation and the right to be reunited as soon as possible. In family law cases, the ECtHR has held, without exception, that family relationships between parents and children must be preserved as much as possible. This means that a separation between parents and children as a result of measures taken by the state is legitimate only as a measure of last resort and, in principle, only temporarily. And even if the separation was not the result of a measure taken by the authorities, states have far-reaching obligations to preserve the bond between parents and their children. These obligations also exist where the family relationship is not yet well developed. The sole reason for such measures not being regarded as absolute is that, in certain cases, separation or non-reuniting may be in the best interests of the child.

Different types of situations can apply in migration cases concerning the right to live together. In cases where the ECtHR holds that the family can live together elsewhere as a unity, the ECtHR regards the family relationship as not being affected by the expulsion or non-admission decision. The perspective on what it means to exercise family life in such cases does not diverge from the approach to family life in family cases. In cases, however, where a separation will occur, namely in cases where the partner and children will not follow the departing partner, the ECtHR regards maintaining family life from abroad (via Skype or other modern means of communication, for example) as being sufficient to preserve the family relationship. The approach to family life is thus very different in this respect, and the ECtHR gives a different interpretation of what it means to exercise family life. The approach is likewise very different in cases where family life has not yet developed since, according to the ECtHR, there is no obligation in such cases for states to establish whether reuniting the parent and child would be in the best interests of the child. Hence, the best interests of the child are not considered. Lastly, where the relationship has already been disrupted as a result, for example, of the migrant parent's detention, this is

held against both the parent and the child. Thus, protecting the parent-child relationship is the sole responsibility of the parent and no account is taken of the best interests of the child. Again, therefore, the approach adopted in such instances in migration law is thus very different from the approach adopted in family law.

With regard to the right to mutually enjoy each other's company, the ECtHR emphasizes in family cases that parents have a right to maintain contact with their children and that children have the right to maintain contact with both parents. According to the ECtHR, this is because, for most children, there will be no doubt that their interests will best be served by efforts to sustain links with their natural families. The ECtHR has consequently held that access arrangements need to be practical and effective. Despite the margin of appreciation allowed to states, the ECtHR strictly scrutinizes whether this is the case and imposes very far-reaching and detailed obligations upon states, such as taking a parent's work schedule into account and imposing family therapy, but also fines on parents who refuse to facilitate access. While the obligation to take measures to enable access is not absolute, the only legitimate reason for not taking such measures in family cases is when access is not in the interests of the child. In migration cases, however, the option of occasionally visiting each other abroad or remaining in touch by telephone or on the internet is, in principle, considered to suffice. The ECtHR has sometimes noted that it does not underestimate the difficulties (for example, financial difficulties) that visiting each other abroad would entail; despite those difficulties, however, the ECtHR assumes that this manner of contact will be enough to protect parent-child relationships. Hence, the way in which the ECtHR interprets what it means to exercise family life in migration cases is very different from the interpretation given in family cases, where being in each other's physical presence is what matters. Consequently there is a discrepancy in the approach taken by the ECtHR regarding the interpretation of when the interests of the family members are sufficiently guaranteed in on the one hand migration law and on the other hand family law.

While the best interests of the child are always decisive for the outcome in family cases, the best interests of the child are never paramount in migration cases in which Article 8 ECHR is invoked. A close examination of all the cases shows that, in migration cases, states always have the right to expel parents who have never had a residence permit or who have lost their residence permit, irrespective of the relationship between those parents and their children. Likewise, states have the right to refuse entry to parents or children who do not comply with the state's immigration regulations. This differs only where the state's decision-making process was inadequate.

This means that the ECtHR has an entirely different approach to regulating parent-child relationships and mediating tensions between individuals, parents and the state in the two fields of law. In family cases, the ECtHR is primarily a family or even a children's court,

with the priority being the integrity of the family. The ECtHR attaches great importance to keeping minor children with their parents. In family law cases the best interests of children often coincide with those of the parents, given that, in principle, it is in the interests of both parents and children for them to maintain their relationship. Where those interests coincide, states have to serve the interests both of the parents and the children. And, where tensions exist between the interests of children and those of their parents, hence where custody or access are not considered beneficial to a child, the decisive factor for the outcome is the best interests of the child. The approach of the ECtHR to maintain the family bond differs only if the best interests of the child require otherwise.

In migration law, by contrast, the state not only has an interest in protecting the interests of parents and/or the best interests of children, but also an additional interest in controlling immigration. What is at issue in migration law, therefore, is not only the regulation of custody or access, but also the right to reside in a particular state. It is in such cases that the ECtHR is primarily an immigration court, with the priority being to maintain the integrity of the border. Where the family is able to live together as a unity elsewhere, and this is a realistic option in the light of the facts of the case, the ECtHR's approach is not at the expense of family life. The position is different if a separation occurs in cases where family life is not yet well developed or has already been ruptured. In such cases, the ECtHR interprets the right to respect for family life differently and does not consider the best interests of the child. Borders must be preserved, irrespective of whether this adversely affects the relationship between parent and child. The integrity of the family in such cases is protected only where the state did not comply with the requirements imposed by the ECtHR regarding the decision-making process, and thus where the state's interest in controlling immigration is no longer taken as a given. Violations of the right to family life therefore have little to do with the actual quality of the family relationship in a particular case. When the interest of the state in controlling immigration is at stake, the family rights of parents and children often disappear from the stage.

An alternative for the ECtHR in migration cases would be to apply the same approach regarding family life as in family cases and actually to consider the interests of parent and child. The ECtHR would then have to balance the interests of the individuals concerned against the right of states to control migration. The fact that family ties, i.e. the parent-child relationship, would then be given greater weight than currently afforded in migration cases would not mean, however, that states' right to control immigration should never prevail. Nonetheless, the ECtHR would then have to substantiate why either the interests of parent, child or state prevails. While the outcome in cases might still be same, the difference would be that the ECtHR is more transparent as regards the prevailing interests and the circumstances in a case that are relevant in establishing if there has been a violation of Article 8 ECHR.

Chapter 3

Regulating of parent-child relationships in free movement and Ruiz Zambrano-like cases

3.1 Introduction

This chapter aims to establish the approach taken by the CJEU in regulating parent-child relationships in family reunification cases. People's migration often has consequences for their ability to exercise family – and, more specifically, parental – rights. Where parents move within the EU or to the EU from a third country, they are likely to want to bring their children, and *vice versa*. Likewise, where people move to a member state and start a family there, they are likely to want to be able to take family members with them when they return to their member state of nationality.

The internal market – and thus the fundamental freedoms – remains one of the primary goals of the EU. As a result, the CJEU is a court dealing primarily with the interpretation of regulations that aim to facilitate and sustain mobility within the EU and facilitate economic activity, such as work.[351] The protection of the right to family life, by contrast, is generally considered to fall under an entirely different stream of law, namely human rights.[352] Initially the protection of fundamental rights, including the right to family life, was an exclusive competence of the national constitutional orders of the member states.[353] In later case law, however, the CJEU established that it is bound to respect fundamental rights, while the Charter of Fundamental Rights of the European Union has also been legally binding since 2009. Nevertheless, the CJEU is not a human rights court aimed at protecting individual or family rights.[354] The hypothesis concerning the CJEU is, therefore, that the CJEU's approach will be more focused on regulating migration than on protecting individual or family rights and that the CJEU is hence primarily a migration court rather than a family court.

In order to examine the approach taken by the CJEU in regulating parent-child relationships, free movement case law concerning residence rights for third-country family members of EU citizens will be assessed. Besides secondary free movement law, certain aspects concerning EU citizens' right to family life are based on citizenship law. In addition, the year 2011 saw a new development in CJEU case law, when the Court ruled in the case of *Ruiz Zambrano*[355] that – on the basis of Article 20 TFEU, which lays down the right to freely reside and move within EU territory – residence rights should be granted to family members of stationary Union citizens if the Union citizens would otherwise be deprived of the genuine enjoyment of the substance of their EU citizenship rights. Here, therefore, the CJEU based its decision on EU citizenship rights rather than on secondary free movement

351 Article 19 TFEU.
352 De Búrca 2013, p. 170.
353 Chalmers, Davies & Monti 2014, p. 251.
354 Families are made up of individuals with rights and wishes of their own. Yet, within families there are also relationships of interdependency. Both are relevant in cases where the right to family life is at stake.
355 CJEU 8 March 2011, C-34/09, ECLI:EU:C:2011:124 (*Ruiz Zambrano*), par. 42-43.

law. As stated by the CJEU, the purpose and justification of the *Ruiz Zambrano* line of reasoning is based on the idea that refusing to allow those family members a right to reside would effectively interfere with the Union citizen's freedom of movement and is therefore very closely intertwined with EU free movement case law.[356] A series of cases following this line of reasoning will also be analysed.

As Wray and Hunter noted:

> *Free movement rights are not, themselves, immigration laws but are designed to give full effect to the purposes of the EU. (…) Yet, free movement rights involving third country nationals (TCN) family members, are generally associated with immigration rather than with economic or citizenship questions and are seen as interfering with national sovereignty in this respect.*[357]

The reason is that, as mentioned above, EU freedom of movement and citizenship law has recognized the need to grant residence rights to third-country family members of Union citizens. Since the EU is a supranational order with direct effect in the member states, tensions may arise between EU law and (stricter) domestic immigration regulations. While the Union citizenship of children or their ability to make use of their free movement rights are often dependent of the status of their parents, parents can in some instances be dependent on their child's status for their Union citizenship. In each case, therefore, the CJEU needs to assess the interests of the child, the parent and the state. This chapter will shed light on the approach the CJEU takes to mediate possible tensions between these interests, as well as examining the role of the right to respect for family life within the cases under scrutiny.

The above leads to the following sub-questions:

1. When does the CJEU assume family life between parents and children to exist?
2. Under which circumstances are parent-child relationships protected by the CJEU in free movement case law and case law based on Articles 20 and 21 TFEU?

3.1.1 Methodology

Given the extensive body of literature devoted to developments in the CJEU's case law on the internal market and the free movement provisions, this chapter and the selection of relevant free movement cases were based on secondary literature. Cases were considered relevant if they concerned relationships between minor children and their parents or parent-like relationships in the event of a possible separation. Hence, cases in which at least

356 CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 73.
357 Wray & Hunter 2014, p. 66.

one of the family members did not have a right to reside within a EU member state. After the first selection of cases on the basis of secondary literature, the CURIA database was checked in order to confirm that all the relevant cases had indeed been taken into account. This check consisted of reading the first selection of relevant cases (i.e. cases concerning a parent-child or parent-like relationship), while also examining the references made by the CJEU itself in order to establish whether any important cases were missing. With regard to the *Ruiz Zambrano* line of cases, a search was conducted in the CURIA database, with 'Ruiz Zambrano' being included in the search terms. This chapter includes all the cases in the series revolving around parent-child or parent-like relationships. The development by which residence rights were granted to third-country family members of EU citizens started in 2002 with the case of *Carpenter*.[358] While this thesis set 1 January 2017 as a time limit, the last of the cases in the *Ruiz Zambrano* series was heard in May 2017. And since this case has major implications for the subject of this thesis, it has exceptionally been included.

The chapter concerning the approach of the ECtHR included a description of the status quo in both family and migration cases. The body of case law based on Article 8 ECHR and the general principles that the ECtHR applies in this respect have been worked out by the ECtHR in great detail over an extensive period of time. This contrasts with CJEU case law, where the Court decides its cases on the basis of consensus. In order to preserve such consensus, the argumentative discourse of the CJEU is limited to what is considered most essential and is built up progressively.[359] As stated by Lenaerts, the CJEU does not take "long jumps" when expounding the rationale underpinning of the solution given to novel questions of constitutional importance.[360] The approach in this chapter therefore differs from the approach in the chapter on ECtHR case law. Given that a large part of this chapter concerns such a novel question – the *Ruiz Zambrano* case was the start of entirely new CJEU doctrine – this chapter sets out the developments over time in CJEU case law rather than starting from the status quo in a particular field. By providing a chronological exposition of the case law, it aims to make clear which types of situations and family relationships are covered by this new doctrine. By setting out the developments over time, this chapter also outlines how the CJEU has consistently broadened the scope of EU law in order to protect EU citizens' family rights.

I will first discuss when the CJEU takes family life between parents and children to exist (3.2) and subsequently the circumstances in which parent-child relationships are protected by the CJEU. In order to do so, however, I first need to briefly discuss the CJEU's assessment more generally (3.3). I will continue by discussing CEJU free movement case law involving residence rights for third-country family members of Union citizens and where denying

358 CJEU 11 July 2002, C-60/00, ECLI:EU:C:2002:434 (*Mary Carpenter*).
359 Lenaerts 2015, Bobek 2014 and Skouris 2014.
360 Lenaerts 2015.

such residence rights may lead to parents and their minor children being separated (3.4). Lastly I will discuss the CJEU's introduction of the new *Ruiz Zambrano* doctrine, which likewise concerns residence rights for family members of Union citizens, and set out how this new doctrine has so far been developed (3.5).

3.2 Parent-child relationships in EU law

No single overarching EU definition of 'child' exists in the treaties, secondary legislation or case law.[361] What a child is varies in EU law, depending on the context. Stalford has recognized a biological (based on blood ties), an age-based and a dependency-based (determined by the child's economic or social relationship with his or her parent or guardian) construct of who is a child.[362] And the reality is often a combination of these different constructions. I will discuss below when family life is taken to exist between parents and children both in free movement cases and in *Ruiz Zambrano* cases.

With regard to free movement cases, Directive 2004/38, which regulates free movement of Union citizens and their family members within the territory of the European Union, establishes which parent-child relationships fall within the Directive's scope.[363] The preamble of the Directive refers to maintaining family unity and states that the Directive respects the fundamental rights and freedoms and the principles recognized by the Charter of Fundamental Rights of the European Union, including the right to family life.[364] Yet the definitions of parent and child given in the Directive are very formal.

Article 2 Directive 2004/38 lays down which family members fall within the scope of the Directive, with Article 2(2)(c) holding that children are the direct descendants who are under the age of 21 or who are dependants of the Union citizen or spouse or registered partner of the Union citizen.[365] Consequently, the definition of the child in secondary free movement law does not correspond with what most countries have set as the age of majority, and as also laid down in the UN CRC: "a child means every human being below the age of eighteen years".[366] Besides age, it follows from the phrasing "direct descendants … or are dependants" that what defines a child in free movement cases is also based on biological ties or dependency. This definition consequently implies a relationship to someone: either

361 Stalford 2012, p. 20.
362 Stalford 2012, p. 21.
363 Until 2004 free movement rights were granted on the basis of different Regulations, Directives and jurisprudence of the CJEU and hence on the basis of a scattered approach. On 1 May 2004, Directive 2004/38 entered into force, which codified the previously dispersed legislative corpus and case law, Carrera and Faure Atger 2009, pp. 2-3.
364 Preamble Directive 2004/38, in particular nos. 5, 6, 15 and 31.
365 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Official Journal of the European Union L158/77 (2004).
366 See Article 1 UN Convention on the Rights of the Child, entry into force on 2 September 1990.

a biological relationship or a dependent relationship. With the inclusion of dependency in this definition, it is not only biological children under the age of 21 who are considered a child; adopted, foster or stepchildren may also fall within the Directive's scope.[367]

Who can be considered a parent in free movement cases likewise follows from Article 2(2)(c) of Directive 2004/38; in other words, a Union citizen with children below the age of 21 or who are dependent and the spouse or registered partner of an EU citizen with children below the age of 21 or who are dependent. According to Directive 2004/38, however, there are certain limitations on who can be a parent. The definition of a spouse is limited to married partners.[368] Consequently, unmarried partners in a durable relationship – including same-sex partners, whom not all member states allow to marry – are not automatically covered by the Directive.[369] Article 3(2)(b) does state, however, that the host member state must facilitate the entry and residence, in accordance with its national legislation, of the partner with whom the Union citizen has a durable relationship. Under Article 2(2)(b), the partner with whom the Union citizen has contracted a registered partnership falls within the scope of the Directive. However, this is only if the host member state's legislation treats registered partnerships as equivalent to marriage. This means that if a host state does not treat registered partnerships as equivalent, but only similar in some respects to marriage, a registered partner does not automatically fall within the scope of the Directive. And, consequently, neither will his or her children.

The above means that the parent-child relationships falling within the scope of Directive 2004/38 are primarily those within the traditional nuclear family. Whether relationships outside the traditional nuclear family are protected depends on the national laws of the various member states.[370] The Directive explicitly mentions that parents and their minor children are covered by Directive 2004/38; where, therefore, it is clear that the applicants in a particular case are legal parents and their children, the CJEU does not specifically address the question of whether they fall within the definition of the Directive. An example is the case of *Eind*, in which the CJEU merely noted that "Mr Eind was a Netherlands national who was joined by his daughter".[371] Likewise, if a case does not concern legal parents and children, but there is no discussion on the domestic level that a particular case does indeed involve a parent-child relationship, either a biological relationship or one based on dependency, the CJEU also readily assumes in its case law based on Directive 2004/38

367 Stalford 2012, p. 24 and see CJEU 11 July 2002, C-60/00, ECLI:EU:C:2002:434 (*Mary Carpenter*) and CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*).

368 CJEU 17 April 1986, Case C-59/85, ECLI:EU:C:1986:157 (*Netherlands v. Reed)*.

369 See Toner 2004.

370 For a more elaborate discussion of families in European Union law see: Klaassen 2015, McGlynn 2006 and Stalford 2012. As will be further elaborated upon in chapter 4, the Netherlands recognizes same-sex marriages and the durable relationship between unmarried partners. Hence, in the Netherlands those relationships are in principle also covered by Directive 2004/38.

371 CJEU 11 December 2007, C-291/05, ECLI:EU:C:2007:771 (*Eind*), par. 9.

that such a parent-child relationship exists. An example of this can be seen in the case of *Baumbast* (concerning Mr Baumbast, his wife Mrs Baumbast, Mrs Baumbast's daughter from a different father, and a daughter of both Mr and Mrs Baumbast), in which the CJEU stated that the parties to the proceedings had agreed that Mrs Baumbast's daughter was to be treated as a member of Mr Baumbast's family and was therefore referred to as one of the two children in that family.[372]

The question of which parent-child relationships are covered by the *Ruiz Zambrano* criterion is not, however, so clear-cut, given that this has not yet been laid down in law or policy. Consequently, the scope of relationships that are potentially covered is still under development in CJEU case law. What can be said, however, is that whether a certain parent-child relationship falls within the scope of the *Ruiz Zambrano* line of cases is dependency-based.[373] According to the CJEU, this dependency is not necessarily based on blood ties.[374] Likewise, cohabitation is not required.[375] Instead, the CJEU looks at the legal, economic or emotional dependency between the individuals concerned.[376] When establishing whether dependency exists, age appears to be a relevant factor.[377] In *Ruiz Zambrano*, which concerned two minor children, dependency was accepted by the CJEU. In the first follow-up case after *Ruiz Zambrano*, however, in which a woman argued that she would be compelled to leave the EU if her spouse was denied a right to reside, the CJEU held that the relationship between the woman and her spouse was not a relationship in which such dependency existed.[378] According to the CJEU, the refusal to allow her husband a right to reside in no way compelled Mrs McCarthy to leave the UK, or the territory of the EU as a whole.[379] Hence, a relationship of dependency appears to be more easily assumed in cases concerning young children since they need their parents in order to be able to live somewhere or to travel.

The above makes clear that the extent to which parent-child relationships are regarded as existing within the scope of Directive 2004/38 and Article 20 TFEU is similar. Both appear to cover the relationship between parents and their minor children. Whether parent-like relationships, such as the relationship between foster parents and foster children, are also covered within the *Ruiz Zambrano* line of cases remains to be seen. However, the fact that the CJEU has stated that blood ties are not necessary points in this direction. A difference is that whereas in the *Ruiz Zambrano* series, dependency between the Union citizen and

372 See amongst others *Baumbast and R.*, *Zhu and Chen*.
373 CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (*Dereci a.o.*).
374 CJEU 6 December 2012, C-356/11 & C-356/11, ECLI:EU:C:2012:776 (*O., S. and L.*), par. 55.
375 CJEU 6 December 2012, C-356/11 & C-356/11, ECLI:EU:C:2012:776 (*O., S. and L.*), par. 54.
376 CJEU 6 December 2012, C-356/11 & C-356/11, ECLI:EU:C:2012:776 (*O., S. and L.*), par. 56.
377 Compare CJEU 8 March 2011, C-34/09, ECLI:EU:C:2011:124 (*Ruiz Zambrano*) with CJEU 5 May 2011, C-434/09, ECLI:EU:C:2011:277 (*Shirley McCarthy*).
378 CJEU 5 May 2011, C-434/09, ECLI:EU:C:2011:277 (*Shirley McCarthy).*
379 CJEU 5 May 2011, C-434/09, ECLI:EU:C:2011:277 (*Shirley McCarthy)*, para. 49-50.

the non-EU family members is the only decisive criterion applying on the basis of Directive 2004/34, dependency is not as such required for the establishment of family relationships mentioned in the Directive. Nonetheless, while the children of a Union citizen's spouse are considered family members irrespective of the actual quality of the relationship between the stepchildren and the Union citizen parent, such a relationship of dependency will often exist.

3.3 Assessment by the CJEU

As mentioned above, this chapter concerns the regulating of parent-child relationships in free movement and *Ruiz Zambrano*-like cases. In the first group of cases, the CJEU used the proportionality test to establish whether there had been a violation of EU law. In this proportionality test, the CJEU used family life arguments to determine whether the national measure at issue constituted a disproportionate interference with the right to free movement. In the second group of cases, the *Ruiz Zambrano*-like cases, however, it was unclear as to which test the CJEU would use to establish whether EU law had been violated. Consequently, the role that the right to family life played in establishing whether EU law had been violated was also unclear. In order to better understand the argumentation applied by the CJEU in the two types of cases and the precise role of family life arguments in the reasoning, I will first briefly discuss the principle of proportionality (3.3.1) and subsequently deal with the situations in which the CJEU applies this principle and the right to respect for family life (3.3.2).

3.3.1 Proportionality test

The principle of proportionality is a general principle of EU law. The general principles of EU law fulfil several functions, with one of these being that they may be relied upon as grounds for judicial review.[380] The principle of proportionality permeates the whole of the EU legal system, applies both to EU and national measures, and covers both legislative and administrative action.[381] Article 5(4) TEU stipulates that, in accordance with the principle of proportionality, the content and form of Union measures shall not exceed what is necessary in order to achieve the objectives of the Treaties.

The proportionality test consists of three parts.[382] First, it must be established whether the measure in question, such as the refusal by a member state, for reasons related to the protection of public order, to grant residence rights to a third-country national who is married to a Union citizen and the parent of a Union citizen child, is suitable to achieve a

380 See generally Lenaerts & Gutiérrez-Fons 2010, pp. 1629-1669.
381 Tridimas 2006, p. 137.
382 CJEU 13 November 1990, C-331/88, ECLI:EU:C:1990:391(*Fedesa e.a.*), para. 12-17.

legitimate aim (suitability test). Second, it must be established that the measure is necessary to achieve that aim and whether other less restrictive means could produce the same result. Third, even if no less restrictive means are available, it must be established that the measure does not have an excessive (negative) impact on the applicant's interests (proportionality *stricto sensu*).[383] The third element requires a balancing of interests. However, some authors, such as Tridimas, argue that, in practice, the CJEU does not distinguish in its analysis between the second and the third test.[384] According to this latter view, therefore, the balancing of interests already becomes relevant when the judge is scrutinizing the necessity of the measure.

Irrespective of whether there are two or three elements in the proportionality test, the essential characteristic of the principle is that the CJEU performs a balancing exercise in which the objectives pursued by the measure at issue are weighed up against its adverse effects on individual freedom.[385] National measures that are liable to make the exercise of fundamental freedoms less attractive need to be proportional. The right to exercise free movement may be subordinated to the legitimate interests of the member states; in particular, the interests of states that those who benefit from the right to move and reside should not become a burden on a state's public finances.[386] Consequently, states have, for example, the right to impose income requirements when deciding whether to admit a person.

The principle of proportionality is a flexible principle, which allows the CJEU to subject national measures to a review of greater or lesser intensity.[387] If the CJEU applies a strict proportionality test, the CJEU allows the member states little discretion, either by determining the outcome in the case at hand or by providing the national court with strict criteria according to which that case must be determined. In other cases the CJEU applies a more lenient test. Under this more lenient approach, national choices are subject to only a mild degree of scrutiny. The CJEU then solely provides guidelines and leaves it up to the national court to apply the principle and reach an outcome on the facts.[388] How far the national autonomy extends thus varies in different types of cases.

3.3.2 Right to family life in free movement and *Ruiz Zambrano*-like cases

The general principles of EU law, such as the principle of proportionality and the fundamental right to respect for family life as codified in the Charter, are applicable only after it has been

383 Chalmers, Davies & Monti 2014, p. 367, Jans, 2000, p. 240 and Prechal 2008, p. 201.
384 Tridimas 2006, p. 139.
385 Tridimas 2006, p. 139.
386 CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*).
387 Jans 2000, p. 263.
388 Tridimas 2006, p. 207.

established that a particular situation is covered by EU law.[389] Not all measures are open for review at the European level. There needs to be a sufficient link between the national measure and EU law. This applies in the case of measures serving to implement EU law, as well as in measures derogating from EU law requirements (if, for example, they restrict one of the fundamental freedoms) and any other measure otherwise falling within the scope of EU law.[390] As far as Directive 2004/38 is concerned, such examples include the above-mentioned requirements regarding sufficient income, but also health insurance. Both are provided for in Directive 2004/38, but may restrict the fundamental freedom to move and reside within the EU. Thus, where member states introduce an income requirement of a certain fixed amount, this measure falls within the scope of the Directive. In the case, therefore, of Directive 2004/38, the application of the principle of proportionality is clear. First it needs to be established whether Directive 2004/38 covers a particular situation. Where this is the case, it then needs to be established whether the national measure at issue is proportional. In order to assess whether this is the case, account must be taken of the Charter and thus of the right to respect for family life and the best interests of the child.

With the *Ruiz Zambrano* ruling the CJEU stretched the scope of application of EU law by ruling that EU law also applies in a situation where the Union citizen has not crossed any border and in the absence of any economic link with EU law. Before *Ruiz Zambrano,* the decision to grant residence rights enabling third-country nationals to reside with nationals of a particular member state in situations with no connection at all to the internal market belonged to the member states' own field of competence. Such cases of 'purely internal situations' thus fell outside the scope of Union law.

In the *Ruiz Zambrano* case law series, the exact relationship between the right to respect for family life and the scope of application of Union law was unclear. After all, the question of whether a Union citizen was compelled to leave the EU because he had to follow his family seemed crucial for the applicability of Union law. The right to respect for family life seemed therefore to play a role in determining whether a situation fell within the scope of EU law to begin with. However, the establishment of whether a particular situation is covered by EU law appears to be missing in these cases or to coincide with the question of whether the national measure to refuse residence to the third-country family member constitutes

389 Elsuwege 2011, p. 266. And, according to Article 51 of the Charter, the requirement to respect fundamental rights defined in a Union context is only binding on the member states when they are implementing Union law. As already observed by various authors, a literal reading of the term 'implementing EU law' seems to suggest that the scope of application of the Charter is narrower than the scope of application of general principles of EU law, which apply to member states' actions falling within the scope of EU law. Nonetheless, the prevailing opinion in literature in general appears to be that the scope of application of the Charter should coincide with the scope of application of the general principles (Bockel & Wattel 2013, p. 871 & 882, De Vries, p. 185, wherein the authors have also referred to CJEU 5 April 2013, C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*)).

390 See for an elaborate discussion of these categories opinion A.G. Sharpston in *Bartsch* (22 May 2008, C-427/06, ECLI:EU:C:2008:297, par. 69) and Tridimas 2006, p. 36.

a violation of EU law. This means a possible tension with Article 51 of the Charter since, according to this Article, the requirement to respect fundamental rights defined in a Union context is binding on the member states only *after* it has been established that a particular situation is covered by EU law.

As Kochenov puts it, "If interpreted broadly, the new vision of the scope of EU law has the potential to constrain the Member States' ability to regulate virtually any issue independently".[391] After *Ruiz Zambrano*, it appeared that the application of EU law could be triggered "by the potential severity of the Member States' impact on the legal situation of EU citizens".[392] In the follow-up cases, the CJEU deals with the problem of determining which types of situations and family relationships are covered by the *Ruiz Zambrano* criterion on a case-by-case basis.[393] In doing so, the CJEU shed light on the question as to which elements are of relevance when *Ruiz Zambrano* is invoked. I will discuss free movement cases below, followed by a discussion of the *Ruiz Zambrano* series (3.5).

3.4 Residence rights for non-EU family members of EU citizens in free movement cases

The Treaty of Maastricht introduced the concept of EU citizenship on 7 February 1992. Nationals of the EU member states are automatically bestowed with this citizenship, which is accompanied by a variety of rights, most of which are associated with the right to free movement within the territory of the European Union.[394] The CJEU has held that Union citizenship is destined to be the fundamental status of nationals of the member states and, in its case law on Union citizenship, has extended EU law's boundaries on citizenship and freedom of movement in order to facilitate the exercise of movement rights.[395]

391 Kochenov 2011, p. 86.
392 Kochenov 2011, p. 93.
393 See also Lenaerts 2015, pp. 1-10.
394 Carrera and Faure Atger 2009, p. 2. And see Article 20 TFEU, which reads:
"1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
(a) the right to move and reside freely within the territory of the Member States."
395 See CJEU 20 September 2001, C-184/99, ECLI:EU:C:2001:458 (*Rudy Grzelczyk*), par. 31. Very much has been written on the development of EU citizenship and the relationship with the right to freedom of movement, see generally Chalmers, D, Davies, G, Monti, G, European Union Law (Cambridge, University Press, 2014), pp. 466-516, Boeles, P, Heijer, M. den, Lodder, G, Wouters, K, European Migration Law (Antwerpen, Intersentia, 2014), pp. 51-89, Bierbach, J.B., Frontiers of Equality in the Development of EU and US citizenship, Doctoral thesis, University of Amsterdam 2015, Kochenev, D., "A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe", 18 CJEL (2011), 56-109, Nic Shuibhne, N., "The Resilience of EU Market Citizenship", 47 CML Rev. (2010), 1597-1627, Menéndez, A.J., "European Citizenship after *Martínez Sala* and *Baumbast*. Has European law become more human but less social?", ARENA Working Paper 2009 via http://www.arena.uio.no, Costello, C., "*Metock*: Free movement and "Normal Family Life" in the Union", CML Rev. (2009), 587-622, Spaventa, E., "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects", 45 CML Rev. (2008),

Given that children do not regularly migrate independently, free movement rights were initially granted to children only in the event of their parents' decision to migrate to another EU member state. However, the CJEU later ruled in cases concerning derived residence rights of non-EU parents/carers of a child with the nationality of an EU member state or with the right to remain in an EU member state that a child can function as an anchor for his or her parents' right to reside in the host state.[396] These and other free movement cases are particularly good examples of where the CJEU sheds light on its views regarding the interdependent relationship between minor children and their parents.

3.4.1 Residence rights in order to enable the right to provide cross-border services

The CJEU interpreted the relationship between the right to free movement and the right to respect for family life in a series of cases, starting with the case of *Carpenter*. All the cases in this series involving parents and minor children will be discussed in order to explore the circumstances in which the CJEU protects parent-child relationships. *Carpenter* revolved around Mary Carpenter, a national of the Philippines, who had overstayed a tourist visa and remained in the UK, where she later married Peter Carpenter, a UK national.[397] Mr Carpenter ran a business that was established in the UK, but for business purposes frequently travelled to other member states. Although Mrs Carpenter had applied for leave to remain in the UK as the spouse of a UK national, this was refused. She appealed this decision, claiming that EU law entitled her to a right to remain in the UK. She argued that she looked after her husband's children from his first marriage during his trips to other member states and that her deportation would therefore restrict her husband's right to provide and receive services. While the UK was satisfied that Mrs Carpenter's marriage was genuine and that she played an important part in the upbringing of her stepchildren, it held that since Mr Carpenter was resident in the UK, he could not be considered to have exercised any freedom of movement within the meaning of EU law. The European Commission argued along the lines of the UK and held that Mrs Carpenter's situation had to be classified as a purely internal situation that needed to be distinguished from the situation of a spouse of a Union citizen who had exercised his or her right to freedom of movement and who had left the member state of origin and moved to another member state in order to become established or to work there.

The CJEU, however, did not agree and held that by providing cross-border services, Mr Carpenter was exercising one of the fundamental freedoms of the EU. According to the

13-45, Hofstotter, B., "A cascade of rights, or who shall care for little Catherine? Some reflections on the Chen case", 30 European Law Review (2005), 548-558. Jacobs, F.G., "Citizenship of the European Union – A Legal Analysis", 13 European Law Journal (2007), 591-610.

396 Stalford 2012, p. 48-49.

397 CJEU 11 July 2002, C-60/00, ECLI:EU:C:2002:434 (*Mary Carpenter*).

CJEU, the EU legislature had acknowledged the importance, in various Regulations and Directives, of ensuring the protection of the family life of member state nationals in order to eliminate obstacles to the exercising of the fundamental freedoms.[398] The CJEU held that deporting Mrs Carpenter would be detrimental to the family life of Mr and Mrs Carpenter and the children and, thus, to the conditions under which a fundamental freedom was exercised.[399] The CJEU stated that the deportation would constitute an interference with the right to family life as laid down in Article 8 ECHR.[400] While the CJEU took into account that Mrs Carpenter had violated the UK's immigrations laws by overstaying her visa, the Court stated that her deportation would not be proportional. The CJEU considered that the marriage of Mr and Mrs Carpenter was genuine and that Mrs Carpenter led a true family life in the UK, in particular by looking after Mr Carpenter's children from a previous marriage.[401]

In this case, therefore, the CJEU found a rather broad linkage with EU law; the whole family had always lived and resided in the UK. Simply because Mr Carpenter travelled regularly to another member state for work-related reasons, the CJEU presented the case as one no longer entailing a purely internal situation. The CJEU made use of its room to manoeuvre and opted for far-reaching protection of family rights. This case shows how the CJEU has extended the boundaries of EU law in order to facilitate the exercising of fundamental freedoms and that it considers the enjoyment of family life as a prerequisite for the ability to exercise fundamental freedoms of EU law. Hence, because the enjoyment of family life contributes to the goal of the internal market, the CJEU holds that family life must be protected, even where domestic immigration regulations have been violated.[402]

3.4.2 Child's right to education and the ensuing residence rights for his or her carer

The joined cases *Baumbast and R.* addressed different but related issues. *Baumbast* concerned Mrs Baumbast, a Colombian national, her husband Mr Baumbast, a German national, and their two daughters, the elder of whom had Colombian nationality and the younger of whom had dual German and Colombian nationality.[403] The family was granted a right to remain in the UK for a period of five years, during which time they owned a house, the daughters went to school, they did not receive any social benefits and had comprehensive medical insurance in Germany. However, their German insurance did not cover emergency care in the UK. Although Mr Baumbast had worked – first as an employed and later as a

398 CJEU 11 July 2002, C-60/00, ECLI:EU:C:2002:434 (*Mary Carpenter*), par. 38.
399 CJEU 11 July 2002, C-60/00, ECLI:EU:C:2002:434 (*Mary Carpenter*), par. 39.
400 CJEU 11 July 2002, C-60/00, ECLI:EU:C:2002:434 (*Mary Carpenter*), par. 41.
401 CJEU 11 July 2002, C-60/00, ECLI:EU:C:2002:434 (*Mary Carpenter*), par. 44.
402 Hofstotter has even argued that since the link with EU was merely accidental in this case, it was evident that the case was rather about the protection of family life than about a right to free movement (Hofstotter 2005, p. 551-552).
403 CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*).

self-employed person – in the UK for the first three years, he then failed to find a job that could support the family. As a result he was employed for the last two of the five years in China and Lesotho via a German company. After the five years had elapsed, Mrs Baumbast applied for indefinite leave for the whole family to remain in the UK. This request was refused as Mr Baumbast no longer worked in the UK and thus no longer fulfilled the requirements of Directive 90/364 (now Directive 2004/38).

The CJEU ruled that all the members of the family had a right to remain in the UK on the basis of EU law, albeit on different grounds. The CJEU held that the children of a migrant EU worker had a right to continue to pursue education even after the migrant worker no longer worked in the host member state since otherwise that migrant worker would be dissuaded from exercising the rights to freedom of movement to begin with.[404] In contrast to what the UK and German authorities and the European Commission had argued, the CJEU also found that the Baumbast children's right to pursue education implied that they had the right to be accompanied by the person who was their primary carer and for that person to be able to reside with them in that member state during their studies.[405] Permission should thus be granted to Mrs Baumbast, as the children's parent and primary carer, to remain in the UK with them.

As for Mr Baumbast, the CJEU stated that, because of his Union citizenship, he could rely on the right to reside within Union territory under Article 18 EC (now Article 21 TFEU).[406] While he could rely on Article 18 directly, that right was subject, according to the Court, to the limitations and conditions laid down by the EC Treaty and the measures adopted to give it effect (Directive 90/364).[407] However, those limitations and conditions needed to accord with the principle of proportionality.[408] The CJEU found that it would be disproportionate to refuse Mr Baumbast a right of residence in the UK on the grounds that his health insurance did not cover emergency treatment, given that he had sufficient resources, that he had worked and therefore lawfully resided in the UK for several years, that during that period his family had also resided in the UK and remained there even after his activities as an employed and self-employed person came to an end, that neither Mr Baumbast nor his family members had become burdens on the public finances of the UK, and that both Mr Baumbast and his family had comprehensive health insurance in Germany.[409]

404 CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*), par. 54. The right of and access to education for children in migrant workers is laid down in Regulation 1612/68.
405 CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*), par. 73.
406 CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*), par. 84.
407 CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*), par. 85.
408 CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*), par. 91.
409 CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*), para. 92-93.

R. concerned Mrs R., a US citizen who had married a French citizen. The couple had two children with dual French-US citizenship. The husband was residing in the UK as a worker, while Mrs R. had joined him as the spouse of a migrant worker. However, the couple subsequently divorced and Mrs R's request to have her residence permit renewed was refused. Since the father was still a worker in the UK, his and the children's right to remain were not in issue. The children had the right to continue their education, and the CJEU deemed the fact that the children did not live with the father on a permanent basis to be irrelevant. Therefore, the only question was whether Mrs R., too, should be granted a right to reside. Mrs R. submitted that, in the case of minor children who had spent all their life living with their mother and continued to do so, the refusal to grant her a right of residence during the continuation of the children's education impaired their ability to exercise their rights. She also held that such a refusal would entail a disproportionate interference with the right to family life as laid down in Article 8 ECHR. According to the UK, the duty to encourage all efforts to enable children entitled to continue their education to attend such courses under the best possible conditions should not be interpreted as requiring the state to allow the person who is their carer to reside with them. It argued that if and insofar as it was established that refusing such a right of residence would unjustifiably interfere with Article 8 ECHR, the UK may grant exceptional leave to remain to the carer parent in derogation from the Immigration Rules. The CJEU, however, agreed with Mrs R. and ruled that the fact that the couple had divorced was irrelevant. The mother as the primary carer – irrespective of her nationality – had a right to remain in order to facilitate the children's exercising of their right to attend education; otherwise, that right would not be effective.[410]

In the case of *Baumbast*, the CJEU gave a very broad interpretation of children's right to education. And in both cases, based on the interdependent relationships between the family members, with the presence of the carer parents being necessary to make the children's EU rights effective, the CJEU was willing to grant EU rights to individuals who were not citizens of the EU. Hence, the CJEU broadened the scope of those who may indirectly benefit from EU free movement provisions. Finally, in the *Baumbast* case, none of the family members was economically active in the host member state. Although the facts that Mr Baumbast had at some point been a worker and the family had not become a burden on the UK's social assistance system were relevant, the CJEU in this case expanded the protection of the fundamental freedoms in EU law to include individuals who had never been or were no longer economically active. The argumentation made clear by the CJEU was that it considers the presence of persons between whom close personal ties exist, i.e. between parents and children, to be necessary for the ability to exercise EU rights. Where splitting up parents and children would damage the effectiveness of EU law, states are obliged to maintain the parent-child relationship.

410 CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R*), par. 73.

3.4.3 Directive 90/364 and the dependent Union citizen

In the case of *Zhu and Chen*, both Mrs and Mr Chen had Chinese nationality and worked for a Chinese company.[411] Their eldest child was born in China and was also a Chinese national. Mrs Chen entered the UK when she was six months pregnant and later travelled to Northern Ireland, where she gave birth to Catherine. Giving birth in Ireland had been a deliberate choice by Mrs Chen since, under Ireland's nationality legislation, Catherine automatically acquired Irish nationality by dint of being born on the island of Ireland (i.e. including Northern Ireland). By the time of the proceedings, Mrs Chen and Catherine had left Northern Ireland and were living elsewhere in the UK. Mrs Chen and Catherine had sufficient resources not to become a burden on the UK and had health insurance. The UK authorities had refused, however, to grant Catherine and Mrs Chen a long-term residence permit because they considered EU law not to be applicable since, according to the UK, Catherine had not made use of her right to free movement. The UK had also argued that Catherine and her mother could not rely on EU law because Mrs Chen had tried to exploit this law.

Again the CJEU did not agree. Just as in the case of *Baumbast*, the CJEU held that Catherine's Union citizenship meant that Article 18 EC was directly applicable to her. Enjoyment of the right to reside and move freely within EU territory was not dependent on the attainment of an age at which Catherine could exercise those rights personally.[412] The CJEU repeated what it had said in *Baumbast*, namely that the exercise of those rights could be subordinated to the legitimate interests of the member states; in particular the interest of a state in ensuring that people who benefit from the right to move and reside should not become a burden on the state's public finances. The CJEU added, however, that since free movement provisions needed to be interpreted broadly, individuals' origin was irrelevant, providing their resources were sufficient.[413] Consequently, the fact that Catherine had those resources through her mother was sufficient. Any other reading would constitute a disproportionate interference with the right to move and reside within EU territory. The CJEU did not agree, therefore, with the UK that Catherine and her mother could not rely on EU law because Mrs Chen had tried to exploit this law. According to the CJEU, it was irrelevant that Mrs Chen had willingly created the situation in which Catherine acquired Irish nationality in order to obtain residence rights for her daughter. The CJEU reasoned in this respect that it is up to member states to determine the conditions under which individuals may acquire or lose that member state's nationality.[414]

411 CJEU 19 October 2004, C-200/02, ECLI:EU:C:2004:639 (*Zhu and Chen*).
412 CJEU 19 October 2004, C-200/02, ECLI:EU:C:2004:639 (*Zhu and Chen*), par. 20.
413 CJEU 19 October 2004, C-200/02, ECLI:EU:C:2004:639 (*Zhu and Chen*), par. 31 & 33.
414 CJEU 19 October 2004, C-200/02, ECLI:EU:C:2004:639 (*Zhu and Chen*), para. 35-40.

The CJEU then noted that it was indeed the Union citizen who was both emotionally and financially dependent on her non-EU mother and, hence, the opposite situation from that addressed in the Directive. However, the CJEU held that:

> *… a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child's right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.*[415]

Thus, Mrs Chen, as the mother and carer of a Union child, should be granted a right to remain in order for Catherine to be able to exercise her EU rights.

In *Zhu and Chen* the CJEU extended the boundaries of EU law in two ways. Firstly, the requirement of economic activity for the enactment of free movement rights was further diminished as this case concerned a baby, Catherine, who could not attend education for at least another couple of years. And it would certainly be years before Catherine would be able to work. Secondly, the CJEU broadened the scope of the Directive by interpreting dependency in such a way that it also covered a Union citizen's dependency on a non-Union mother, even though this situation was not expressly protected in the Directive. So, once again, the CJEU protected the family relationship between mother and child by extensively interpreting the Directive in order to allow EU free movement law to be fully effective. While the CJEU noted that the state may have a legitimate interest in refusing residence rights to third-country family members, this legitimate interest was subjected to careful scrutiny, with the state needing to provide evidence that the family had actually become a burden on the state's public finances, and the origin of the Union citizen's resources being considered irrelevant.

3.4.4 Derived residence rights for children of migrant or former migrant workers

This development of abandoning the requirement for economic activity has likewise been applied to residence rights for children of migrant or former migrant workers. In the case of *Eind*, the CJEU held that the Surinamese daughter of a Dutch father should be granted a right to reside in the Netherlands.[416] While Mr Eind was working in the UK, his daughter

415 CJEU 19 October 2004, C-200/02, ECLI:EU:C:2004:639 (*Zhu and Chen*), par. 45.
416 CJEU 11 December 2007, C-291/05, ECLI:EU:C:2007:771 (*Eind*).

had joined him directly from Suriname. After he returned to the Netherlands, he had been unemployed due to illness and had therefore relied on social benefits. The Netherlands rejected the application for a residence permit for his daughter since he could no longer be considered a migrant EU worker. The CJEU held that a Union citizen would be deterred from leaving his member state of origin if, after returning to that member state, he would be unable to continue living with close relatives,[417] even if this family life only started in the host member state. The CJEU continued by stating that:

> *Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter.*
>
> *It follows that, in circumstances such as those in the case before the referring court, Miss Eind has the right to install herself with her father, Mr Eind, in the Netherlands, even if the latter is not economically active.*[418]

The CJEU then added that a child had such a right until she turned 21 or remained a dependant of her father. According to the CJEU, it was irrelevant that Mr Eind's daughter had not had a right of residence in the Netherlands before he left for the UK. The CJEU noted in this respect that imposing such a requirement would run counter to the objectives of the EU legislature, which has recognized the importance of ensuring protection for the family life of nationals of the member states in order to eliminate obstacles to the exercising of the fundamental freedoms.[419]

In this case, therefore, the CJEU ruled that Union citizens have the right to be accompanied by their family members after the former return to their member state of nationality.[420] According to the CJEU, being compelled to be without their family members would deter Union citizens from making use of the right to free movement in the first place. In other words, splitting up parents and children adversely impacts on Union citizens' exercising of their free movement rights, and the question of whether those Union citizens are no longer economically active is considered irrelevant.

417 CJEU 11 December 2007, C-291/05, ECLI:EU:C:2007:771 (*Eind*), para. 35 & 36.
418 CJEU 11 December 2007, C-291/05, ECLI:EU:C:2007:771 (*Eind*), para. 37 & 38.
419 CJEU 11 December 2007, C-291/05, ECLI:EU:C:2007:771 (*Eind*), par. 44.
420 The CJEU had earlier ruled on the right to return for Union citizens in a case that concerned a Union citizen and her spouse (CJEU 7 July 1992, C-370/90, ECLI:EU:C:1992:296 (*Surinder Singh*).

3.4.5 Derived residence rights for non-EU and non-self-sufficient primary carers

The CJEU ruled in the cases of *Ibrahim*[421] and *Teixeira*[422] in 2010, by which time Directive 90/364 had been replaced by Directive 2004/38, which includes a right to education for children of migrant EU workers. Ms Ibrahim, a Somali national, had entered the UK to join her husband Mr Yusuf, a Danish national who worked in the UK. The couple had four children, all Danish nationals, and the eldest two children attended schools in the UK. At some point Mr Yusuf had stopped working, claimed social benefits and then later left the UK. Ms Ibrahim, who had never worked nor been self-sufficient and also did not have comprehensive health insurance, then filed for divorce. Ms Teixeira and her then husband, both Portuguese nationals, had entered the UK together, where they had a daughter. The couple later divorced, but both remained in the UK, where the daughter lived with her mother. Ms Teixeira was not self-sufficient. Both Ms Ibrahim and Ms Teixeira applied for housing benefit, but their requests were refused since they were not self-sufficient and therefore had no right to remain in the UK.

In both cases the CJEU issued a similar ruling, in which it referred to *Baumbast* and held that children of migrant or former migrant EU workers have a right to pursue education under Regulation 1612/68 and that this right has to be interpreted in line with the right to family life laid down in Article 8 ECHR. Those children consequently have the right to be accompanied by their primary carers. The CJEU added that those primary carers of EU citizen children attending schools in a member state have those rights solely on the basis of Regulation 1612/68, without any need to comply with the requirements laid down in Directive 2004/38; i.e. without the requirement to have sufficient means of subsistence or comprehensive health insurance. The CJEU also considered it irrelevant that the children had only started attending school when the migrant parent was no longer a worker. In the case of *NA*, the CJEU added that Regulation 1612/68 not only ensures that a worker's children can undertake and complete their education even if that worker ceases to be employed in the host member state, but also that the parent (i.e. the former migrant worker) is not required to reside in the host member state on the date when the child starts attending school or university, nor required to be present in that member state throughout the period of attendance at school or university.[423]

In this way, and purely because one of the parents had at some point been a worker within the meaning of Directive 2004/38, the children had access to very generous rights to education under Regulation 1612/68. And these rights, in turn, led to far-reaching derived residence rights for the children's non-EU parents. Family rights of EU workers' children

421 CJEU 23 February 2010, C-310/08, ECLI:EU:C:2010:80 (*Ibrahim*).
422 CJEU 23 February 2010, C-480/08, ECLI:EU:C:2010:83 (*Teixeira*).
423 CJEU 30 June 2016, C-115/15, ECLI:EU:C:2016:487 (*NA*), par. 59.

must be protected even if this becomes a burden on the member state's resources. Thus, the free movement rights of children who are Union citizens, and consequently their family rights, prevail over the interests of the state.

3.4.6 Derived residence rights for cross-border commuters

The last case to be discussed here is the case of *S. & G.*, which concerned two different but comparable matters.[424] The question arising here was whether a Union citizen may be reunited with his non-EU spouse (in the *G.* case) or mother-in-law (in the *S.* case) in the Union citizen's member state of nationality. Both Union citizens were cross-border commuters and so regularly travelled to another member state (Belgium) for work, while living in their member state of nationality (the Netherlands). While the Union citizens were in Belgium for work-related reasons, S. and G. took care of the Union citizens' (and, in the case of G., also her own) children.

The CJEU ruled that since the Union citizen had not actually moved to another EU member state, but merely travelled to that other member state, Directive 2004/38 was not applicable. Nonetheless, it ruled that cross-border commuters fell within the scope of Union law[425] and that the *Carpenter* reasoning could also be applied in these situations. According to the CJEU, the effectiveness of workers' right to freedom of movement may require a derived right of residence to be granted to a non-EU family member of the worker – a Union citizen – in the Union citizen's member state of nationality.[426] The CJEU then repeated that the purpose and justification of such a derived right of residence are based on the fact that refusing to allow the right would interfere with the exercising of the fundamental freedoms guaranteed by the TFEU.[427] While leaving it to the national courts to establish whether this was the case in these situations, the CJEU stated that if the non-EU family member takes care of the Union citizen's child, it follows from *Carpenter* that this is a relevant factor for national courts to take into account when examining whether refusing to grant a right of residence to the third-country national may discourage the Union citizen from effectively exercising his free movement rights.[428] According to the CJEU, it was also relevant that the child in *Carpenter* was being taken care of by the Union citizen's spouse. The mere fact that it may appear desirable for the child to be cared for by the Union citizen's mother-in-law is not therefore sufficient in itself to have such a dissuasive effect.[429]

In this case the CJEU again discussed the rationale behind the protection of family rights. If residence rights – thus the protection of the parent-child relationship – are necessary for

424 CJEU 14 March 2014, C-457/12, ECLI:EU:C:2014:136 (*S. & G.*).
425 CJEU 14 March 2014, C-457/12, ECLI:EU:C:2014:136 (*S. & G.*), par. 39.
426 CJEU 14 March 2014, C-457/12, ECLI:EU:C:2014:136 (*S. & G.*), par. 40.
427 CJEU 14 March 2014, C-457/12, ECLI:EU:C:2014:136 (S. & G.), par. 41.
428 CJEU 14 March 2014, C-457/12, ECLI:EU:C:2014:136 (S. & G.), par. 43.
429 CJEU 14 March 2014, C-457/12, ECLI:EU:C:2014:136 (S. & G.), par. 43.

the effectiveness of free movements rights, member states are also obliged to grant those rights to non-EU family members of Union citizens. While the CJEU reiterated that this may be the case if the non-EU family member takes care of the family's children, it made a clear distinction between the relationship between children and their grandmother, and children and their mother. The CJEU appears in this case, therefore, to intend the very strong protection afforded to family rights in free movement cases to be limited to the nuclear family. While the CJEU does not rule out EU law also covering the relationship between the children and their grandmother, it makes clear that more is required of relationships outside the nuclear family. However, this judgment does not clarify exactly what such relationships should then entail.

3.4.7 Concluding remarks: free movement cases

In the cases discussed above, the CJEU consistently applied the proportionality test. In assessing whether the national measure at issue constituted a disproportionate interference with the right to free movement, the CJEU brought family life arguments into the arena by allowing children's primary carers to reside in the host state with them or allowing children to reside with their parents and primary carers. The CJEU thus attaches importance to the social, emotional and material interdependence between family members.[430] The right to freedom of movement is one of the most fundamental elements of EU citizenship, and the CJEU acknowledges that the enjoyment of family life is inherent to the enjoyment of freedom of movement within the EU. In other words, if the protection of family rights is necessary in order to make EU rights effective, the CJEU holds that those rights derive from EU law. In these cases, therefore, the interests of the child, the parents and the Union coincide. Although this does not necessarily mean that EU citizen children or children with a right to reside in an EU member state are automatically entitled to have their third-country national parents residing with them, the CJEU's case law in cases concerning minor children has very much enhanced the various EU rights available to children.

3.5 EU residence rights for stationary Union citizens and their TCN family members?

While the outcome in the above line of cases at some point becomes rather predictable, the implications of these cases are far-reaching in terms of the boundaries of EU law as they show a relaxation both of the requirement for economic activity and the cross-border requirement.[431] But while the cross-border and economic links may have been very broad,

430 Stalford 2012, p. 49.

431 See Hofstotter 2005, p. 551 where he describes how the outcome in these line of cases are arguably appealing as to their outcome in the individual instance, the reasoning of the CJEU may be seen as merely instrumental to the result pursued.

in all the above cases the CJEU found a link that could attract the application of EU law.[432] The CJEU completed this development by abandoning the cross-border requirement entirely in the case of *Ruiz Zambrano*.[433] Nonetheless, whereas it was very clear in the previously discussed cases that the CJEU applied the principle of proportionality and that the right to respect for family life and the best interests of the child were consequently taken into account, it was not clear which test was applied in the *Ruiz Zambrano* series.

3.5.1 'Law-making' by the CJEU: the introduction of a new doctrine

The *Ruiz Zambrano* case concerned a Colombian couple living in Belgium and who applied for asylum. Although the Belgian authorities refused this application, the civil war in Colombia meant that the family was not expelled. During their stay in Belgium the couple had two children, who acquired Belgian nationality under Belgium's nationality law since Colombian law did not grant Colombian nationality to children born outside Colombia unless the parents took specific steps to obtain this for the children.[434] By acquiring Belgian nationality, the children acquired the status of Union citizens. In domestic proceedings concerning the father's unemployment benefit, the question arose as to whether Mr Ruiz Zambrano could claim a derivative right of residence under EU law by virtue of the fact that his children were Union citizens, and whether he should then be exempt from the requirement to have a work permit. Besides the Belgian authorities and the European Commission, seven other governments submitted observations. They all argued that since the children resided in the member state of which they were nationals and had never left the territory of that member state, their situation was not one of those envisaged by the freedoms of movement and residence guaranteed under EU law.

The CJEU agreed that the minor children, who had lived only in Belgium, had not exercised their right of free movement within the European Union and so could not derive any rights from the favourable provisions of Directive 2004/38. However, the CJEU went on to state, as in earlier cases, that the Ruiz Zambrano children enjoyed the status of Union citizens and that citizenship of the Union is intended to be the fundamental status of nationals of the member states. On this basis the Court concluded that:

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432 See for a critique to this approach to determining what constituted a cross-border situation Kochenov 2011, pp. 69-74 with further references.

433 The CJEU had done so earlier in *Rottmann*, a case that concerned a person who was liable to lose the status of Union citizen and thus the rights attached. The CJEU concluded that this situation fell within the ambit of Union law by reason of its nature and its consequences and noted that in such a situation member states must, when exercising their powers, have due regard to Union law. According to the CJEU national courts should therefore establish whether the withdrawal decision at issue observes the principle of proportionality (CJEU 2 March 2010, C-135/08, ECLI:EU:C:2010:104 (*Rottmann*).

434 On the basis of Belgian nationality law at that time, Belgian nationality was granted to those who would otherwise become stateless. And since the parents had not taken the necessary steps to provide the children with Colombian nationality this would have happened to the Ruiz Zambrano children. Hence, just as in *Zhu and Chen*, the parents had willingly created the situation that their children acquired Belgian nationality and therewith Union citizenship.

> *Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.*[435]

In this remarkably short judgment, the CJEU decided that refusing to grant a right of residence or work permit to a non-EU parent with dependent minor children in the member state where those children are nationals and reside would indeed have such prescribed effect.[436] The CJEU said that refusing a right of residence in such situations could be assumed to result in such children having to leave the territory of the Union in order to accompany their parents.[437] In those circumstances, the Union citizens would then be unable to exercise the substance of the EU rights conferred on them by virtue of their status as EU citizens.[438] This judgment made clear that EU citizens do not always need to exercise their free movement rights in order to enjoy EU family rights as, in this case, a cross-border link was entirely absent.

The *Ruiz Zambrano* case appears very clear, both in its language and its outcome. Nonetheless, the CJEU laid down a very open criterion in this case by referring to the deprivation of the substance of EU citizenship rights and the right to reside within EU territory. In line with the judgments discussed earlier, the CJEU's approach in *Ruiz Zambrano* moved in the direction of a further enhancement of citizenship rights.[439] The CJEU's reasoning, however, was very limited; alternatively, the CJEU did not deem it necessary in this particular case to provide more guidelines or, considering that cases are based upon consensus, could not agree on more detailed guidelines. Due to its broad formulation, the *Ruiz Zambrano* formula could potentially be applied to any situation in which a Union citizen – even an adult – was obliged to leave the Union. Families in which only one of the parents faced expulsion from the EU member state could potentially fall within the scope of this criterion, while partners, spouses or guardians could also possibly benefit from this judgment. The CJEU left it to future cases to shed more light on the types of situations and family relationships covered by this new doctrine.

435 CJEU 8 March 2011, C-34/09, ECLI:EU:C:2011:124 (*Ruiz Zambrano*), par. 42.
436 CJEU 8 March 2011, C-34/09, ECLI:EU:C:2011:124 (*Ruiz Zambrano*), par. 43.
437 CJEU 8 March 2011, C-34/09, ECLI:EU:C:2011:124 (*Ruiz Zambrano*), par. 44.
438 CJEU 8 March 2011, C-34/09, ECLI:EU:C:2011:124 (*Ruiz Zambrano*), par. 44.
439 CJEU 20 September 2001, C-184/99, ECLI:EU:C:2001:458 (*Rudy Grzelczyk*), par. 31, CJEU 17 September 2002 C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R.*), par. 82, CJEU 2 October 2003, C-148/02, ECLI:EU:C:2003:539 (*Garcia Avello*), par. 22, CJEU 19 October 2004, C-200/02, ECLI:EU:C:2004:639 (*Zhu and Chen*), par. 25 and CJEU 2 March 2010, C-135/08, ECLI:EU:C:2010:104 (*Rottmann*), par. 43.

The CJEU's decision in the concrete case, which left no room for the national courts, created the impression that the question of when a Union citizen is compelled to leave the Union is a simple factual question. The CJEU based its reasoning solely on Article 20 TFEU and remained silent on the role of the right to family life. Nevertheless, this reasoning is implicitly based on assumptions about the protection of family ties since no Union citizen is ever literally forced to leave the territory of the EU. Not even minor children, since they can always be left in the care of other family members or friends, or placed in foster care or otherwise be left in the care of the state. While this case, in principle, concerned only Mr Zambrano, the CJEU simply mentioned that refusing a right of residence would cause the children to have to leave the territory of the Union in order to accompany their *parents.* The CJEU did not seem to care that this case, in principle, concerned only Mr Zambrano's social security rights, while it ignored Mrs Zambrano's position entirely. Although the CJEU did not make this explicit, it seems from this case, therefore, that whether a third party in the member state of which the children are a national could care for the children is not relevant. The only reasonable option in such a situation is for children to be accompanied by *both* their parents.

The type of situations actually covered by the judgment and how national courts should determine whether a Union citizen is being deprived of EU citizenship rights, i.e. when a Union citizen is compelled to leave the Union, remained unclear after *Ruiz Zambrano*. Another issue that therefore also remained unclear was whether fundamental rights, in particular the right to family life and the best interests of the child, must be taken into account by member states in establishing whether a Union citizen is being deprived of his or her EU citizenship rights. This vagueness resulted in a flow of case law requesting clarification, and the CJEU has since ruled in several follow-up cases.

In the next part, the significance of the *Ruiz Zambrano* case law series will be discussed. In principle, fundamental rights, including the right to respect for family life, are applicable only *after* it has been established that a particular situation is covered by EU law. However, the analysis of the case law will reveal that, in this series of cases, elements of the right to family life, such as the actual quality of the relationship between family members, were used in order to establish whether EU law covers a particular situation *to begin with*.

3.5.2 Dependency between a Union citizen and third-country national as the decisive factor

Dereci a.o. was a much-awaited CJEU ruling.[440] This joint case involved five different applicants, all of whom were third-country nationals wishing to reside with their Austrian family members, but where the family constellations differed.[441] Again, the Austrian authorities, the European Commission and seven other governments argued that the specific families' situations did not fall within the scope of EU law. The CJEU held that the criterion for the denial of genuine enjoyment of the substance of citizenship rights "refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole".[442] According to the CJEU, this criterion is specific in character.[443] The CJEU then continued as follows:

> *Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.*[444]

According to the CJEU, the question of whether the right to the protection of family life necessitates the granting of a right of residence had to be tackled within the framework of the provisions on the protection of fundamental rights. The CJEU further explained the role of fundamental rights and stated that the Charter and Article 8 ECHR have the same scope. The Charter, however, is applicable only when the situation of the applicants in the proceedings falls within the scope of EU law.[445] If not, Article 8 ECHR comes into play.

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440 CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (*Dereci a.o.*). The CJEU had in the meantime ruled in the case of *McCarthy*. This case concerned the refusal to grant residence rights to the Jamaican husband of Mrs. McCarthy, a national of both the UK and Ireland. The CJEU held that in this case the national measure at issue did not in any way deprive Mrs. McCarthy of the substance of citizenship rights or of her right to move and reside freely within the territory of the EU. Mrs. McCarthy was not obliged to leave the territory of the EU. The CJEU thereto mentioned that Mrs. McCarthy enjoyed, under a principle of international law, an unconditional right of residence in the United Kingdom due to her nationality of that country. As far as the genuine enjoyment test is concerned it apparently made a difference that *Ruiz Zambrano* concerned minor children whereas *McCarthy* concerned a spouse, since the Ruiz Zambrano children likewise had an unconditional right of residence in Belgium due to their nationality of that country but they needed their parents in order to make that right effective (CJEU 5 May 2011, C-434/09, ECLI:EU:C:2011:277 (*Shirley McCarthy*) par. 49-50.

441 Mr. Dereci was the only applicant who had minor children. Mr. Dereci was also the only one who besides an appeal to Article 20 TFEU had invoked the Turkish Association regime in order to be granted leave to remain in Austria. The CJEU ruled that Mr. Dereci could indeed derive a right of residence on the basis of this regime. Hence, the only applicant in this case with minor children had a right to reside on the basis of EU law.

442 CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (*Dereci a.o.*), par. 66.

443 CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (*Dereci a.o.*), par. 67.

444 CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (*Dereci a.o.*), par. 68.

445 CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (*Dereci a.o.*), par. 72.

The *Dereci a.o.* case was the first case in the *Ruiz Zambrano* series in which the CJEU left it to the national court to determine whether the refusal to grant residence permits would violate EU citizenship rights. Although this development should be welcomed, the CJEU unfortunately did not provide much more clarity about how the national court should test whether the persons in question have "genuine enjoyment of the substance of their EU rights". In stating that "the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole", the CJEU seemed to suggest that as long as a Union citizen is able to move to another member state and thus make use of his free movement rights, family life can also be enjoyed that way.[446] As long as a Union citizen can move to another member state, that Union citizen is not being deprived of the genuine enjoyment of EU rights. In the case of the Ruiz Zambrano children, however, the CJEU did not consider moving to another member state to be an option. Although no reasons why the Ruiz Zambrano family was unable to reside in another member state were given, it can be assumed that this was because both parents were third-country nationals. The CJEU thus attached much weight to the issue of dependency.

Dereci a.o. was also the first judgment in which the CJEU dealt explicitly with the right to family life and fundamental rights more generally. Unfortunately the part of the judgment in which the CJEU explained the role of fundamental rights in more detail is puzzling. The CJEU concluded that the Charter can be invoked only after it has been established that EU law applies, i.e. when it has been established that the EU citizen will have to leave the Union. After, however, it has been established that the *Ruiz Zambrano* criterion has been fulfilled, a right to reside is granted and the invoking of fundamental rights will in most cases be superfluous. The role of fundamental rights thus remained unclear. On this occasion, and contrary to previous judgments, the CJEU left a broad scope of discretion to the national court. The national court has to assess on an individual basis whether a Union citizen will have to leave the territory of the EU. Indeed it may be true that a full test of fundamental rights comes into play only once it has been determined that no *Ruiz Zambrano*-like situation exists. But since establishing dependency requires a particular care relationship to be evaluated, elements of the right to family life must play a role in determining whether there is a *Ruiz Zambrano* situation to begin with. This assessment, however, falls outside the scope of EU law. The interplay between dependency and family life is explained further in the next cases in the series.

446 This suggestion appears, although even more implicit, in *McCarthy* (CJEU 5 May 2011, C-434/09, ECLI:EU:C:2011:277 (*Shirley McCarthy*).

3.5.3 Connection between *Ruiz Zambrano* situations and Union citizen's freedom of movement

The CJEU delivered its next judgment in the series on 8 November 2012. This was in the case of *Yoshikazu Iida*,[447] which revolved around a Japanese father of a daughter with Japanese, German and American nationality. Mr Iida lived in Germany, while his spouse and daughter had relocated to Vienna. The parents had joint custody of their daughter, and the father and daughter still had a good relationship. Although Mr Iida's residence permit based on remaining with his spouse was not renewed, he was granted a German residence permit based on his job on a contract of unlimited duration in that state. This permit could be renewed. What was new in this situation was that the residence card that Mr Iida requested was the type pertaining to a family member of a Union citizen and was requested in his daughter's member state of origin rather than in the state where she currently lived.

The CJEU first made a more general connection between the *Ruiz Zambrano* situation and the freedom of movement. It explained that the *Ruiz Zambrano* situation is covered by legislation on third-country nationals' right of entry and residence outside the scope of the directives; in other words, a situation covered by the national legislation of the member states only. However, while the *Ruiz Zambrano* situation in principle falls within the competence of the member states, it can nonetheless have a connection with a Union citizen's freedom of movement. This applies in cases where denying residence to the parent on whom the child is dependent would amount to interference with that freedom of movement.[448] According to the CJEU, this was not the case in *Iida*. Apart from the fact that Mr Iida was not seeking a right of residence in the host member state in which his spouse and his daughter – the Union citizens – resided, the CJEU also considered it relevant that he had a residence right under national law, that he was in principle eligible for the status of long-term resident on the basis of Directive 2003/109[449] and that the absence of a right of residence for the father under EU law did not obstruct his daughter from exercising her right of free movement.[450] On the contrary, the daughter had moved to Austria. Therefore, it could not validly be argued that she was compelled to leave the Union and was thus denied genuine enjoyment of the substance of her EU citizenship rights. The CJEU also mentioned that a purely hypothetical prospect of the right of freedom of movement being obstructed sometime in the future does not establish a sufficient connection with EU law. As there was no linkage with EU law, the CJEU, referring to Article 51 of the Charter, refrained from considering the rights in the Charter.

447 CJEU 8 November 2012, C-40/11, ECLI:EU:C:2012:691 (*Yoshikazu Iida*).
448 CJEU 8 November 2012, C-40/11, ECLI:EU:C:2012:691 (*Yoshikazu Iida*), para. 71 & 72.
449 CJEU 8 November 2012, C-40/11, ECLI:EU:C:2012:691 (*Yoshikazu Iida*), para. 73-75.
450 CJEU 8 November 2012, C-40/11, ECLI:EU:C:2012:691 (*Yoshikazu Iida*), par. 77.

Just as in *Dereci a.o.,* the CJEU seemed to emphasize the division of competences between the EU and the member states as laid down in Article 51 of the Charter. Again the CJEU focused on the specific circumstances of the case and did not deem it necessary for this case to provide further guidance on the genuine enjoyment criterion. What became clear, however, is that when a Union citizen child has clearly been able to move freely within EU territory, the criterion of being denied genuine enjoyment is not fulfilled. Likewise, since Mr Iida already had very strong residence rights, the CJEU did not focus on the question of when something can generally be considered a purely hypothetical prospect. This case made clear the very strong parallels between the *Ruiz Zambrano* situation and other free movement cases, such as *Zhu and Chen* or *Eind,* outside the scope of the directives. The question in all those situations is whether a national measure amounts to interference with the freedom of movement.

3.5.4 CJEU further explains the element of dependency

Next up in the series was *O. & S. and L.*, a joint case brought by two applicants.[451] Both cases concerned third-country nationals with permanent resident status in Finland. Both had Finnish children with their Finnish ex-partners. Both had also remarried a third-country national, O. and M. respectively (who had Ivorian and Algerian nationality respectively), with whom they also had children. Those children had Ghanaian and Algerian nationality respectively. The various children had a right to reside in Finland on the basis of their mothers' permanent residence status. Hence, only Mr O. & Mr M. had no right to remain in Finland. Although they had both applied for a residence permit on the basis of their marriage, their applications were refused on the ground that they did not have sufficient means of subsistence. Unlike in earlier cases, where the third-country national was the parent of the Union citizen child, neither Mr O. nor Mr M. was the biological father of the EU citizen concerned. And neither Mr O. nor Mr M. had custody of the Union citizen children. The main issue at hand, therefore, was whether the lack of residence status of Mr O. and Mr M. caused their partners and the children under their partners' custody (including the children with EU citizenship) to be obliged to leave the territory of the Union.

The CJEU left it to the referring court to examine all the circumstances of the case in order to determine whether citizenship rights were being undermined. The CJEU held that either law or fact could cause the Union citizen children to be compelled to leave the Union. For both aspects, the CJEU offered relevant factors that the member state should take into account. Where it concerned the law, the CJEU specifically mentioned the permanent residence status of the Union citizens' mothers. The CJEU concluded that the mothers' permanent residence status meant there was no obligation either for them or for the Union

451 CJEU 6 December 2012, C-356/11 and C-357/11, ECLI:EU:C:2012:776 (*O., S. and L.*).

citizens dependent on them to leave the territory of that member state or the European Union as a whole.[452] The CJEU went on to examine whether the Union citizens concerned would, in fact, be unable to exercise genuine enjoyment of their EU rights. The CJEU considered it relevant in this respect that the mothers had sole custody of the Union citizen children and that the children were part of reconstituted families.

With regard to the mothers' sole custody, the CJEU noted that since both mothers had sole custody of the Union citizens, a decision by them to leave Finland in order to accompany their new partners would have the effect of depriving their Union citizen children of all contact with their Finnish (biological) fathers. However, the CJEU added that this would be an issue only if the Union citizen children indeed still had contact with their Finnish fathers.[453] If the mothers decided to stay in Finland in order to preserve their Finnish children's relationship with their Finnish fathers, this would have the effect of harming the relationship of the other children, who were third-country nationals, with their biological fathers.[454] The CJEU then turned to the relationship between the children with Union citizenship and their mothers' new partners and noted the lack of legal, economic or emotional dependency between them.[455] That, according to the CJEU, pointed to the conclusion that denying a residence permit would not automatically lead to the EU citizens having to leave the EU.[456] However, as said, this issue was ultimately left to the member state to decide. Hence, as the Advocate General had already observed, the degree of actual dependency between the Union citizen and the third-country national is of utmost importance.[457]

The CJEU furthermore repeated that even if the refusal to grant residence rights did not lead to the denial of effective enjoyment of citizenship rights, member states are nevertheless obliged to examine whether a residence permit should be granted on other grounds. A relevant factor in this case, in contrast to earlier cases, was that it concerned family reunification with third-country nationals. This meant that Directive 2003/86, and therefore also Articles 7 and 24 of the Charter, applied. The Court did not mention what this would entail for the particular family relationships at issue, but instead left this to the referring court to decide. The CJEU did, however, state, while referring to *Chakroun*, that promoting family reunification is the aim and purpose of the Directive, and that the objective and the effectiveness of that Directive should not be undermined. [458]

452 CJEU 6 December 2012, C-356/11 and C-357/11, ECLI:EU:C:2012:776 (*O., S. and L.*), par. 50.
453 CJEU 6 December 2012, C-356/11 and C-357/11, ECLI:EU:C:2012:776 (*O., S. and L.*), par. 51.
454 CJEU 6 December 2012, C-356/11 and C-357/11, ECLI:EU:C:2012:776 (*O., S. and L.*), par. 51.
455 CJEU 6 December 2012, C-356/11 and C-357/11, ECLI:EU:C:2012:776 (*O., S. and L.*), para. 51 & 56.
456 CJEU 6 December 2012, C-356/11 and C-357/11, ECLI:EU:C:2012:776 (*O., S. and L.*), par. 56.
457 Opinion A.G. Bot in *O., S. and L.*, (Joined Cases C-356/11 and C-357/11, ECLI:EU:C:2012:595), par. 44.
458 CJEU 4 March 2010, C-578/08, ECLI:EU:C:2010:117 (*Chakroun*).

Despite its rulings in earlier cases concerning Article 51 of the Charter, the CJEU also explicitly stated in this case that the circumstances to be taken into account in order to determine whether a Union citizen is in fact being deprived of the substance of rights include elements of the right to family life. Aside from legal and economic dependency, the CJEU mentioned emotional dependency as playing a role in determining whether this is the case. Judicial determination of the extent to which a Union citizen is emotionally dependent on a third-country national necessarily requires an evaluation of the presence of family life. The CJEU held, in addition, that family relations and custody rights are factors to be taken seriously. Thus the question of whether a national measure (such as the refusal to grant a residence permit) compels a Union citizen to leave EU territory is not a question that can be answered by a simple 'yes' or 'no'. Yet this case also shows that the mere desirability of being able to live together in the host member state is indeed not enough to assume that Article 20 TFEU will otherwise be violated. Where the question at stake is whether a *Ruiz Zambrano*-like situation is covered by EU law, the issue would appear not to be about the interdependency between *all* the family members involved, but instead only about the dependency between the Union citizen and the third-country national. This is different from the fundamental rights test – the right to respect for family life – that would be applied after it has been established that a situation falls within the scope of EU law. However, elements of the right to family life continue to play a role in determining whether a Union citizen is compelled to leave. The need to assess the individual's family circumstances has elements in common with the EU's proportionality test, in which the national measure (i.e. the refusal to grant residence rights) needs to be balanced against the individual's right to free movement.

3.5.5 Mere presence of parent with Union citizenship not relevant

The next case was the case of *Alokpa and Moudoulou*.[459] Mrs Alokpa was a Togolese national who entered Luxembourg, where she gave birth to twins who were in need of medical care. For this reason she was granted leave to remain for a few months. Mr Moudoulou, a French national, had recognized the children, who consequently acquired French nationality and were issued with French passports and identity cards. The children had no contact with their father, however, as Mrs Alokpa and her children remained living in a hostel in Luxembourg, where they were entirely dependent on the state. The question referred was whether Mrs Alokpa, who had sole responsibility for her minor children, could obtain a derived right of residence in Luxembourg and whether refusing her such a right would deprive the children of the enjoyment of their EU rights.

459 CJEU 10 October 2013, C-86/12, ECLI:EU:C:2013:645 (*Alokpa and Moudoulou*). *Ymeraga and Ymeraga-Tafarshiku* was the case before *Alokpa and Moudoulou*. *Ymeraga* however, is left out of the discussion since there were no minors involved. The case concerned family reunion between Mr. Kreshnik Ymegara and his parents and two brothers. The CJEU's reasoning is in line with the earlier *McCarthy* ruling in which the Union citizen was not dependent on the third-country national. This case was thus yet another confirmation that for an adult Union citizen it is extremely difficult to fall within the scope of the genuine enjoyment test based on Art. 20 TFEU (CJEU C-87/12, ECLI:EU:C:2013:291).

In this case, the children resided in a state other than the state of their nationality. Hence, the CJEU ruled that if Mrs Alokpa's children fulfilled the conditions set out in Article 7(1) of Directive 2004/38 (in particular the requirement for sufficient resources for themselves and their mother), they would have the right to reside in the host member state, in this case Luxembourg, on the basis of Article 21 TFEU.[460] If these conditions were satisfied, Mrs Alokpa, too, as the minor children's primary carer should also be granted a right of residence.[461] With regard to Article 20 TFEU, the CJEU followed the opinion of the Advocate General and held that Mrs Alokpa, as the sole carer since birth of the two children with French nationality, had the benefit of a derived right to reside in France.[462] The Luxembourg authorities' refusal to grant her a right of residence did not result, therefore, in her children being obliged to leave the territory of the European Union as a whole.[463]

This judgment confirmed what *Dereci a.o.* and *Iida* already seemed to suggest, namely that if a Union citizen is able to move to another member state and thus make use of his or her right of free movement there, family life can be enjoyed in that way. What is particularly interesting about this judgment is that the CJEU paid no attention to the existence of a French father who could be capable of taking care of the children. Leaving the children in the father's care in a case in which there is no family life between the father and the children evidently cannot be considered an appropriate alternative for ensuring a citizen child's right to reside within the EU. The fact that CJEU did not address this as a specific question makes it all the more evident that the CJEU attaches weight to the actual quality of the relationship between the child and its carer. This again shows the situations in which, and how, family life arguments play a role in determining whether a child is compelled to leave the Union.

3.5.6 Expulsion of parents with criminal record must be proportional

On 13 September 2016 the CJEU ruled in the cases of *CS* and *Rendón Marín.*[464] These were two different, but similar cases. The case of *CS* involved a Moroccan national who had entered the UK following her marriage to a UK national and who was later granted indefinite leave to remain. A child was born with British nationality, and CS was this minor child's sole carer. CS was subsequently convicted of a criminal offence and sentenced to twelve months' imprisonment. After completing her prison sentence she applied for asylum, but this request was denied and she was subsequently ordered to be deported. *Rendón Marín*

460 CJEU 10 October 2013, C-86/12, ECLI:EU:C:2013:645 (*Alokpa and Moudoulou*), para. 24-27.
461 CJEU 10 October 2013, C-86/12, ECLI:EU:C:2013:645 (*Alokpa and Moudoulou*), para. 28-31.
462 CJEU 10 October 2013, C-86/12, ECLI:EU:C:2013:645 (*Alokpa and Moudoulou*), par. 34.
463 CJEU 10 October 2013, C-86/12, ECLI:EU:C:2013:645 (*Alokpa and Moudoulou*), par. 35.
464 CJEU 13 September 2016, C-304/14, ECLI:EU:C:2016:674 (*CS*) and CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*). In the earlier case of *NA* the CJEU already found a right to reside on the basis of secondary EU legislation and therefore found Article 20 TFEU not to be applicable (CJEU 30 June 2016, ECLI:EU:C:2016:487, para. 73-74).

concerned a Colombian father who lived in Spain, where he had been granted sole care and custody of his two minor children with Union citizenship (one had Spanish and the other had Polish nationality). Although Mr Rendón Marín had been sentenced to a term of nine months' imprisonment, this sentence was provisionally suspended for two years. He applied for a residence permit on the basis of exceptional circumstances, but this request was refused because of his criminal record.

Although Mr Rendón Marín's son had never exercised his right of freedom of movement and had always resided in the member state of which he was a national, his daughter was a Polish national who resided in Spain. In this case, therefore, the CJEU not only analysed whether Mr Rendón Marín had a residence right on the basis of Article 20 TFEU, but first whether he had a residence right on the basis of Article 21 TFEU and Directive 2004/38. If so, and providing the daughter had sufficient resources (through her father) and comprehensive health insurance, Mr Rendón Marín would in principle, according to the CJEU, have a derived right to reside in Spain.[465] Although this right could be limited under Articles 27 and 28 of the Directive, the CJEU noted that public policy and public security, as justifications for derogating from the right of residence of Union citizens or members of their families, must be interpreted strictly.[466] Hence, such a decision must be based on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or public security.[467] The CJEU then stated that, in order to determine whether an expulsion measure is proportionate, account should be taken of the criteria set out in Article 28(1) of the Directive, namely the length of time during which the individual concerned has resided in the host member state's territory; his age, health, family and economic situation; his social and cultural integration into the host member state, and the extent of his links with his country of origin.[468] The gravity of the offence must also be assessed.[469] Thus, the CJEU held, account should be taken of the fundamental rights, in particular the right to respect for private and family life, as laid down in Article 7 of the Charter, in conjunction with the obligation to take into consideration the child's best interests, as recognized in Article 24(2) of the Charter.[470] Consequently, national legislation that, on the sole ground that the third-country national has a criminal record, automatically refuses a residence permit to a third-country national who is the parent and sole carer of one or more minor Union citizens is in violation of Article 21 TFEU and Directive 2004/38.[471]

465 CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), para. 45-53 where the CJEU also refers to CJEU 19 October 2004, C-200/02, ECLI:EU:C:2004:639 (*Zhu and Chen*).
466 CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 58.
467 CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 60.
468 CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 62.
469 CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 62.
470 CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 66.
471 CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 67.

With regard to Article 20 TFEU, the CJEU ruled similarly in both *CS* and *Rendón Marín*, holding that it indeed appeared that both parents, as sole carers for Union citizens, fell within the scope of Article 20 TFEU and in principle had a right to remain.[472] However, the CJEU continued by stating that Article 20 TFEU does not affect member states' opportunity to derogate from this right for reasons of public policy or public security.[473] By analogy with Article 21 TFEU and Directive 2004/38, the CJEU then assessed whether residence rights under Article 20 TFEU could be limited. The CJEU stressed that a criminal record provides an insufficient basis for concluding the existence of a genuine, present and sufficiently serious threat to public policy or public security. The referring court must specifically assess all the current and relevant circumstances of the case in the light of the principle of proportionality, the child's best interests and fundamental rights, in particular the right to family life.[474] The CJEU then mentioned the factors to be taken into account in such an assessment, namely the personal conduct of the individual concerned, the length and legality of his residence in the territory of the member state concerned, the nature and gravity of the offence committed, the extent to which the person currently represents a danger to society, and the age of the children at issue and their state of health, as well as their economic and family situation, i.e. the extent to which they are dependent on their parent.[475] The CJEU referred here to the Strasbourg case of *Jeunesse*.[476] Consequently it is only in exceptional circumstances that member states may derogate from the rights granted by Article 20 TFEU.

The CJEU's choice first to analyse whether Mr Rendón Marín had a residence right on the basis of Article 21 TFEU and Directive 2004/38 and only then on the basis of Article 20 TFEU was in line with all its earlier judgments.[477] Article 20 TFEU comes into play only if there is no option to rely on secondary free movement legislation. *Rendón Marín* was the first case after *Dereci a.o.* in which it became clear when invoking fundamental rights is not superfluous even after it has been established that a certain situation falls within the scope of Article 20 TFEU: namely in situations where it has been established that a particular situation is covered by the *Ruiz Zambrano* criterion, but a member state has sought to limit the attached rights. The CJEU came up with a test for possible derogations of the rights

472 CJEU 13 September 2016, C-304/14, ECLI:EU:C:2016:674 (*CS*), para. 32-33 and CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), para. 78-80.

473 CJEU 13 September 2016, C-304/14, ECLI:EU:C:2016:674 (*CS*), par. 36 and CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 81.

474 CJEU 13 September 2016, C-304/14, ECLI:EU:C:2016:674 (*CS*), par. 41 and CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 85.

475 CJEU 13 September 2016, C-304/14, ECLI:EU:C:2016:674 (CS), par. 42 and CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*), par. 86.

476 ECtHR 3 October 2014, Appl. no. 12738/10 (*Jeunesse v. the Netherlands*).

477 CJEU 5 May 2011, C-434/09, ECLI:EU:C:2011:277 (*Shirley McCarthy*), CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (*Dereci a.o.*), CJEU 8 November 2012, C-40/11, ECLI:EU:C:2012:691 (*Yoshikazu Iida*), CJEU 10 October 2013, C-86/12, ECLI:EU:C:2013:645 (*Alokpa and Moudoulou*) and CJEU 30 June 2016, C-115/15, ECLI:EU:C:2016:487 (*NA*).

granted by Article 20 TFEU, and did so by analogy with Directive 2004/38. *Rendón Marín* confirmed the CJEU's ruling in the case of *Iida*. Although this situation in principle falls outside the scope of the Directives, it can nonetheless have a connection with a Union citizen's freedom of movement. Once again, the CJEU made clear how much importance it attaches to the family rights of Union citizens, not only by referring to Articles 7 and 24(2) of the Charter, but also by referring to a Strasbourg case in which the ECtHR stressed the rights of the child in situations involving the expulsion of a parent.

Rendón Marín was also the first case in the series in which the national authorities invoked public interest, public policy or public security as justification for the national measure at issue, and where the CJEU consequently conducted an assessment of the national measure, with reference to the principle of proportionality. However, this case also shows that those derogation grounds are subject to strict scrutiny. Free movement of Union citizens is the standard; hence the state has to prove an actual threat to its public security if it wishes to derogate from this, while member states are also obliged to carefully consider the child's best interests and the fundamental right to respect for family life.

3.5.7 Right to family life relevant for the expulsion of carer parents of stationary EU citizen child

Lastly, the CJEU ruled in the case of *Chavez-Vilchez*.[478] This long-awaited judgment shed more light on the question that had remained unclear after *Ruiz Zambrano* and all the cases that followed, namely whether the *Ruiz Zambrano* criterion also applies in situations where one parent has a right to reside, but the other parent does not.

Chavez-Vilchez concerned eight different applicants, all of whom were third-country nationals and mothers of one or more children who had Dutch nationality because of their fathers being Dutch nationals. The children had all been recognized by their fathers, but lived primarily or exclusively with their mothers. However, there were also differences between the applicants regarding the relationships of the parents and children in terms of custody rights and contributions to costs of support, as well as the mothers' situations regarding the right to reside in the EU. And whereas Ms Chavez-Vilchez and her child had made use of their right to free movement, the minor children of the seven other mothers had resided in the Netherlands since birth and had thus not exercised their right to free movement.

The Dutch authorities had refused to grant the mothers social assistance and child benefit owing to their lack of residence status. During the domestic proceedings against those refusals, the Dutch Central Appeals Court decided to refer questions to the CJEU. The

478 CJEU 10 May 2017, C133/15, ECLI:EU:C:2017:354 (*Chavez-Vilchez*).

referring court wanted to know whether the mothers could acquire a right of residence under Article 20 TFEU and, more specifically, how important it was that the child had a father who resided either in the Netherlands or the EU. The referring court also wanted to know whether it was up to the third-country national to prove that the EU parent was not able to assume sole responsibility for caring for the child. The Dutch authorities assumed that *Ruiz Zambrano* was applicable only in situations where the EU parent is not in a position, on the basis of objective criteria, to care for the child because, for example, of being in prison or deceased. Where this is not the case, it is up to the third-country national parent to demonstrate that the child will be compelled to follow that parent abroad. The Dutch state deemed it irrelevant, for example, that the third-country national parent was responsible for the child's primary day-to-day care, that there was little if any contact between the child and his or her EU parent, that the EU parent was not willing to take care of the child and that the EU parent had no rights of custody over the child.[479] Regarding the last point, the Dutch authorities maintained that *Ruiz Zambrano* applied only after an application by the EU parent for custody, or even joint custody, had been dismissed by the courts.

Once more, the CJEU stated that since Chavez-Vilchez and her child had exercised their right to free movement, their case should first be analysed in the light of Article 21 TFEU and Directive 2004/38.[480] According to the CJEU, it was for the Dutch state to establish whether Ms Chavez-Vilchez should be granted a derived right of residence on this basis. If not, just as for the other mothers, the question then was whether such a right should be granted on the basis of Article 20 TFEU.

Regarding Article 20 TFEU, the CJEU held that, in such cases, it is important to determine which parent is the primary carer of the child and whether there is indeed a relationship of dependency between the child and the third-country national parent. As part of that assessment, account must be taken of the right to respect for family life and the best interests of the child, as stated in Articles 7 and 24(2) respectively of the Charter of Fundamental Rights of the European Union.[481] The CJEU added that the existence of a Union citizen parent who is actually able and willing to assume sole responsibility for the child's primary day-to-day care is a relevant factor, but does not in itself constitute sufficient grounds for concluding that the child would not be compelled to leave the Union if the third-country parent were to be refused a right of residence. In order to reach such a conclusion, while also considering the best interests of the child, account must be taken of all the specific circumstances, including the child's age and physical and emotional development, the

479 CJEU 10 May 2017, C133/15, ECLI:EU:C:2017:354 (*Chavez-Vilchez*), para. 36-37.

480 CJEU 5 May 2011, C-434/09, ECLI:EU:C:2011:277 (*Shirley McCarthy*), CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (*Dereci a.o.*), CJEU 8 November 2012, C-40/11, ECLI:EU:C:2012:691 (*Yoshikazu Iida*), CJEU 10 October 2013, C-86/12, ECLI:EU:C:2013:645 (*Alokpa and Moudoulou*) and CJEU 30 June 2016, C-115/15, ECLI:EU:C:2016:487 (*NA*) and CJEU 13 September 2016, C-165/14, ECLI:EU:C:2016:675 (*Rendón Marín*).

481 CJEU 10 May 2017, C133/15, ECLI:EU:C:2017:354 (*Chavez-Vilchez*), par. 70.

extent of the child's emotional ties to both parents, and the risks that separation from the third-country parent could entail for the child's equilibrium.[482]

The CJEU then stated that Article 20 TFEU does not preclude member states from requiring third-country nationals who are responsible for the primary day-to-day care of a Union citizen child to prove that refusing that third-country national a right of residence would oblige the child to leave EU territory. The CJEU added that, based on the evidence provided by the third-country national, member states must then undertake the necessary enquiries in order to assess whether a refusal would indeed have such consequences in the light of all the specific circumstances.[483] Despite the burden of proof being on the third-country parent, the CJEU stated that national authorities must also ensure that the application of national legislation on the burden of proof in such cases does not undermine the effectiveness of EU citizenship rights. The CJEU held that national authorities have to find out where the Union citizen parent lived, whether that parent is actually able and willing to assume sole responsibility for the daily care of the child, and whether the child is dependent on the third-country parent to such an extent that the child will be compelled to leave the Union.[484]

In this ruling, the CJEU mentioned that all the circumstances should be taken into account and assessed in a way that reflects the best interests of the child and the relevant individuals' right to respect for family life. The CJEU gives weight to the issue of dependency; as this case again very clearly shows, this concerns the actual quality of the relationship existing between the third-country parent and the child. This ruling clarifies the question that had long remained unanswered, namely whether *Ruiz Zambrano* could be applied in cases where one parent had a right to reside and the other did not. This ruling means that third-country national parents may indeed rely on Union law despite the existence of another parent who may formally be in a position to take care of the child alone. The CJEU unequivocally confirmed in this ruling that, as the Court sees it, strong protection of the close affective bonds existing between parents and minor children is a necessary prerequisite for effective enjoyment of Union rights. Where splitting up families would hamper their opportunities to exercise the right to freely move and reside within the EU, the CJEU gives due weight to the right of the parent and child to remain together.

3.5.8 Concluding remarks on Article 20 TFEU

The above cases highlight that the question of when the CJEU assumes family life between parents and children to exist is inseparable from the question of the circumstances in which the CJEU protects parent-child relationships in cases based on Article 20 TFEU.

482 CJEU 10 May 2017, C133/15, ECLI:EU:C:2017:354 (*Chavez-Vilchez*), par. 71.
483 CJEU 10 May 2017, C133/15, ECLI:EU:C:2017:354 (*Chavez-Vilchez*), para. 76-78.
484 CJEU 10 May 2017, C133/15, ECLI:EU:C:2017:354 (*Chavez-Vilchez*), para. 76-77.

The essential question in these cases is between whom a relationship of dependency exists and, if such a relationship exists, whether it is a relationship that should be protected. This dependency is accepted in cases involving relationships between minor children and their sole or primary caring parent. That the child has another parent is a relevant factor, but not in itself decisive. These cases also show that whereas the assessment of whether a particular situation is a *Ruiz Zambrano* situation should be made on the domestic level, and hence falls outside the scope of EU law, the *Ruiz Zambrano* series has nevertheless made clear that, in this assessment, the member states have to take account of the right to respect for family life and the best interests of the child as laid down in EU law. Member states thus have to carefully consider all the facts of the case and to interpret those facts in the light of CJEU case law. Once it has been established that the *Ruiz Zambrano* criterion covers a particular situation, the CJEU has applied Directive 2004/38 by analogy and stressed that where the right to freely move and reside within the EU is at stake, this right should in principle prevail. While the CJEU recognizes that states have legitimate interests, such as their interest in protecting the public interest, public policy or public security, and has held that residence rights under Article 20 TFEU can be limited, the Court has also stated that derogations from fundamental EU rights should be seen as the exception. Consequently, states have to prove that derogation in a particular case is necessary.

3.6 Concluding remarks

Before the concept of EU citizenship was introduced, EU law was reserved exclusively for those who somehow participated in the construction of the internal market. It was the Treaty of Maastricht that introduced the concept of EU citizenship and, with this citizenship, came a variety of rights, most of which are associated with the right to free movement within EU territory. The CJEU has repeatedly held that Union citizenship is intended to be the fundamental status of nationals of the member states and, in its case law on Union citizenship, has extended the boundaries of EU law on citizenship and freedom of movement in order to facilitate the exercising of free movement rights.

The above discussion of free movement cases shows that the CJEU has consistently handled such cases through the application of human rights. The CJEU has acknowledged in its case law that the right to freedom of movement is one of the most fundamental elements of EU citizenship, and that the enjoyment of family life is inherent to the enjoyment of the freedom of movement within the EU. According to the CJEU, the enjoyment of family life contributes to the goal of the internal market, and the Court has therefore always taken account of the interdependent relationship existing between parents or parent-like figures and children. Where residence rights have to be granted to third-country national parents in order to make their children's EU rights effective, the CJEU has granted those

rights. Hence, the CJEU gives due weight to the interests of children where those children are Union citizens or have derived EU rights as a result of their parents' exercising of free movement rights. In such cases, maintaining the parent-child relationship is in both parents and the children's interests. However, maintaining the parent-child relationship may collide with the interests of a member state. And the state may limit the right to free movement and the attached family rights, but only in the event of an actual and established danger to the state's public security. Where this is not the case, the right to free movement prevails. Hence, any severing of the family relationship between parents and children should never, in principle, compromise Union citizens' fundamental right to free movement.

In its free movement case law, the CJEU has consequently diminished the requirements for economic activity and a cross-border link. This has led to a very broad interpretation of what constitute cross-border links. Whereas for a long time the CJEU held that EU law could not apply to legal questions factually confined to one member state, i.e. to wholly internal situations, this changed with the case of *Ruiz Zambrano*, which thus further broadened EU law's scope of application.

It follows from this CJEU case law series that dependency is highly relevant in demonstrating both the parent-child relationship and the circumstances in which that relationship should be protected. These two matters are in fact inseparable: if there is a relationship of dependency, the relationship needs to be protected. The CJEU's focus is very much on who the child's carer is. Hence, the CJEU attributes much weight to the actual quality of the relationship. In this case law series, the CJEU also takes the interests of the EU citizen child and the child's family circumstances very seriously. It does so in order to guarantee the child's right to reside and the child's possible exercising of free movement rights. With regard to the *Ruiz Zambrano* criterion, it is important to note that what matters is not so much the interdependency between *all* the family members, but primarily the dependency between the Union citizen and the third-country national. Nonetheless, broader family relationships should also be taken into account. The follow-up cases in the *Ruiz Zambrano* series thus make clear that elements of the right to family life do play a role in determining whether a Union citizen is compelled to leave. Similar to free movement cases, states have to preserve the parent-child relationship where splitting up parents and children would hamper the effective use of Article 20 TFEU. This differs only where there is a risk to states' public security.

While the CJEU is not a human rights court, the approach it adopts reflects a very strong connection between the internal market, the freedom of movement and the enjoyment of the right to family life. This has resulted in a Court that has substantially extended the boundaries of EU law and has always been very generous in granting family rights to Union citizens. In cases before the CJEU the interests of parents and children coincide,

as they both have an interest in maintaining their family bond. The interests of parents and children in maintaining their family bond in turn often coincide with the goals of the EU. Consequently free movement rights and the possible exercising of these rights, and the associated family and children's rights, have often outweighed the interests of the state in maintaining a restrictive immigration policy. It should be noted that the CJEU is more likely to accept the need to protect the family rights of Union citizens in the case of a nuclear family than in the case of other family forms.

The CJEU nonetheless needs to respect the division of competences between the EU and the member states. Therefore, however broad its interpretation may be, the CJEU still holds on to the cross-border logic in free movement cases. And, in order to respect the limitations provided for in Article 51 of the Charter, the CJEU applied a full proportionality and family life test in the *Ruiz Zambrano* line of cases only after it had been established that a *Ruiz Zambrano* situation did indeed exist, in other words: after it had been established that a Union citizen would be compelled to leave the Union. In such cases the CJEU recognizes that states may have legitimate interests in refusing the person a right to reside. When applying the proportionality and family life test however, derogation grounds from the right to reside within the Union are subject to strict scrutiny. Free movement of Union citizens is the standard; hence the state has to prove an actual threat to its public security if it wishes to derogate from this. That someone has, for example, committed a crime is not always sufficient to deny free movement or citizenship rights and severe family ties. The CJEU thus carefully balances all the interests at stake.

Chapter 4

Parent-child relationships in Dutch family and migration law

4.1 Introduction

> *"A child will suffer due to his or her parent's behaviour if one parent consistently obstructs access between the child and the other parent. In such cases the best interest of the child requires that, in order to have an effective access arrangement, the parent with whom the child is supposed to have access should be awarded custody of the child. In this case, due to the behaviour of the mother, the child only briefly had contact with her father, on two occasions between August 2008 and December 2008. Consequently, only the transfer of custody, as requested by the father, will guarantee that effective access, which is in the interest of the daughter, takes place."*
> Supreme Court 9 July 2010, no. 09/03415, ECLI:NL:HR:2010:BM4301

> *"That limited access between the alien and his son is due to the mother's behaviour does not change the fact that the relationship between the alien and his son, since the termination of the relationship between the parents, has been limited and has never become structural. Since July 2013 there has no longer been any contact between the alien and his son. (....) the Deputy Minister was justified in concluding that, in this case, family life can also be maintained in other ways, for example through modern means of communication."*
> Council of State 18 August 2014, no. 201402385/1/V1, ECLI:NL:RVS:2014:3248

The above two quotations (*NB: Translations of Dutch court judgments are by the author, unless stated otherwise*) from the Dutch family court and the migration court respectively show what will be assessed in this chapter. Both family and migration law cases may entail tensions between the individuals concerned. And both the above cases concerned the situation of a parent who was obstructing access between the child and the other parent. The migration law case, however, included an additional problem for effective access rights in that the parent whose access rights were limited or non-existent due to the other parent's behaviour had no right to reside in the Netherlands. Hence there were also tensions between the individuals concerned and the state. This case suggested that the state's obligation to enable effective access disappears once migration law, too, plays a role. This chapter examines the extent to which this is true.

This chapter more generally concerns how international provisions are applied in Dutch legislation and case law. Similar to the chapter concerning the Strasbourg jurisprudence, it focuses on the approach taken by Dutch family and migration law courts when regulating parent-child relationships – and more specifically the right to custody and access. It aims to identify the question of which norms concerning custody and access are manifested in Dutch family and migration legislation and case law, and the circumstances in which custody and access are protected in the two areas of law. While, in contrast to family law,

migration law is not aimed at regulating access and custody, decisions concerning non-admission or expulsion (of a parent or child) lead or may lead to a separation between parents and children, and may inevitably, therefore, have consequences for the ability to exercise parental rights. While the interests of children, parents and the state are at stake in both fields of law, those interests are assessed differently.

While family law in principle regulates relationships between individuals, state interests play a major role in the field of immigration law. When relying on the Dutch public interest (i.e. the general interests of migration control, economic welfare and public order), the state maintains a restrictive immigration policy. As the general interests of migration control, economic welfare and public order are commonly considered legitimate interests, the state enjoys a wide margin of discretion in protecting those interests. Migration courts consequently have to assess state interests that do not play a role in family law. As a result, the outcome of a migration law case may be that a separation will occur despite the importance of protecting custody and access rights. Given, however, the fundamental nature of the parent-child relationship under international and European law, the hypothesis underlying this chapter is that, irrespective of the outcome, the Dutch authorities' assessment of individuals' interest in the protection of custody and access rights is unlikely to differ in family law cases from its assessment in migration cases.

The sub-question examined in this chapter are:

1. In which circumstances is family life between parents and children taken to exist in family law cases on the one hand and in migration law cases on the other?
2. Under which circumstances are custody and access protected in family law on the one hand and in migration law on the other hand?

4.1.1 Methodology

This chapter is based on legislation, literature and case law. As it aims to analyse the regulating of family relationships between parents and their minor children, it includes case law, literature and legislation only where they concern minor children.

States' obligations in the field of family law have been extensively discussed in literature.[485] And this literature has revealed that the general principles that family courts apply stem to a large extent from relatively old case law, with many of these cases by now having been incorporated into national legislation. While the family law part of this chapter is therefore primarily based on literature, a search was also conducted on rechtspraak.nl in order to find recent examples so as to check whether other authors' findings remain valid. This search

485 See generally Krans, Stolker & Valk (Eds.) 2017, Vlaardingerbroek and others 2017, Schrama and Antokolskaia 2015, Wortmann & Duijvendijk-Brand 2018 & De Boer 2010.

covered case law from 1 January 2010 until 1 January 2017, with earlier case law being included only if necessary for the understanding of a development in Dutch legislation. The search terms applied were 'custody OR access', 'joint custody', 'sole custody' and 'deny access'. A search was also conducted on rechtspraak.nl in order to find family court cases in which migration law, too, played a role. Here, family court cases in which the terms 'migrant', 'alien' or 'migration law' were mentioned were selected.

While various manuals and articles have likewise been written to set out the norms applicable in the field of migration law, only a few of them specifically address the ability to exercise parental rights.[486] Hence, this part of the chapter is based to a lesser extent on literature.[487] For migration cases, it was impossible to use the search terms 'custody' OR 'access' because, as mentioned earlier, measures taken in this context are not aimed at regulating custody and access as such. Hence, custody and access are often not explicitly mentioned in the case law. Consequently the search string used on rechtspraak.nl for migration cases was '8 ECHR ~child ~daughter ~son ~mother ~father ~parent'.[488] For EU case law, the search terms applied were '2004/38 OR 2003/86 OR "Article 20 TFEU" OR Zambrano'. A time limit was set, with only cases brought before the Dutch Council of State between 1 January 2010 and 1 January 2017 being included. Specifying this time limit ensured that all the relevant cases over an extensive period of time could be considered.

I will first discuss the establishment of parent-child relationships in Dutch family law (4.2) and subsequently set out the norms laid down for custody in this field, as well as examining how Dutch family courts interpret those norms (4.3). I will then do the same regarding access rights in Dutch family law (4.4), while also explaining that parental rights are not merely optional rights for parents, but also impose duties on them (4.5). Next, I will explore the approach taken by the family court in seeking to protect custody and access for families where one of the family members lacks a residence status and, hence, where migration law also plays a role (4.6). After some concluding remarks (4.7) on the position in family law, I will discuss how custody and access are regulated in Dutch migration law. First, the establishment of parent-child relationships in Dutch migration law will be explored and compared with the establishment of parent-child relationships in Dutch family law (4.8). Although migration law is not aimed at regulating custody and access, Article 8 ECHR or EU law are often invoked where parents and children are at risk of being separated. I will

486 See Boeles et al 2014, pp. 211-215, Cardol 2013, 'Ruiz Zambrano vanuit familie en jeugdrechtelijk perspectief', A&MR, no. 08, pp. 376-382, Cardol 2007, De betekenis van het Internationale Verdrag inzake de Rechten van het Kind voor gezinshereniging', Migrantenrecht, no. 1+2, pp. 37-43, Cardol 2005, 'Het belang van het kind in het vreemdelingenrecht', Migrantenrecht, no. 2, pp. 52-55, Hooghiemstra & Wijers (ed.), Allochtone gezinnen, juridische positie, Den Haag: Nederlandse Gezinsraad 2005, pp. 16-35 and pp. 46-48 and Forder 2005a, pp. 21-115.

487 But see footnote 478 and amongst others Zwaan, Terlouw and others 2016, pp. 167-238 & Boeles and others 2014, pp. 199-240.

488 Boolean Search Terms were used in order to further produce more relevant results. I used a proximity operator in order to include cases that mention "Article 8 ECHR" but for example also "Article 8 *of the* ECHR".

therefore then immediately turn to the Dutch migration court's approach in regulating custody and access in cases in which applicants invoked Article 8 ECHR (4.9) and EU law (4.10).

4.2 Parent-child relationships in Dutch family law

Dutch family law has been profoundly influenced by international human rights law, with the ECHR and, more specifically, the interpretation by the ECtHR of the right to family life, as laid down in Article 8 ECHR, having had a particularly significant effect on national legislation and case law. In addition to blood ties, the existence of family life within the meaning of Article 8 ECHR has become an important criterion in determining whether family rights and obligations exist or may arise.[489] The existence of family life, in turn, is important for issues such as custody, access and child protection measures.

4.2.1 Parent-child relationships in Dutch filiation law

Within family law, and more specifically filiation law, it is important to distinguish between different types of parenthood. These different types can include legal parenthood (i.e. the establishment of legal ties), physiological parenthood, which can be divided into genetic parenthood (i.e. who supplied the gametes) and biological parenthood (i.e. who conceived the child or from whom was the child born), and social parenthood (i.e. who is responsible for the daily care and upbringing of the child).[490] While legal, biological and social parenthood may often overlap, this is not necessarily the case. A stepfather, for example, and the legal mother may together take care of and raise a child. Who a child's father, mother or parent is may depend, therefore, on the context. Dutch filiation law is laid down in Title 11 of Book 1 of the Dutch Civil Code ('CC'). According to Art. 1:197 CC, a child, its parents and their blood relatives stand in a familial relationship to each other.

Children are defined as persons who have neither reached the age of eighteen nor been declared of age (Art. 1:233 CC).[491] While Article 1:198 CC defines a mother, Art. 1:199 CC lays down what constitutes a father. Article 1:198 CC was changed substantially by the introduction of the Lesbian Co-Parents Act in 2014.[492] Before 1 April 2014, a co-mother could become a legal mother only after an adoption procedure. Since 1 April 2014, however,

489 See Krans, Stolker & Valk (red) 2017, general comments title 11, 14 and 15, Vlaardingerbroek and others 2017, par. 1.4.2Schrama and Antokolskaia 2015, p. 21 and 26, Wortmann & Duijvendijk-Brand 2018, pp. 1-2 & De Boer 2010 and Chapter 2 on the Strasbourg jurisprudence.

490 Vlaardingerbroek and others 2017, par. 6.2.

491 According to art. 1:253ha CC, an under aged mother of sixteen years or older who wants to care for and raise her child may request the Juvenile Court to be emancipated. Where this is in the best interests of the mother and her child, the Juvenile Court may award such a request.

492 *Stb.* (Bulletin of Acts and Decrees) 2014, 132.

Art. 1:198 CC holds that a child's mother is the woman who gave birth to the child; the woman who at the time of the child's birth was married to or in a registered partnership with the woman from whom the child was born, if this child was conceived through artificial donor insemination and has a certificate showing that the sperm donor is unknown; the woman who has recognized the child whose parenthood has been established by law, or the woman who has adopted the child. Hence, there are various way in which a child can have two legal mothers, either automatically[493] if the mothers are in a marriage or registered partnership, or through recognition or adoption. According to Art. 1:199 CC, the father of a child is the man who, at the time of the child's birth, is married to or in a registered partnership with the woman who gave birth to that child; the man whose marriage to or registered partnership with the woman who gave birth to the child was dissolved because of his death within a period of 306 days before the birth of the child, even if the mother has remarried; the man who has recognized paternity of the child whose paternity has been established by law or the man who has adopted the child. Although it is possible for a child to have two legal fathers through an adoption procedure, this is possible only if the mother no longer has custody of the child.

There are certain legal consequences attached to the establishing of a family relationship, including parenthood. One of these is that establishing a family relationship also establishes a care relationship. The establishment of a family relationship is important for parental authority, the duty of care, access, information and consultation rights, and for maintenance and inheritance.[494]

4.3 Custody in Dutch family law

Custody is regulated in Art. 1:245 CC,[495] which states that all minor children are subject to parental authority. The legal concept of parental authority is an umbrella term for both custody and guardianship. Under Art. 1:247 (1) CC, parental authority entails the duty and right of parents to care for and raise their minor children. Paragraph 2 states that the words "care for and raise" include caring and taking responsibility for the mental and physical welfare and safety of the child and for promoting the development of his or her personality. According to paragraph 2, parents may not use mental or physical violence or apply any other degrading treatment when caring for and raising their child.

Below, I will first discuss who may be granted custody on the basis of Dutch family

493 This certification needs to be handed over by the Foundation on Donor Information as mentioned in the "Law on donor information artificial insemination, see art. 1:198(b) CC.
494 Vlaardingerbroek and others 2017, par. 6.3.
495 See regarding custody: Schrama and Antokolskaia 2015, pp. 253-269, Vlaardingerbroek and others 2017, para. 9.1-9.4.

legislation (4.3.1) and then the current approach regarding custody in Dutch family law, namely the primacy of joint custody in cases where the family is separated (4.3.2). Lastly, I will discuss Dutch family courts' approach to settling custody disputes (4.3.3). For reasons of readability, all subsequent references to parents mean legal parents, unless stated otherwise.

4.3.1 Who has custody?

Article 1:253b (1) CC holds that the mother from whom the child is born has custody by dint of law. When the birth mother and the other parent are in a formal relationship, meaning a marriage or a registered partnership, they share custody from the moment the child is born (Articles 1:251 (1) and 1:253aa (1) CC). If the marriage or registered partnership starts after the child is born, the other parent acquires custody as of that moment (Art. 1:253 (1) CC). The situation is more complicated when parents are not in a formal relationship. If both parents who are not and have never been married to each other want to share custody, they can submit a request to the court to be granted shared custody (Art. 1:252 CC). The father is required to have the mother's permission for this. If parents have never been in a relationship with each other, or were never married to each other and split up, and the mother refuses permission, the father will need to go to court if he wishes to obtain sole or joint parental authority (Art. 1:253c (1) CC).[496] The court may deny this request only if the child is likely to face unacceptable suffering due to his or her parents' behaviour or if refusal is necessary to protect the interests of the child (Art. 1: 253c (2) CC).

It is also possible for a non-legal parent to be awarded custody. By law (1:253sa CC), a parent and his or her spouse or registered partner who is not the legal parent share custody of a child who is born during the marriage or registered partnership. The couple may be either a male-female couple or two women. The idea behind this rule is that since the couple is in a durable relationship, it can be assumed that they will share responsibility for the child and that it is important for the child that this responsibility should be given legal recognition.[497] Since it is not possible for more than two persons to have custody rights, this provision applies only if a parent has sole custody, and so for a child who does not have a legal father. It is also possible for a non-legal parent who has a close personal relationship with the child to be awarded custody after making application to the court (Art. 1:253t CC). This is often the stepparent, but may also be a grandparent or other relative such as a brother or sister. Again, this request is possible only if a parent has sole custody since it is not possible for more than two persons to have custody rights.[498]

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496 It has been argued that now that more and more children are born outside of marriage, unmarried fathers who have acknowledged their child should also be awarded custody automatically. A proposal thereto has been submitted, see Parliamentary papers II 2016/2017, 34 605, no. 2 and see the report by Wolfsen and others 2016.

497 Parliamentary papers II 1999/2000, 27 047, no. 5, p. 2.

498 In the Wolfsen report it has been recommended that custody can be held by up to four people, see Wolfsen report 2016, pp. 251-252 and 537-540.

4.3.2 Primacy of joint custody after divorce or separation

The principle that, during their marriage, parents exercise joint custody over their minor children has been in Dutch family law for decades.[499] It was incorporated in Art. 1:246 CC on 1 January 1970, and this Article has since been amended many times. A radical change took place on 2 November 1995, when the previously existing rule that, after divorce or separation, one parent should be appointed guardian, while someone else (usually the other parent) should simultaneously be appointed co-guardian was abandoned. This created the opportunity for parents, where they both agreed, to request to be granted continued joint custody after the divorce. This opportunity, which was laid down in Art. 1:251 CC, resulted directly from decisions of the Supreme Court, in which the latter gave its own interpretation of the ECHR.[500] These interpretations were later confirmed by the ECtHR.[501]

The principle that applies to this day was laid down in 1:251 (2) CC on 1 January 1998. Under this principle, divorced parents retain joint custody by law; if one or both of them do not want joint custody to continue, they have to file a request for sole parental authority in custody proceedings.[502] It does not matter whether such situations result from a formal divorce or a separation between parents who were not in a formal relationship. Where parents have joint custody, both parents can share care of the children after divorce or separation; in most cases, however, the child resides with one parent (often the mother), while the other parent (often the father) has access arrangements.

As of March 2009, the law went a step further, when the entry into force of the legislation promoting continued parenting and careful divorce introduced the concept of residential co-parenting rather than joint custody.[503] Co-parenting is an arrangement in which the child shares the time spent residing with each parent more or less equally.[504] Hence, the exception whereby care was equally divided between both parents became the rule. This new legislation added the following paragraphs to Art. 1:247 CC:

Par. 3. Parental authority includes the obligation for a parent to promote the development of the ties between his child and the other parent.
Par. 4. A child whose parents exercise joint custody reserves, after dissolution of the marriage (…), the rights to equal care and upbringing by both his parents.

499 For reasons of readability as of now where parents are mentioned, unless stated otherwise, these are the child's legal parents.
500 Supreme Court 4 May 1984, no. 6647, ECLI:NL:HR:1984:AG4807 and Supreme Court 21 March 1986, no. 6952, ECLI:NL:HR:1986:AC9283 and Forder 2016, p. 337-338.
501 See for a more extensive discussion of this development Forder 2016, p. 337-338.
502 Law of 30 October 1997, Stb. 506.
503 Act of 27 November 2008, Stb. 500.
504 Nikolina 2015, p. 2.

> Par. 5. While implementing the fourth paragraph in an agreement or in a parental plan, parents may take into account practical obstacles that arise in connection with the dissolution of the marriage (…) however, only to the extent and for as long as those obstacles exist.

The possibility to file a request for sole parental authority was included in a new Art. 1:251a CC.

The purpose of the legislation designed to promote continued parenting and careful divorce is to encourage parents who are getting divorced or separated to make agreements about the consequences of their separation for the children involved. The idea here is that it is important for a child, also after a separation, to maintain contact with both parents, and for both parents to continue to feel responsible for the child's care, education and development. The legislation therefore assumes co-parenting to be the standard, and that both parents, even after separation, will be equally responsible for the child's care, upbringing and development. This responsibility is reflected in the exercising of joint custody.[505] This legislation makes it mandatory for parents to submit a parenting plan when filing for divorce.[506] This obligation applies not only to parents who have been in a formal relationship, but also to those who have been in an informal relationship, albeit in such cases whether the parents have complied with this obligation is not formally checked by a third party.[507] Where they share custody on another basis, such as where the father has been granted joint custody by court order following the mother's refusal to agree with shared custody, a parenting plan is not mandatory.[508]

The obligation to submit a parenting plan is regulated in Art. 815 (3) Code of Civil Procedure, which states that, in such a plan, parents should agree on how they wish to divide the responsibilities for caring for and raising their children or to shape the rights and obligations regarding contact, and on how they will inform and consult each other on important matters concerning the person and property of the child and on child alimony.[509]

At first sight, the text of Art. 1:247 paras. 4 and 5 CC indicates a full 50/50 split between the parents. This would suggest little allowance being made for situations in which one parent cares for and raises the child, while the other parent has only access rights, or situations in which one of the caring parents moves to another city or abroad, since an equal division of tasks would then no be longer possible.[510] Hence, little allowance for the situation applying

505 See also Parliamentary Papers II 2004/2005, 30 145, no. 3, p. 1-2.
506 Tomassen-van der Lans 2015.
507 Tomassen-van der Lans 2015, p. 50.
508 Art. 1:253 CC.
509 Parliamentary papers II 2004/2005, 30 145, no. 3, p. 5.
510 Wortmann & Duijvendijk-Brand 2018, p. 243.

before the introduction of the law on co-parenting. Yet, as the Supreme Court has ruled, care and upbringing responsibilities need not always be equally divided between both parents.[511] Exceptions to the right to equal parenting are possible. If parents cannot agree on the division of care responsibilities, the court, in reaching its decision, should regard the best interests of the child as paramount.[512] However, even where communications between parents are not ideal, the court will normally hold co-parenting to be appropriate in the absence of any other contraindications.[513]

4.3.3 Settling custody disputes: strict criterion for ending joint custody

It follows from the above that, in Dutch family law, joint custody is the standard. Where both parents exercise joint custody and irrespective of the relationship between the parents, this is in principle a matter between the parents, without any role for the state. This is different, however, where one of the parents has invoked Art. 1:251a CC (and so filed a request to be awarded sole parental custody) or where the exercising of joint custody is subject to dispute. In the event of a dispute between parents, Art. 1:253a CC states that this dispute may be submitted to the Regional Court at the request of one or both of the parents. The court will consequently settle the dispute by taking a decision in the best interests of the child. The court may also make an arrangement for the exercising of parental authority. This arrangement may include assigning care and upbringing duties to each parent and (but only if this is required in the child's best interests) a temporary ban on a parent having contact with the child, as well as decisions on which of the parents the child will reside with primarily and how information about serious matters relating to the child's person or property should be provided to the parent with whom the child does not primarily reside, or the way in which that parent has to be consulted (Art. 1:253a (2) CC).

The criterion to be met for ending joint custody is very strict.[514] Back in 1999, the Supreme Court stated that a lack of communication (especially in the period in which the divorce and related issues had not yet been settled) did not necessarily imply that parental custody should be awarded to one parent only, although this would be deemed relevant if the communication problems were of such a serious nature that they would cause unacceptable suffering to the child and no improvement could be expected in the foreseeable future.[515] By now, this criterion has been enshrined in law (see Art. 1:251a (1)a CC). Besides the criterion

511 Supreme Court 21 May 2010, no. 09/03564, ECLI:NL:HR:2010:BL7407, par. 3.5.
512 Supreme Court 21 May 2010, no. 09/03564, ECLI:NL:HR:2010:BL7407, par. 3.7.3.
513 Court of Appeal 's-Hertogenbosch 21 February 2012, no. HV 200.097.162/01 en HV 200.097.578/01, ECLI:NL:GHSHE:2012:BV6414.
514 See for a critique on this strong protection of joint custody amongst others: Ackermans-Wijn & Brands-Bottema 2009, 'De invoering van het ouderschapsplan: goed bedoeld, maar slecht geregeld', Trema 2009, no. 2, p. 45 and Broekhuijsen-Molenaar, 'Redelijk recht en eenhoofdig gezag na scheiding' in Ex Libris Hans Nieuwenhuis. Opstellen aangeboden aan prof. mr. J.H. Nieuwenhuis, hoogleraar burgerlijk recht aan de Universiteit Leiden, bij zijn emiraat, Deventer: Kluwer 2009.
515 Supreme Court 10 September 1999, no. R98/134, ECLI:NL:HR:1999:ZC2963.

formulated by the Supreme Court, other reasons may justify granting sole parental custody (see Art. 1:251a (1)b CC). These reasons must be driven by the best interests of the child, with the court having to explain in each specific case why a change of parental custody is in the child's best interests.[516]

In practice, family courts are very cautious in awarding sole custody. Such requests are granted only in extreme situations, such as after domestic abuse,[517] or where the parent deprived of parental rights has been convicted of child abuse,[518] in cases of alcohol or drug abuse,[519] cases of mental illnesses,[520] cases where one parent has shown too little or no involvement at all in the child's life for a very long period of time[521] or cases in which the other parent's place of residence or contact details are unknown.[522] Where possible, the court also takes into account the views of the minor.[523]

An example of a case in which the other parent's place of residence or contact details were unknown was a case before the Court of Appeal in which the parents had not been in touch for years and where, likewise, the father and the child had not seen each other in years.[524] According to the court, a minimal degree of communication between parents is required in order for joint custody to be exercised. The father's lawyer held that he had the father's contact details and that the mother could get in touch with the father either through him or the child protection board. The court did not agree and found that communicating through another person or body was an inappropriate way of exercising joint custody, given that, in the event of an emergency, decisions regarding the child would have to be taken immediately and that therefore, for joint custody to be awarded, the parents would need to be able to consult each other speedily. Cases in which the court has accepted that there was indeed an unacceptable risk that a parent's behaviour would cause the child to suffer damage and that no improvement could be expected in the foreseeable future have included cases where one parent systematically boycotted visitation rights and the minor was deterred from contact with the other parent[525] and cases where the stalemate that had arisen between

516 Parliamentary papers II 2004/2005, 30 145, no. 3, p. 14.
517 Regional Court Breda 3 June 2012, no. 240519 FA RK 11-4587, ECLI:NL:RBBRE:2012:BW2459 and Regional Court Haarlem 30 May 2012, no. 189183 - JU RK 12-106, ECLI:NL:RBHAA:2012:BX0503.
518 Regional Court Arnhem 4 June 2012, no. 220633, ECLI:NL:RBARN:2012:BW5825 and Regional Court Dordrecht 30 May 2012, no. 96428 - FA RK 12-7076, ECLI:NL:RBDOR:2012:BW8371
519 Regional Court Breda 20 February 2012, no. 242621 FA RK 11-5491, ECLI:NL:RBBRE:2012:BV7585.
520 Regional Court Groningen 29 November 2011, no. 124470, ECLI:NL:RBGRO:2011:BV1547.
521 Court of Appeal The Hague 15 February 2012, no. 200.091.467-01, ECLI:NL:GHSGR:2012:BV9561 and Court of Appeal The Hague 25 July 2012, no. 200.102.626/01, ECLI:NL:GHSGR:2012:BX2760.
522 Court of Appeal Leeuwarden 12 July 2016, 200.184.447/01, ECLI:NL:GHARL:2016:6129.
523 See again the ruling of the Court of Appeal The Hague of 15 February 2012, in which the Court noted that the minor - fueled by his experiences with his mother – did not want interference of his mother with his life (ECLI:NL:GHSGR:2012:BV9561, par. 9).
524 Court of Appeal Leeuwarden 12 July 2016, 200.184.447/01, ECLI:NL:GHARL:2016:6129.
525 Supreme Court 9 July 2010, no. 09/03415, ECLI:NL:PHR:2010:BM4301, Court of Appeal Amsterdam 27 January 2005, no. 1330/04, ECLI:NL:GHAMS:2005:AS6020 and Court of Appeal The Hague 31 August 2005, no. 17-H-05, ECLI:NL:GHSGR:2005:AU2003.

the parents had far-reaching consequences for the minor, such as the case in which it was established that the minors involved needed psychological help, but were not getting this help because the parents could not agree on where the treatment should take place.[526]

4.4 Right to access in Dutch family law

According to the ECtHR, the right to enjoy each other's company is a fundamental element of the right to family life. The importance of maintaining the bond between parent and child is also reflected in Dutch family law.[527] I will first discuss who may be granted a right to access in Dutch family legislation (4.4.1) and then the Dutch family courts' approach to access disputes (4.4.2). Lastly, I will discuss the approach of these courts in terminating access rights (4.4.3).

4.4.1 Who has a right to access?

A child has a right to access with his or her parents and a person with whom the child has a close personal relationship. If parents and children no longer live together as a result of a divorce (formal or informal) or have never lived together, the imposition of child protection measures (such as the deprivation of parental authority) or detention does not mean that the bond between child and parent is broken or that such a bond should not be established. Article 1:377g CC holds that the court may, of its own motion, order a certain decision to be taken regarding the establishing or terminating of access arrangements if the child has indicated to the court that it would appreciate this. This likewise applies if the minor has not yet reached the age of twelve, but is nevertheless able to reasonably evaluate his or her interests in the matter.

Where both parents have custody, they also have access rights (Art. 1:247 and 1:253a CC). The parent who exercises authority has an obligation to promote the development of bonds between the child and the other parent (see Art. 1: 247 (3) CC).

Owing to the fundamental nature of the relationship between parent and child, parents without custody also have access rights and obligations.[528] On the basis of legal parenthood, a right to access exists for the father without custody but who has recognized the child, for a father whose paternity has been established by law, for a parent who has been removed from or deprived of custody, for a parent who has adopted the child, for the minor mother without custody and for the co-mother (see par. 4.2). This is provided for in Art. 1:377a-g

526 Regional Court The Hague 12 July 2012, no. 416543 - FA RK 12-2470, ECLI:NL:RBSGR:2012:BX1695.
527 Besides Article 8 ECHR, where access rights are at issue the family court also refers to Article 9(3) of the CRC and Article 24(3) of the Charter of Fundamental Rights of the EU.
528 Vlaardingerbroek and others 2017, par. 11.1.1.

CC. Meanwhile Article 1: 377a (1) CC stipulates that children have the right to maintain contact with their parents and, *vice versa*, that the parent without custody has the right and obligation to maintain contact with his or her child. Where it concerns the right to access, it is irrelevant that the divorce may have been caused through certain behaviour by one or both of the parents or that the child protection measures may have been necessary as a result of shortcomings in the parenting skills of the parents.[529] Hence, as far as access is concerned, the law reflects the view that actual links may deserve protection irrespective of their quality.

Art. 1: 377a CC holds that the child has a right of access to a person with whom the child has a close personal relationship: i.e. a relationship such as meant in Article 8 ECHR. Hence, in determining whether a sufficiently close relationship exists, the case law of the ECtHR based on Article 8 ECHR is very important. Besides on the basis of the existence of family life, access may also be protected under the right to respect for private life. A person who is the biological, but not legal father of a child may have a right to access without the existence of a close personal relationship between him and the child. Hence, access rights may even be granted to the biological father in the absence of actual links between him and the child. The Court of Appeal has ruled that Article 8 ECHR should be interpreted broadly and that a biological father's request to establish access arrangements should not automatically be rejected on formal grounds, without the court examining whether the interests of the child would benefit from such access.[530] With regard, therefore, to a possible breach of Article 8 of the ECHR, which includes the right to a private life, interests always need to be balanced before a biological father's request for access can be declared inadmissible.

4.4.2 Access disputes

Whenever a dispute arises between parents concerning access rights, the court will order a visitation arrangement at the request of one or both of the parents or at the request of a person with whom the child maintains a close personal relationship under Art. 1:377a (2) CC. And, at the request of one or both of the parents or a person with whom the child maintains a close personal relationship, the court may change a court order establishing a right of contact or a visitation arrangement mutually agreed by the parents on the grounds of a change in circumstances or on the grounds that the original court order was issued on the basis of incorrect or incomplete information (Art. 1:377e CC).

529 Forder 2005a, p. 50.

530 Court of Appeal 's-Hertogenbosch 21 November 2013, HV 200.131.506/01 & HV 200.131.510/01, ECLI:NL:GHSHE:2013:5670, par. 3.10.3 and Regional Court The Hague 8 April 2014, no. C/09/450611, ECLI:NL:RBDHA:2014:6336. The courts based their decisions on two rulings by the ECtHR, namely ECtHR 21 December 2010, Appl. no. 20578/07 (*Anayo v. Germany*) and ECtHR 21 December 2010, *Anayo v. Germany* and ECtHR 15 September 2011, Appl. no. 17080/07 (*Schneider v. Germany*). See also Vlaardingerbroek and others 2017, par. 11.1.1.

There are many ways for a family court to ensure that both the parent with access rights and the parent with custody observe the access arrangements in place. The court can modify existing access arrangements, impose a fine for non-compliance with access arrangements, arrange for access rights to be exercised under supervision by a third party or an institution, arrange for access rights to be exercised with the help of the police, take the non-cooperative parent into custody, impose child protection measures (i.e. place the child under supervision) or impose a change in parental custody or the child's principal residence.[531] In cases where the parent with custody is refusing to cooperate with the establishing or implementation of access arrangements, the family court has held that it must take all measures appropriate in a given case to make sure that this parent cooperates. According to the family court, this obligation is based on the obligation under Article 8 ECHR for national authorities, including courts, to endeavour as much as possible to allow the right to family life between parents and their children to develop.[532] The need for an active approach by the court may be especially applicable if the parent with custody has put forward insufficiently plausible reasons for refusing access.[533] The mere fact that the parent with custody objects to access arrangements does not constitute a reason to deny access between the other parent and the child.

4.4.3 Reasons for denying access

A parent's right to access with his or her child can be denied by the family court only on the grounds of one (or more) of the four exhaustive reasons listed in Art. 1:377a (3) CC, namely that such contact would seriously harm the mental or physical development of the child; that the parent or the person with whom the child maintains a close personal relation is obviously incapable or clearly not in a position to have contact with the child; that the child who has reached the age of twelve made it known at the court hearing that he or she has serious objections to contact with the parent or person with whom he or she maintains a close personal relationship, or that such contact would otherwise conflict with significant interests of the child. The basic assumption is that there should be access between parents and children since this is, in principle, considered to be in the child's interests. The question to be answered, according to the family court, is therefore not whether access is in the best interests of the child (i.e. would access be beneficial for the child), but whether access should be rejected because of the existence of one or more disqualification grounds (i.e. would access damage the child).[534] The family court referred to the explanatory memorandum of a bill concerning access after divorce to stress the strong obligation for the court to state reasons when denying access:

531 Wortmann & Duijvendijk-Brand 2018, pp. 285-288.
532 Supreme Court 17 January 2014, no. 13/02989, ECLI:NL:HR:2014:91, par. 3.5.
533 Supreme Court 17 January 2014, no. 13/02989, ECLI:NL:HR:2014:91, par. 3.5.
534 Vlaardingerbroek and others 2014, par. 11.1.3 and Supreme Court 8 December 2000, no. R00/036, ECLI:NL:HR:2000:AA8894.

> *In its judgment the court will have to set out which facts and circumstances in a particular case weigh so heavily that a conflict with the best interests of the child and his fundamental right to contact with both parents could be assumed as a reason to deny access rights. The strong obligation to state reasons, which stems from the wording of the grounds for denial of access rights, is reasonable given the fundamental nature of the rights of access. Moreover, in this way, it is made clear to the parent who has been denied access rights why he or she does not have that right. Since a denial of the right to access with the child represents a serious infringement of the right to respect for family life of the non-custodial parent, this should be done on the basis of a clear justification.*[535]

In practice, as in custody cases, family courts are very cautious about denying access to a parent. With regard to access rights, the family court may consider the absence of contact between parent and child over a period of many years to be all the more reason to enable those ties to develop. The Court of Appeal has held, for example, that:

> *For the development of the child it is important that her father is, in any way, part of her life precisely because she already had to miss his presence in person for years.*[536]

Where, however, parents and children have not seen each other for a long period of time, access needs to be built up gradually.[537] Cases in which the court denied access related to physical or sexual child abuse,[538] cases of alcohol or drug abuse,[539] cases where the minor had faced a traumatic experience (such as when the minor had witnessed her father stabbing both her mother and stepfather, as a result of which her stepfather died)[540] or cases where the relationship between the parents was such that the parents' inability to communicate with each other (and thus to make unencumbered access possible for the child) would cause the child to suffer damage.[541]

535 Supreme Court 22 April 2016, no. 15/05786, ECLI:NL:PHR:2016:613 and Parliamentary papers II, 1984-1985, 18 964, no. 3, p. 11.
536 Court of Appeal Leeuwarden 5 October 2010, no. 200.048.661, ECLI:NL:GHLEE:2010:BO1454.
537 Court of Appeal Leeuwarden 12 July 2016, no. 200.184.447/01, ECLI:NL:GHARL:2016:6129.
538 Court of Appeal The Hague 6 April 2016, no. 200.179.408/01, ECLI:NL:GHDHA:2016:1041.
539 Court of Appeal 's-Hertogenbosch 28 May 2015, no. 200.158.777-01, ECLI:NL:GHSHE:2016:435.
540 Court of Appeal Leeuwarden 29 November 2011, no. 200.191.142/01, ECLI:NL:GHARL:2016:9717.
541 Court of Appeal Leeuwarden 29 March 2016, no. 200.162.335/01, ECLI:NL:GHARL:2016:2749.

4.5 Obligation to give actual meaning to the exercise of parental custody or access

Case law shows not only that joint custody and access rights are the standard, but also that parents are forced to give actual meaning to the exercising of parental custody and/or access rights. An example of this can be found in what are referred to as relocation cases, i.e. where one parent seeks a family court's substitute permission to move to another city or abroad because the other parent disagrees with this relocation. According to the family court, such a request should take all circumstances into account when balancing the different interests at stake, including:

- the need to relocate;
- the extent to which the relocation has been thought through and prepared;
- whether the relocating parent offered alternatives and measures to alleviate the effects of the child's relocation on the other parent;
- the extent to which parents are capable of mutual communication and consultation;
- the rights of the other parent and the child to meet each other in a familiar environment;
- the division and continuity of care;
- the frequency of contact between the child and the other parent before and after the move;
- the age of the child, his opinion and the extent to which the child is settled in his surroundings or even particularly accustomed to relocations;
- the costs (or extra costs) of access after the relocation.[542]

In many of these cases, such permission was denied because granting it would make it harder for the child to remain in contact with the other parent and, *vice versa*, harder for the other parent to give meaning to his or her parental rights (both of custody and access).[543] This has been different, however, in cases where the relocation was considered to be in the best interests of the child. In a case before the Court of Appeal, for example, the police had brought a mother and child to a women's shelter. Because the father had continued uttering threats, the child protection board advised the mother to find a safe place for her and child since the board would otherwise request the court to place the child in care. In the Court's

542 See: Court of Appeal The Hague 9 November 2016, no. 200.187.607/01, ECLI:NL:GHDHA:2016:3319.

543 Court of Appeal The Hague 9 November 2016, no. 200.187.607/01, ECLI:NL:GHDHA:2016:3319, Court of Appeal Leeuwarden 27 September 2016, 200.185.056/01, ECLI:NL:GHARL:2016:7800, Regional Court Dordrecht 22 August 2012, no. 98248/FARK12-7878; 98625/FARK12-8066 and 98698/FARK12-8103ECLI:NL:RBDOR:2012:BX7272, Court of Appeal Arnhem 7 June 2012, no. 200.096.386, ECLI:NL:GHARN:2012:BX1918, Court of Appeal Leeuwarden 21 June 2012, no. 200.099.940/01, ECLI:NL:GHLEE:2012:BX0531 and Supreme Court 18 June 2010, no. 09/02912, ECLI:NL:HR:2010:BM5825.

opinion, the need for the mother to relocate with the child was therefore necessary to ensure the safety of both the mother and child.

Various other cases clearly show that parents are forced by the family court to give actual meaning to the exercising of parental custody or access rights. According to the family court, custody and access are not optional; in other words, they are not merely rights, but duties. With regard to custody, the family court has held that once a parent has custody, this parent is obliged to care for and nurture his or her minor child.[544] In a case before the Regional Court, the mother argued that unless the co-parenting arrangements were changed into arrangements making her the residential parent and granting the father access arrangements, she was no longer willing to take responsibility for the child. The Regional Court ruled, however, that the mother had custody and was therefore obliged to take responsibility for the child's well-being.

With regard to access, the family court has ruled that the obligation to give meaning to access rights may result in a parent having to pay a fine for non-compliance with that parent's own access arrangements[545] or non-compliance with the other parent's access rights.[546] This obligation ceases to exist only if access would go against the best interests of the child, such as in a case involving a father with limited intellectual capacity, various psychological problems and a deeply-rooted aversion to children in general and who had consistently refused access to his child.[547]

4.6 Intersection of family and migration law cases from the perspective of the family court

The Dutch family court has at times been confronted with cases concerning the application of the above family norms to families in which one of the members lacks a residence status. In those cases, family law intersects to a certain extent with migration law, and the family court then appears to apply the norms regarding custody and access in the same way, i.e. without regard for the migration factors. Thus, shared custody and a right to access are the basic assumption, and only the best interests of the child constitute a reason to deviate from this standard. However, a child's best interests may be influenced by the precarious residence status of one of the family members. Hence it appears, according to the court, that the precarious residence status of one of the parents may in some cases damage the child.

544 Regional Court Roermond 17 May 2008, no. 80284/FA RK 07-746, ECLI:NL:RBROE:2008:BD0701 & Regional Court Amsterdam 12 July 2007, no. 371392 / KG ZA 07-1057 SR/MV, ECLI:NL:RBAMS:2007:BA9482.
545 Regional Court Roermond 24 December 2008, no. 90815 / KG ZA 08-274, ECLI:NL:RBROE:2008:BG8982.
546 Court of Appeal Leeuwarden 22 July 2014, no. 200.142.322-01, ECLI:NL:GHARL:2014:5830.
547 Court of Appeal Arnhem 7 June 2016, no. 200.178.131, ECLI:NL:GHARL:2016:4505.

The fact that a father had been declared an undesirable alien in 2007 for a period of ten years and had resided in Morocco ever since did not constitute sufficient reason to assume that the parent's behaviour would cause the children to suffer damage, and the court therefore saw no reason to terminate his custody rights.[548] The cases in which the court ruled that sole custody should be awarded, and where access was likewise denied, revolved around severe physical abuse.[549] In a recent example, where the issue at stake was whether the father (who was detained at the time) should be granted access, the father's residence permit was revoked after he was convicted of having forced the mother into prostitution for some years, during which period there had been more occasions of serious ill-treatment and abuse.[550] The Court of Appeal considered that the child protection board should examine whether access between child and father and/or the right to information were possible such that neither the safety of the minor nor that of the mother would be endangered. When examining these possibilities, the child protection board should take account, according to the court, of the father's precarious residence status. However, the decisive issue when determining whether access rights were possible was the safety of both the child and the mother.

In another case, access rights were denied to a father of three children in the Netherlands.[551] Both the father and mother had been deprived of their parental custody and their three children resided with a foster mother. The reasons for denying access related to the fact that the father had taken two of his children abroad without their mother's consent. While abroad, the father had not resided with them, and this had been a traumatic experience for the children. Although there had been a few meetings between the children and their father afterwards, these were unsuccessful, as the children had responded dismissively to the father. As regards his youngest child, the court noted that she had resided with the foster mother since birth (2006) and the father had since visited her only twice. Here, the fact that the father resided in the Netherlands unlawfully did not play a role in the decision to refuse access.

4.7 Conclusion: family law

The above overview of custody and access in Dutch family law shows that, for Dutch families, joint custody is a particularly strong right. The idea behind this strong protection is that it is in a child's best interests to maintain contact with both parents. It is therefore

548 Court of Appeal Arnhem 4 June 2015, no. 200.158.101, ECLI:NL:GHARL:2015:4049.
549 Court of Appeal The Hague 16 March 2011, no. 200.070.731-01, ECLI:NL:GHSGR:2011:BP9698 and Court of Appeal Arnhem 15 February 2011, no. 200.047.910-01, ECLI:NL:GHARN:2011:BQ5287.
550 Court of Appeal Leeuwarden 29 September 2016, no. 200.185.619/01, ECLI:NL:GHARL:2016:7893.
551 Court of Appeal Amsterdam 9 July 2013, no. 200.120.780/01, ECLI:NL:GHAMS:2013:2010.

only in exceptional circumstances that the best interests of the child will be served by the awarding of sole custody. After parents separate, the 'old situation' must be maintained as much as possible, with parents being forced in different ways to give actual meaning to the exercising of parental custody. Likewise, the basic assumption is that there should be access between parents and children since this is in the child's best interests. Hence, denying access is appropriate only in exceptional circumstances related to the best interests of the child. And, again, parents can be forced to give meaning to the exercising of access rights. The illegal status of a family member does not constitute such exceptional circumstances.

4.8 Parent-child relationships in Dutch migration law

Since migration law is not aimed at *regulating* custody and access, this part of the chapter discusses the norms and case law affecting the ability to *exercise* custody and access rights in Dutch migration law. These are the norms that regulate third-country nationals' right to family reunification, given that the latter revolves around the right of family members to be together. In situations concerning family reunification between parents and minor children, therefore, these norms inevitably regulate the ability to exercise parental rights. Family reunification within the Netherlands is regulated in the Aliens Act 2000 ('AA 2000'). Article 15 of this Act states that the conditions under which a residence permit based on family reunification is granted to third-country nationals are provided for in the Aliens Decree 2000 ('AD 2000'). Three categories of family reunification will now be discussed: firstly, family reunification based purely on AD 2000; secondly, family reunification based on AD 2000 and Article 8 ECHR, and thirdly family reunification based on AD 2000 and EU law.

The conditions for the first category – family reunification purely on the basis of the AD 2000 – are laid down in Articles 3.13 – 3.22a AD 2000, which concern a family member of someone legally residing in the Netherlands and who asks for permission to reside in the Netherlands with that legal resident. AD 2000 contains special arrangements for situations that are not covered by Articles 3:13 - 3.22a AD 2000, but which the legislator nonetheless wants to protect. One such situation is where legal residency can be obtained through the birth of a child in a family (Art. 3.23 AD 2000). In some cases, adults may be admitted in order to reside with an unaccompanied minor (Art. 3.24a AD 2000), while a child who is going to be adopted is also permitted in the meantime to stay in the Netherlands (Articles 3:26 and 3:27 AD 2000). Lastly, legal residence may be granted to a foster child (Art. 3.28 AD 2000). While Articles 3.13 - 3.22a AD 2000 also cover people falling within the Family Reunification Directive's scope of application (2003/86), this chapter does not assess case law based on that Directive since that case law simply assumes a bond between parents and minor children to exist and this bond to be worthy of protection. The case

law consequently concerns questions such as whether, in general, the costs of legal fees or the costs of the integration exam disproportionally interfere with the right to family reunification as laid down in the Directive.

The second category concerns family reunification based on AD 2000 and Article 8 ECHR. Article 8 ECHR is of particular importance to the right to family reunification in the Netherlands, especially where a separation between parents and children will or may occur. If a request for a residence permit based on the above Articles is rejected, the Deputy Minister of Security and Justice ('the Deputy Minister') may grant a residence permit *ex officio*, on the basis of Article 3.6 AD 2000, if refusing a right to reside would violate Article 8 ECHR. In such situations, third-country nationals themselves may invoke Article 8 ECHR in both admission and expulsion cases.

Where a third-country national's request for a residence permit has been refused and, thus, where a parent and child may possibly be separated, the only matter that is considered in cases before the Administrative Jurisdiction Division of the Council of State ('the Council of State') is whether this refusal is in accordance with Article 8 ECHR. Hence, whether the initial application was on the basis of Articles 3.13 – 3.22a AD 2000 or Article 8 ECHR is not relevant.[552] From here on, therefore, I will concentrate on the Council of State's interpretation of Article 8 ECHR. In this chapter, I will interpret admission and expulsion in the same way as the ECtHR; in other words, if someone does not have a right to reside in the Netherlands when he or she applies for a residence permit, it is considered an admission case, whereas a case in which a right to reside is revoked or not extended is an expulsion case. Hence, what matters is not someone's presence in the territory, but rather their residence status before the application. Admission cases most commonly involve family life that started during illegal residence (which may have been protracted) or non-compliance with the requirement to obtain a provisional residence permit and/or sufficient means of subsistence. Expulsion cases generally involve a residence permit (granted either for family life or on asylum grounds) being revoked for reasons related to public order.[553]

Besides Article 8 ECHR, third-country nationals may also invoke EU law in seeking permission to reside with family members who are Union citizen. The legal status of Union citizens and their family members is regulated in Articles 8.7 - 8:25 AD 2000. The

552 Thereby, there is a close relationship between art. 3.13 and further AD 2000 and Article 8 ECHR. Art. 3.13 may be based upon 8 ECHR. Thereby the connection is made explicit as far as in concern 3.14(c) AD 2000. According to art. 3.14(c) AD 2000 it is required that the children are part and already formed part of the family of the parent, with whom they wish to reside in the Netherlands, in the country of origin and are under the parental custody of the parent with whom they wish to reside in the Netherlands. The Immigration and Naturalization Services (INS) accept that this criterion is met if there is family life within the meaning of Article 8 ECHR. Hence, the INS uses Article 8 ECHR to establish whether there is a family relationship as meant in art. 3.14(c) AD 2000.

553 See amongst others Walsum 2010a, pp. 525-528, Boeles et al 2014, pp. 215-222 and Spijkerboer 2014, pp. 95-131.

requirements in EU freedom of movement law are less demanding than those in Dutch national family reunification law. Under EU law, family members wishing to reside in the Netherlands are not required, for example, to pass an integration exam, while the costs of residence permits are much lower, and the Union citizen with whom the family member wishes to reside in the Netherlands does not have to comply with the Dutch income requirement. Since EU free movement law is more favourable for family reunification, the main issue in cases in which EU law is invoked is whether EU law indeed covers that particular situation. Besides free movement legislation, there are also cases in which Article 20 TFEU and the *Ruiz Zambrano* judgment of the CJEU have been invoked. Before *Ruiz Zambrano*, family life between a Dutch child and his or her parent(s) without a right to reside was not considered to be a situation covered by EU law. This, however, is no longer necessarily the case.

4.8.1 Establishment of parent-child relationships in Dutch migration law

I will start with the establishment of parent-child relationships on the basis of Article 8 ECHR and then consider cases in which EU law was invoked.

In cases before the Council of State in which Article 8 ECHR has been invoked, the Council of State starts by establishing whether, in the particular case, family life can be regarded as existing within the scope of Article 8 ECHR. If the existence of family life is not disputed by a party, the Council of State merely notes that it is undisputed that there is family life, under Article 8(1) ECHR, between the alien and the family members with whom the alien wishes to reside.[554] The Council of State does not specify what the relationship between the alien and his family members entails.

In a few cases, the Council of State found that family life within the scope of Article 8 ECHR did not exist. The reverse is also possible, namely the Deputy Minister may deny the existence of family life, whereas the Council of State may find it to exist. However, there were no examples of such cases during the period under review. The cases in which the Council of State found family life not to exist within the scope of Article 8 ECHR were cases in which no evidence of family ties was provided or where no meaning had been given to family life, such as in the case of an alien who had never had any contact with the child or given meaning to family life in the sense of Article 8 ECHR in any other way.[555] Or the case of an alien who claimed to be the father of a child born in the Netherlands and who did so on the basis of a Dutch birth certificate that contained only the mother's data. It could not be concluded from that birth certificate that he was the father of the child and nor had

554 See for example Council of State 17 December 2015, no. 201503890/1/V1, ECLI:NL:RVS:2015:4011, par. 1. It may be that whether or not a particular relationship amounts to family life is subject of dispute on a lower level but that this is an issue that it generally settled before the case appears before the Council of State.

555 Council of State 28 march 2013, no. 201201196/1/V1, ECLI:NL:RVS:2013:BZ8698.

he demonstrated this in any other way, for example by arranging for a DNA analysis. The Council of State held, therefore, that the alien had neither demonstrated that he actually had a child nor that he had a family life within the meaning of Article 8 of the ECHR.[556] In one case, the Council of State considered the family ties to have been severed.[557] This case concerned a child, then fourteen years old, who had been left behind by his mother when he was two and had been raised by his grandmother and later his aunt. His mother had never attempted to get in touch with him during that period and nor had she made efforts to restore their relationship since residing in the Netherlands. The Council of State mentioned that it was undisputed that she had only had telephone contact with him twice.

The existence of family ties has also been an issue in situations involving family reunification with refugees. Under certain conditions, family members of refugees can obtain an asylum permit in order to protect those refugees' family life. However, Dutch migration law allows for family reunification only with family members "actually belonging to the family unit". This means that the close family ties between the individual who wishes to join his family members in the Netherlands should already have existed in another country and have been maintained. If this condition is not fulfilled, a permit on the basis of asylum will be rejected. In practice, asylum seekers can have difficulties proving those "actual" family ties through documents.[558] Hence, an identifying hearing is offered as a means to prove the "actual family bond". And while DNA research is a possibility for demonstrating biological ties with children, the identifying hearing remains the only possibility for foster children lacking reliable documents. There have been quite a few cases in which an application was rejected because the applicant was held not actually to belong to the family unit. However, the strict separation between asylum and non-asylum cases ('the watershed') means these cases fall outside the scope of this research, with the Deputy Minister holding there to be no obligation to assess Article 8 ECHR in asylum cases. Where such a permit is refused in asylum cases and such a refusal is argued to violate Article 8 ECHR, the Council of State has held that an assessment of Article 8 should take place in a separate procedure.[559]

In this chapter, the establishment of parent-child relationships on the basis of EU law is relevant in two contexts: in free movement cases (on the basis of Directive 2004/38) and in cases in which Article 20 TFEU and the *Ruiz Zambrano* case are invoked.[560] The

556 Council of State 21 February 2014, no. 201300418/1/V1, ECLI:NL:RVS:2014:607. And see Council of State 7 January 2014, no. 201304707/1/V1, ECLI:NL:RVS:2014:58, Council of State 5 November 2014, no. 201307172/1/V2, ECLI:NL:RVS:2014:4029, Council of State 29 July 2014, no. 201307042/1/V4, ECLI:NL:RVS:2014:2928 (this case concerned the existence of family life between the alien, his partner and her children from a previous relationship).

557 Council of State 22 April 2014, no. 201306330/1/V1, ECLI:NL:RVS:2014:1558.

558 See for a discussion of this issue: Strik and Vreeken 2014 and Strik, Ullersma and Werner 2012.

559 See for example: Council of State 6 February 2012, no. 201203898/1/V1, ECLI:NL:RVS:2013:CA3717 and Council of State 27 June 2013, no. 201200573/1/V4, ECLI:NL:RVS:2013:105.

560 As mentioned in the foregoing the Family Reunification Directive (Directive 2003/86) will not be discussed in this chapter.

relationships considered to be family relationships within the free movement context are detailed in national legislation, specifically Article 8.7 AD 2000.[561] Under Article 8.7(2)a-d AD 2000, a parent is the Union citizen or spouse or registered partner of the Union citizen of direct descendants under the age of 21 or of those who are dependants.[562] Consequently, children are the direct descendants under the age of 21 or are dependants of the Union citizen or spouse or registered partner of the Union citizen. The Dutch Immigration and Naturalization Services (INS) holds that adoptive children are equivalent to direct relatives in the descending line.[563] As the Netherlands has acknowledged same-sex marriages and registered partnerships, such marriages and partnerships are covered by Article 8.7 AD 2000. The Netherlands has also acknowledged a right to reside for the unmarried partner with whom the Union citizen is in a durable relationship and for their children under the age of 18 (Article 8.7(4) AD 2000).[564] In other words, a stricter age limit applies when determining who are considered children in the case of unmarried partnerships. A residence permit granted on the basis of Article 8.7(4) AD 2000 is a residence permit on the basis of national law, whereas a residence permit granted on the basis of Article 8.7(2)a-d AD 2000 is a residence permit on the basis of EU law.[565] What constitute parents and children in the *Ruiz Zambrano* line of cases is dependency-based: in other words, based on the relationship between the third-country national whose presence in the Netherlands is necessary in order to make the Union citizen's EU rights effective.[566]

In summary, the establishment of parent-child relationships can be assessed either on the basis of Article 8 ECHR or on the basis of EU law. With regard to Article 8 ECHR, the family relationship between a parent and child is not determined by the Council of State unless this relationship is disputed. With regard to EU law, parent-child relationships are readily assumed in situations involving free movement law. This is different in situations involving Article 20 TFEU. In this context, the parent-child relationship between a Union

561 See more elaborately Klaassen 2015, pp. 175-236.

562 Art. 8.7 AD 2000 only mentions non-Dutch nationals however Directive 2004/38 also applies to returning Dutch nationals, see Par. B10/2.2 Aliens Circular 2000.

563 Par. B10/2.2 Aliens Circular 2000.

564 While Directive 2004/38 only requires of member states to facilitate the right to family reunification to unmarried partners, the Netherlands has chosen to grant this right to unmarried partners of Union citizens in art. 8.7(4) AD 2000, since it also allows for family reunification for unmarried partners of Dutch nationals. It is assumed that a couple is in a durable relationship if they, prior to the moment of their appeal to EU law, have lived together for a period of six months or have a child together, par. B10/2.2 Aliens Circular 2000.

565 On 10 May 2017 the Council of State has asked for a preliminary ruling of the CJEU (Council of State 10 May 2-17, no. 201600860/1/V2 and 201604637/1/V2, ECLI:NL:RVS:2017:1252 and CJEU 15 May 2017, C-257/17 (*C. and A v. Staatssecretaris van Veiligheid en Justitie*)). The Council of State wants to know whether the CJEU has jurisdiction to answer questions referred for a preliminary ruling by the courts of the Netherlands concerning the interpretation of certain provisions of a directive in proceedings relating to the right of residence of members of the family of sponsors who have Netherlands nationality, if that directive has been declared to be directly and unconditionally applicable under Netherlands law to those family members. If this question will be answered in the confirmative answer this means that although the permit is based on national law it still needs to comply with EU requirements.

566 Par. B10/2.2 Aliens Circular 2000. The Aliens Circular has recently been updated in order to comply with a ruling of the CJEU in the case of *Chavez-Vilchez* (CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354). However, the case law as discussed in this chapter dates from before the amendment of the Aliens Circular.

citizen child and its third-country national parent is covered only if there is no Dutch parent with whom the child could reside, even if this Dutch parent does not have custody or contact with the child.[567]

4.8.2 Comparing parents and children in family and migration law

For the purposes of migration law, a parent is the person who can exercise parental rights, and this is the background against which the norms regulating who is eligible for family reunification have been considered. As stated, family reunification can be based on AD 2000, on AD 2000 and Article 8 ECHR or, lastly, on AD 2000 and EU law.

Under AD 2000, in principle only the nuclear family deserves protection. And even the nuclear family needs to demonstrate close links between the family members and that the parents have custody of the child. The Dutch Civil Code (specifically Articles 1:253sa and 1:253t CC) also protects social parents. Hence the Aliens Decree provides narrower protection. However, as stated earlier, where a permit is denied on the basis of AD 2000, Article 8 ECHR can be invoked. What is of particular relevance, therefore, is whether family life exists within the meaning of Article 8 ECHR as, in both family and migration law cases involving close personal ties between a parent or parental figure and a child, such relationships may attract the protection of Article 8 ECHR. Parent-child relationships are readily assumed under Article 8 ECHR. Where, therefore, a situation concerns Article 8 ECHR, migration and family law apply the same criteria.

Certain relationships are covered by EU law, while parent-child relationships of Dutch nationals and nationals of other EU member states who have made use of their right to free movement are covered by Dutch migration law. Under free movement legislation, children are protected until the age of 21, and thus enjoy a longer period of protection than provided for in the Dutch Civil Code. In addition, under Article 20 TFEU, third-country nationals on whom a Union citizen child is dependent can also rely on Dutch migration law in order to be granted a right to remain and thus exercise parental rights. Parent-child relationships within this category are narrower, however, than those protected by the Dutch Civil Code. The latter protects close and personal relationships, whereas the existence of a close and personal relationship between the third-country parent and the Union citizen child has been deemed irrelevant under Article 20 TFEU. In such situations, the third-country parent is protected only if there is no parent who is (legally) capable of taking care of the child.

567 On 14 July 2017, the Deputy Minister has stated that the ruling of the CJEU of 10 May 2017 in the case of *Chavez-Vilchez* necessitated adjustments to the Dutch policy as regards Article 20 TFEU/Ruiz Zambrano applications (Parliamentary papers II 2016/2017, 19637, 2338, pp. 1-2. Consequently the Aliens Circular has been amended. As stated this change in policy and Dutch case law has occurred after 1 January 2017 and therefore this development falls outside the scope of this thesis.

4.9 Custody and access in Article 8 ECHR cases

Article 8 ECHR is the basis for a large number of cases – 123 during the period under review – that have been brought before the Council of State.[568] As already mentioned, cases invoking Article 8 ECHR often concern admission cases where a permit is refused because family life started during often protracted illegal residence or because of non-compliance with the requirement to obtain a provisional residence permit from abroad or to have sufficient means of subsistence. Where these cases concerned expulsion, they generally involved a residence permit (granted either on the basis of family life or asylum) being revoked for reasons related to public order. The reasons given by the Council of State in Article 8 cases has so far been very brief.[569] As a result, the facts of individual cases remain to a large extent unclear; in most of them, however, at least some of the facts can be deduced from the considerations expressed by the Deputy Minister or the alien or from the decision of the Regional Court, as laid down in the Council of State's rulings. I will first briefly discuss the starting point of the Council of State's assessment (4.9.1) and then move on to examine the elements that the Council of State always takes into account in cases in which Article 8 ECHR is invoked (4.9.2). Lastly, I will explore the approach adopted by the Council of State in cases in which it explicitly dealt with the regulation of custody (4.9.3) and access (4.9.4).

4.9.1 Marginal assessment by the Council of State in Article 8 ECHR cases

It is settled case law in Article 8 ECHR cases that the starting point of the Council of State's analysis is that the state is obliged to take all the relevant facts and circumstances into account, with the Council of State stating that:

> *The court must assess whether the Deputy Minister has included all relevant facts and circumstances in his balancing act and, if so, whether the Deputy Minister has not wrongly considered that this balancing act has resulted in a "fair balance" between the interest of the alien to exercise family life in this country and the general interest of the Dutch society in maintaining a restrictive admission policy. This measure implies that the judicial review should be somewhat reticent.*[570]

Consequently, the Council of State notes that it carefully reviews *whether* all relevant facts

568 In twelve cases the Council of State found that Article 8 was violated or that the Council of State did not comply with the obligation to state reasons. In the other cases no violation was found.

569 See also Korte 2007, p. 45.

570 See for example: Council of State 17 December 2015, no. 201503890/1/V1, ECLI:NL:RVS:2015:4011,

and circumstances are included, but not so much *how* they have been taken into account.[571] The Council of State applies a somewhat marginal review in Article 8 ECHR cases.[572] In principle and providing all the facts have been taken into account, the state's decision is upheld. Hence, it is not the Council of State that performs the balancing exercise under Article 8 ECHR; instead it merely assesses whether the Deputy Minister has performed this balancing exercise.

4.9.2 Elements in the balancing exercise on the basis of Article 8 ECHR

It followed from the analysis of the case law that the following factors are considered relevant in the balancing exercise; whether there are public order elements, whether family life is possible elsewhere, whether family life can be exercised through other means such as holiday visits, and the best interests of the child.[573] Each of these factors is discussed below.

4.9.2.1 Public order

If there are public order elements, the Deputy Minister in principle takes the position that, in the light of Article 8 ECHR, revoking or not prolonging a residence permit is justified. In these cases, the Council of State looks at whether the Deputy Minister took all the relevant circumstances into account and, if the Council of State considers this to be the case, the Deputy Minister is regarded as being justified in taking the view that public order outweighs the interests of the alien.[574]

4.9.2.2 Family life elsewhere

An element that is always considered by the Council of State in Article 8 ECHR cases is whether family members could possibly follow the alien abroad, i.e. to the alien's country of nationality or to a third country with which a family member has certain ties.[575] It is up to the alien to investigate and substantiate that exercising family life elsewhere, either in the country of origin or a third country if objective obstacles stand in the way of returning to the country of origin, is impossible, while the state has no obligation to prove that the

571 Geertsema 2012, pp. 1507-1508.

572 Much has been written on this marginal assessment by the Council of State in Article 8 ECHR cases. For a critique see Boeles 2008, p. 7, Boeles 2005, pp. 120-122. See also, Korte 2007, pp. 45-47, Geertsema 2012, pp. 1507-1508.

573 These factors have also been discussed in literature: see amongst others Klaassen & Lodder 2016, Van Walsum 2010a and see also Work Instruction 2015/4 (AUA) of the INS with guidelines for the purposes of Article 8 ECHR.

574 See for example Council of State 17 December 2015, no. 201503890/1/V1, ECLI:NL:RVS:2015:4011, Council of State 20 February 2015, no. 201404470/1/V1, ECLI:NL:RVS:2015:539, Council of State 3 October 2014, no. 201402866/1/V2, ECLI:NL:RVS:2014:3655, Council of State 12 August 2014, no. 201311362/1/V3, ECLI:NL:RVS:2014:3081, Council of State 24 December 2013, no. 201307043/1/V3, ECLI:NL:RVS:2013:2707 and Council of State 20 December 2013, no. 201211046/1/V3, ECLI:NL:RVS:2013:2558.

575 Work Instruction 2015/4 (AUA) of the INS with guidelines for the purposes of Article 8 ECHR and see for example: Council of State 27 October 2015, no. 201500617/1/V2, ECLI:NL:RVS:2015:3402, Council of State 22 October 2015, no. 201407641/1/V3, ECLI:NL:RVS:2015:3332, Council of State 14 September 2015, no. 201501234/1/V2, ECLI:NL:RVS:2015:3011, Council of State 17 September 2015, no. 201502332/1/V3, ECLI:NL:RVS:2015:3021 and Council of State 20 February 2015, no. 201404470/1/V1, ECLI:NL:RVS:2015:539.

family members will actually be admitted to that third country.[576] An example of such a situation was the case of a Somali family where the father resided in the Netherlands on the basis of asylum and the mother did not have a residence status.[577] The Council of State held that the Deputy Minister had not wrongly concluded that the family could go to Kuwait because the father once had a residence permit for Kuwait, while the mother had argued in appeal that this residence permit had expired and that the mother and child had never been to Kuwait and thus had no ties with a third country. According to the Council of State, however, the expiry of the residence permit and the fact that the mother and child had never visited Kuwait were not relevant. Another such case concerned the admission of a seven-year-old child with a Somali mother who resided in the Netherlands on the basis of asylum.[578] The mother had initially requested permission under the more favourable conditions for refugees, but this request had been submitted too late. Her subsequent request for a provisional residence permit was rejected because she did not meet the income requirement. At the time of the proceedings, the child was living in Ethiopia without a right to reside there and was being cared for by his half-brothers and half-sisters, who were also minors. During her stay in the Netherlands, the mother had another daughter with her new partner, who lived in Norway. The two had met on the internet, and the new partner had been to the Netherlands a few times, although the mother and daughter had never been to Norway. The Council of State agreed with the Deputy Minister that the mother had not made it apparent that family life could not be exercised in Ethiopia or in Norway; therefore, the mother could choose to exercise her family life there, with or without her new partner and daughter.

The state thus has no obligation to prove that the family members will actually be admitted to a third country. As a result, the reasoning that family life can be exercised abroad can be upheld even where none of the family members has the nationality of or a right to reside in that third country. And it can also be upheld, as in another case, despite the fact that the child for whom a provisional residence permit had been requested resided unlawfully in Ethiopia and had no connection with the mother's new Norwegian partner, that mother and daughter had neither Norwegian nor Ethiopian nationality and that neither had ever been to Norway or Ethiopia. As Boeles stated, when it comes to assessing whether family life can be exercised abroad, the Council of State confines itself to the question of whether, strictly speaking, it is not impossible to exercise family life abroad. The Council of State thus looks only at theoretical possibilities and does not seek to establish whether family life elsewhere is in fact a realistic option.[579]

576 See also Work Instruction 2015/4 (AUA) of the INS with guidelines for the purposes of Article 8 ECHR.
577 Council of State 14 September 2015, no. 201501234/1/V2, ECLI:NL:RVS:2015:3011.
578 Council of State 17 September 2015, no. 201502332/1/V3, ECLI:NL:RVS:2015:3021. See also Ismaïli case note JV 2015/319, ve15001611. For this particular case I had access to underlying documents, hence, more details concerning the facts of the case.
579 See also Boeles 2007, p. 4-5.

4.9.2.3 Family life through other means

Another relevant element that is always included in the balancing exercise is whether family life can be exercised from abroad through holiday visits or by using modern means of communication (i.e. internet or telephone).[580] This was made clear in a case in which the Amsterdam Regional Court ruled that refusing to grant a father, who resided in Tunisia, a provisional residence permit would mean that the daughter would grow up without her father for most of her youth since the daughter could not leave the Netherlands due to her speech, language and hearing problems.[581] The Regional Court added that it followed from the *Udeh* judgment that it is important for children to grow up in the presence of their parents and that holiday visits and modern means of communication cannot serve as an appropriate alternative.[582] Lastly, the Regional Court mentioned that the parents in this case could not have foreseen that the daughter would be unable to exercise family life from abroad. The Deputy Minister argued, however, in appeal that the way family life was currently exercised could continue; in other words, the mother and daughter could exercise family life with the father in Tunisia for shorter periods of time on an annual basis and the father could fulfil his role as father through modern means of communication. The Council of State held that the Deputy Minister was justified in taking this view.[583] Another example involved a case in which a father was due to be expelled following criminal convictions and whereby a re-entry ban had been imposed.[584] In this case, the Council of State held that if the mother were to decide that she and children would not follow the father abroad, the children could maintain contact through holiday visits and modern means of communication.

4.9.2.4 Best interests of the child

The balancing exercise also requires the Deputy Minister to look at the best interests of the child and whether children can be expected to adjust to a new environment, with the main focus in this respect being on the ages of the children involved. Some cases mention only that, given their young ages, the children are regarded as being able to adapt to a new environment.[585] In cases, however, where ages are specified, children are considered to be of an adaptable age anywhere between their first birthday and eighteen: in one case, the

580 See for example: Council of State 17 December 2015, no. 201503890/1/V1, ECLI:NL:RVS:2015:4011, Council of State 17 April 2015, no. 201403069/1/V3, ECLI:NL:RVS:2015:1227, Council of State 13 April 2015, no. 201409835/1/V3, ECLI:NL:RVS:2015:1298, Council of State 28 August 2014, no. 201403279/1/V1, ECLI:NL:RVS:2014:3323, Council of State 18 August 2014, no. 201402385/1/V1, ECLI:NL:RVS:2014:3248, Council of State 28 October 2013, 201209198/1/V1, ECLI:NL:RVS:2013:1814 and Council of State 20 March 2012, no. 201103155/1/V1, ECLI:NL:RVS:2012:BW0005.

581 Council of state 28 August 2014, no. 201403279/1/V1, ECLI:NL:RVS:2014:3323.

582 Council of state 28 August 2014, no. 201403279/1/V1, ECLI:NL:RVS:2014:3323.

583 This case is also illustrative of this type of correction of regional courts by the Council of State

584 Council of State 20 March 2012, no. 201103155/1/V1, ECLI:NL:RVS:2012:BW0005.

585 See amongst others Council of State 17 December 2015, no. 201503890/1/V1, ECLI:NL:RVS:2015:4011, Council of State 22 October 2015, no. 201407641/1/V3, ECLI:NL:RVS:2015:3332, Council of State 3 October 2014, no. 201402866/1/V2, ECLI:NL:RVS:2014:3655, Council of State 3 June 2014, no. 201400439/1/V1, ECLI:NL:RVS:2014:2136.

children were between twelve and nineteen,[586] while in another they were eleven, eight and five,[587] and in yet another case the child had not yet reached the age of two.[588] In the case of a thirteen-year-old, the Council of State held, for example, that:

> *In the decision, the Deputy Minister (...) has underlined that the alien never had legitimate residence in the Netherlands and despite this has chosen to intensify her family life. According to the Deputy Minister, the situation in which the alien and the child find themselves is largely due to the choices made by the alien so that responsibility lies with her and not with the Dutch state. Furthermore, according to the Deputy Minister, no insurmountable obstacles exist to exercising family life in Ghana. It is not clear why the child, due to his age of 13 years, will not be able to adapt to his new living environment with the help of the alien. According to the Deputy Minister, the child can learn to speak Ghanaian, considering that the alien speaks that language and that she likewise has learned to speak a foreign language at a later age. Furthermore, according to the Deputy Minister, it is not apparent that the child cannot attend education in Ghana.*
>
> *The entirety of facts and circumstances offers, although the child is 13 years old and has been born and goes to school here, no ground to conclude that the Deputy Minister has wrongly ruled that the refusal to grant a foreign national a permanent residence permit is not contrary to Article 8 of the ECHR.*[589]

Although, therefore, the best interests of the child are mentioned, the actual consequences for the child have not been thoroughly assessed. As the above makes clear, the child in this case is to a large extent defined by his parents: because the mother was able to learn a second language, the child is likely to be able to do the same. Another example can be found in a case in which the Council of State ruled that the Deputy Minister had rightly held that despite both children having Dutch nationality, they could be assumed also to have ties with Iran since that was both parents' country of origin.[590] Despite the child's best interests being mentioned, the focus is very much on the parent; if the alien does not comply with immigration regulations or where public order is at stake, the Council of State holds that it is the parents' choice as to where they want to reside in order to be able to maintain the family unity. A child can thus be held accountable for choices made by his or her parents.[591]

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586 Council of State 10 June 2013, no. 201205735/1/V1, ECLI:NL:RVS:2013:CA3592.
587 Council of State 24 April 2013, no. 201204040/1/V1, ECLI:NL:RVS:2013:BZ9017.
588 Council of State 19 February 2014, no. 201308112/1/V1, ECLI:NL:RVS:2014:690.
589 Council of State 27 June 2013, no. 201201347/1/V1, ECLI:NL:RVS:2013:110. See also Council of State 10 June 2013, no. 201205735/1/V1, ECLI:NL:RVS:2013:CA3592, Council of State 24 April 2013, no. 201204040/1/V1, ECLI:NL:RVS:2013:BZ9017 and Council of State 19 February 2014, no. 201308112/1/V1, ECLI:NL:RVS:2014:690.
590 Council of State 30 November 2011, no. 201002659/1/V3, ECLI:NL:RVS:2010:BO6323.
591 See for a critique of this approach Werner 2015.

The above discussion of the elements that are included in an Article 8 ECHR assessment shows that, in the view of the Council of State, the family relationship is not affected by whether family life can be exercised abroad or through others means, while the assessment of the child's best interests is reduced to establishing whether the child, considering his or her age, can be expected to adjust to another living environment.

4.9.3 Custody in Article 8 ECHR migration cases

There are also cases in which the Council of State has explicitly dealt with custody. In cases where the parent without a right to reside does not have custody, the Council of State has held that the child can remain with the parent who has custody, irrespective of whether the child also has access with the parent without custody.[592] In cases where the parent without a right to reside has sole custody, the child can follow that parent abroad.[593] Such situations are not seen as constituting interference with the right to family life. The same applies in situations where a parent without custody has either Dutch nationality or a right to reside in the Netherlands. In a case involving a Cameroonian mother who stated that she and the father were no longer together, the Council of State held that:

> *The mother has failed to show that the Deputy Minister wrongly took the view that the children and the father can follow her to Cameroon. Furthermore, the Deputy Minister was entitled to take the view that, although it follows from the information submitted by the mother that the children have a developmental delay, it is not established that they are suffering or that one of them suffers from an autistic disorder. The whole of facts and circumstances for the balancing exercise under Article 8 ECHR indicate that, even if it must be assumed that special education is not available for the children in Cameroon, there are no grounds for considering that the Deputy Minister mistakenly took the view that the refusal to grant the mother a residence permit is not contrary to Article 8 of the ECHR.*[594]

The Council of State also held that since the mother had sole custody of the children, the mother and children were not at risk of being separated from each other.[595] The actual consequences for the relationship between the child and the other parent were not assessed. In this case, both the father and the children had Dutch nationality. The Deputy Minister mentioned only that the father could follow the children on his Dutch passport, and the Council of State accepted this reasoning. However, the assumption that the father would follow his ex-partner to Cameroon, a country with which he had no ties whatsoever, seems

592 Council of State 18 November 2014, no. 201406140/1/V1, ECLI:NL:RVS:2014:4296, see also par. 4.8.2.
593 Council of State 17 October 2012, no. 201110785/1/V1, ECLI:NL:RVS:2012:BY0833. Where the child has Dutch nationality just as in this case, besides Article 8 ECHR, Article 20 TFEU is often invoked in this situation.
594 Council of State 20 February 2012, no. 201200899/1/V1, ECLI:NL:RVS:2012:BY8239, par. 4.2.
595 Council of State 20 February 2012, no. 201200899/1/V1, ECLI:NL:RVS:2012:BY8239, par. 4.2.

unlikely. Similarly, the implications for the children of being separated from their father were not assessed either. Hence, in cases where only one of the parents has custody, it is that relationship that the Council of State assesses, not the child's relationship with both parents. According to the Council of State, the right to respect for family life is complied with if the child can stay with the parent who has custody, regardless of the relationship between the child and his or her other parent.

Where both parents have custody, the Council of State has held that, in assessing the case, the Deputy Minister can consider it to be up to the parents to decide whether the children will stay in the Netherlands with the biological parent who has Dutch nationality or a right to reside, or to follow the other parent to the country of origin.[596] Those parents can also decide that the parent with Dutch nationality or a right to reside will follow the other parent.[597] The Council of State likewise considers this to be an option when the parents are divorced.[598] In a case such as this, the Regional Court ruled that while the Deputy Minister could indeed attach significant weight to the fact that family life had started during precarious stay, the Deputy Minister should have paid more attention to the interests of the children. In its ruling it considered that an access arrangement was in place from which it followed that the children had an interest in maintaining contact with both parents, that the parents exercised joint custody, that the father did not have a Nigerian passport and that the mother had submitted a statement from the father in which he stated that he did not consent to her taking the children to Nigeria. The Regional Court did not stop there and held that the Deputy Minister had not commented on the situation that if the mother had to go to Nigeria to apply for a provisional residence permit, this could mean a permanent separation between her and the children because whether she met the requirements for such a permit remained to be seen. According to the Regional Court, the same applied regarding contact between the children and the father if the mother were to take the children to Nigeria, while the idea that contact could be maintained through modern means of communication was almost illusory, given the children's young age. The Council of State disagreed with the Regional Court and held that the Deputy Minister had duly substantiated and rightfully concluded that as no very exceptional situation had occurred, expulsion would not violate the right to respect for family life protected by Article 8 of the ECHR. The Council of State also held that it was the choice of the parents where and with whom the child should reside. Hence, the Council of State's assessment of the Deputy Minister's balancing of interests under Article 8 ECHR was very marginal, with the Council of State once again regarding custody as a power that parents have to freely decide where they want the child to reside. That the specific facts of the case and the relationship between the parents may mean this 'free choice' was merely hypothetical was

596 Council of State 24 July 2014, no. 201310108/1/V3, ECLI:NL:RVS:2014:2856.
597 Council of State 24 July 2014, no. 201310108/1/V3, ECLI:NL:RVS:2014:2856.
598 Council of State 13 April 2015, no. 201409835/1/V3, ECLI:NL:RVS:2015:1298.

not taken into consideration. And neither was any account taken of the possibility that the custody and contact rights of the parent remaining in the Netherlands may be illusory.

The above cases again make clear that the focus here is very much on the alien's compliance with migration law requirements. Where family life started during a precarious stay, the situation in which the alien and his or her partner (or ex-partner) and children find themselves is seen as being due to choices the alien made in the past. It is therefore the alien, not the Dutch state, who bears responsibility for the separation after one of the parents is expelled.[599] Although children's position is taken into account, their best interests do not outweigh those of the state. And where a residence permit is revoked for reasons related to public order, the Council of State has held that the Deputy Minister was not wrong in considering the state's interest in protecting public order to outweigh the interests of the alien and his or her children.[600] Custody is thus not interpreted as being in place in order to protect a child's right to be cared for by both parents, but is instead seen as a legal competence for parents to freely decide where and with whom the child should reside, irrespective of what this means for the child's best interests. In such situations, therefore, only some of the whole collection of parental rights are considered.

However, as mentioned above, the Council of State does require the Deputy Minister to take all the relevant circumstances into account. The latter has to make it clear that all the aspects that the alien has brought to the fore have been separately and coherently assessed.[601] Where the Deputy Minister did not comply with the obligation to state reasons, the Council of State will order the Deputy Minister to take a new decision.[602] In a case, for example, in which the mother had provided various documents related to the behavioural issues of her child, who had a form of autism, the Council of State stated that:

> *The mere position of the Minister (now Deputy Minister) that the presence of the mother is sufficient to overcome the behavioural problems of the child cannot, in view of the aforementioned documents, be followed without further explanation since those documents show that the problem is not limited to the contact between the mother and her child. The position of the Minister that family life can be exercised elsewhere likewise cannot be followed without further justification, since that position cannot*

599 Spijkerboer 2014 and see for example: Council of State 25 November 2013, no. 201211130/1/V1, ECLI:NL:RVS:2013:2230, Council of State 17 May 2013, no. 201204087/1/V4, ECLI:NL:RVS:2013:CA0620, Council of State 24 April 2013, no. 201204040/1/V1, ECLI:NL:RVS:2013:BZ9017 and Council of State 19 July 2010, no. 200909876/1/V3, ECLI:NL:RVS:2010:BN2232.

600 See for example Council of State 20 February 2015, no. 201404470/1/V1, ECLI:NL:RVS:2015:539 and Council of State 12 August 2014, no. 201311362/1/V3, ECLI:NL:RVS:2014:3081.

601 Council of State 15 July 2011, no. 201005039/1/V2. ECLI:NL:RVS:2011:BR3779.

602 See for example: Council of State 21 March 2014, 201208328/1/V1, ECLI:NL:RVS:2014:1197, Council of State 23 December 2013, no. 201300783/1/V1, ECLI:NL:RVS:2013:2693, Council of State 20 March 2013, no. 201200637/1/V4, ECLI:NL:RVS:2013:BZ5220 and Council of State 17 November 2011, no. 201008491/1/V4, ECLI:NL:RVS:2011:878.

> *be seen separately from what has been brought forward in relation to the behavioural problems of the child and therewith the child's interest to remain in the Netherlands in order to obtain the necessary further treatment or counselling. The argument that the alien has participated in the transfer of custody to the father of her child cannot alter the foregoing, as it cannot be determined what considerations lay on the basis of that decision.*[603]

In this case, the Minister had failed to consider the various documents the mother had provided to prove that this child had a particularly strong interest in remaining in the Netherlands, while the facts of the case showed that the mother had even been willing to transfer custody to the father in order to make sure that the child was indeed able to remain in the Netherlands. Thus, the Council of State held that the Minister had to take a new decision and, in doing so, examine the evidence provided by the mother.

4.9.4 Access in Article 8 ECHR migration cases

There are likewise cases in which the Council of State has explicitly addressed access rights. With regard to access, Council of State considers the same points as in the above overview of the elements considered in respect of custody. The issue of access often arises after a couple divorces or separates, while, as explained above, divorce or separation are not deemed to represent obstacles preventing a parent from following his or her ex-partner abroad. If all the facts and circumstances that are brought to the fore by the alien have been taken into account, the Council of State holds there to be no violation of Article 8. The Council of State has held, for example, that:

> *Furthermore, the Deputy Minister did not mistakenly claim that the family members of the foreigner can follow him to a third country in order to exercise their family life. (….)*
>
> *Although it follows from the above-mentioned documents that the presence of the alien is beneficial for the development of his minor son because care and upbringing would otherwise come down to the mother, whereas he [the father] has better command of the Dutch language, it is not apparent that in his absence the other family members cannot provide care or his wife, if necessary, cannot get more support from aid agencies. In addition, the alien has not substantiated that in a third country, such as Iran, the necessary care for his minor son is not present.*[604]

603 Council of State 17 November 2011, no. 201008491/1/V4, ECLI:NL:RVS:2011:878.
604 Council of State 2 December 2014, no. 201404725/1/V1, ECLI:NL:RVS:2014:4515.

Account is taken of whether access arrangements are in place. If such arrangements exist, the child is assumed to have an interest in maintaining the bond with both parents. However, the fact that extensive (or other) access arrangements are in place or that it has been established in other ways that it would be beneficial for the child to grow up with both parents nearby does not outweigh the state's interest in controlling immigration.[605] In a case involving a Ghanaian father without a right to reside in the Netherlands, the Deputy Minister attached considerable weight to the fact that family life had started during protracted unlawful residence.[606] The couple in this case were divorced; however, access arrangements were in place and the father was actively involved in the child's upbringing. The Deputy Minister held that no insurmountable obstacles stood in the way of exercising family life in Ghana, that the father had not recognized the child and did not have custody, and that the access arrangements between the alien and his ex-partner could be altered. The Deputy Minister considered, with regard to the father, that he was intensively involved in the child's upbringing, and that the child and his mother had Dutch nationality. The Council of State held that:

> *Unlike the Regional Court considered, the Deputy Minister has rightly included in the balancing of interests that the alien does not have sufficient means of subsistence (…). The Deputy Minister also rightly pointed out that relevant facts and circumstances in balancing the different interests are that the family life between the alien and the child developed during the unlawful residence of the alien in the Netherlands, that the alien had no social ties with the Netherlands before his arrival, that he had lived in Ghana for 34 years, had not recognized the child and had no legal custody over him and that he had not previously lodged an application for a residence permit for a stay with the child and that there is no objective barrier to him to exercise family life in Ghana.*[607]

With regard to the relationship between the father and his child, the Council of State mentioned only that the father had not recognized the child and did not have custody. The Council of State thus remained silent on circumstances that were favourable for the father, namely the fact that access arrangements were in place and that the father was very much involved in the child's life. Whereas the Council of State holds that while it does not perform the balancing exercise under Article 8 ECHR itself, it does look carefully at whether the Deputy Minister has taken all the relevant circumstances into account, in this case only a few of the relevant circumstances were actually considered. Here, therefore, the Council of State did not apply its own standard of review.

605 See, for example, Council of State 17 December 2015, no. 201503890/1/V1, ECLI:NL:RVS:2015:4011.
606 Council of State 18 November 2014, no. 201406140/1/V1, ECLI:NL:RVS:2014:4296.
607 Council of State 18 November 2014, no. 201406140/1/V1, ECLI:NL:RVS:2014:4296, par. 1.2.

Moreover, the Council of State did not address the Deputy Minister's statement that the access arrangements could be altered. This would entail changing arrangements where access is exercised in the Netherlands to arrangements where access is exercised from abroad. In practice, therefore, changing the access arrangements in this way would involve making a change specifically in order to be able to deny the father a residence permit. Access is meant, however, to protect the child's right to have contact with both his parents, and the right of the father to have contact with his child. Existing access arrangements should therefore be changed only if they are not in the child's best interests. The Deputy Minister's reasoning, which was upheld by the Council of State, shows that, in migration law cases, it is not that the state's interest in controlling immigration may outweigh the interests of the parent and child in enjoying access, but that access itself has been given an entirely different meaning.

In cases where access has been limited, the Council of State has not found a violation of Article 8 ECHR. According to the Council of State, it is irrelevant that such access was limited as a result of the other parent's behaviour. Indeed in one such case the Council of State held as follows:

> *That, as the Regional Court has considered, the limited relationship between the alien and his son is due to the attitude of the mother does not detract from the fact that ever since the relationship between the alien and the mother ended, contact between the alien and his son has actually remained limited and never became structural. Thereby it is taken into account that since July 2013 there has not been any contact between the alien and his son. The Deputy Minister has rightly deemed relevant that the alien did not demonstrate that access will be resumed. Furthermore, in considering that there are obstacles to exercising family life elsewhere, taking into account the fear of the mother that the alien will bring his son to Iraq, the Regional Court did not acknowledge that the Deputy Minister rightly considered that family life can be exercised in another way, for example through modern means of communication.*[608]

Hence, no obligation exists to take measures to enable ties between a parent and child to be maintained where this is obstructed by the other parent. On the contrary, the fact that there is no contact means that the father can leave. If, as a result of the mother's behaviour, there is already no contact, it would seem unlikely that contact will be maintained by telephone or internet. Thus, whereas the family court attaches great importance to access arrangements that are practical and effective, the Council of State, in the same way as it regards custody, looks only at theoretical possibilities for exercising access, instead of at whether these are realistic in the specific case.

608 Council of State 12 August 2014, no. 201311362/1/V3, ECLI:NL:RVS:2014:3081.

Besides after divorce or separation, access is also relevant if child protection measures have been imposed. Where a child protection measure has been imposed, exercising family life elsewhere will clearly be impossible since, in such cases, it is not up to the parents to decide where the child should reside, but instead the child welfare organization that is responsible for administering the child protection measure. In such a case, the Regional Court found the imposition of an exclusion order to be in violation of Article 8 ECHR.[609] The father had maintained regular contact with his daughter since birth and while this contact had not always been equally intense, the Regional Court stated that access of some significance between father and daughter could be assumed. All the more, given that the daughter attached great importance to the visits to her father, and that the father, unlike his ex-wife, could provide the daughter with the necessary structure and discipline. The Regional Court considered there to be insurmountable obstacles to prevent the father and daughter from exercising family life outside the Netherlands since the family court, based on the child welfare agency's advice, had ruled that the relationship between father and daughter was in the daughter's interests and that the exclusion order made access impossible. The Regional Court therefore held that the Minister also could not reasonably conclude that interfering with the right to family life was justified. The Regional Court added that, in view of the family court's decision and the supervision order that was in place, the Minister could not reasonably conclude that the fact that the daughter could maintain contact with her father by telephone was sufficient to protect the daughter's interests. The Council of State nonetheless ruled that instead of considering whether the Minister had taken all the relevant interests into account in the decision-making process, the Regional Court's assessment had wrongfully replaced the Minister's evaluation of those interests with its own.

The reserved stance adopted by the Council of State was also visible in another case in which care had been transferred to a child welfare organization. In this case, a two-year re-entry ban had been imposed on a Nigerian mother who was held in aliens detention.[610] The mother had stated that she had sole custody of her daughter, but that the father had acknowledged the child. However, care had been transferred to a child welfare organization, and the daughter resided with a foster family. The reasons why care had been transferred were not mentioned, and neither were the implications of this for the mother's custody of the child. The re-entry ban meant that the mother would be unable to visit her daughter for two years. The Council of State held that, in light of the entirety of the facts and circumstances, the Deputy Minister had not been mistaken in claiming that the re-entry ban did not violate Article 8 ECHR. Yet the Council of State mentioned only that the mother resided in the Netherlands unlawfully and that the restrictions she would suffer as a

609 Council of State 1 May 2012, no. 201101008/1/V1, ECLI:NL:RVS:2012:BW4897. See also: Council of State 17 April 2015, no. 201403069/1/V3, ECLI:NL:RVS:2015:1227, Council of State 23 May 2013, no. 201302213/1/V3, ECLI:NL:RVS:2013:CA1299.

610 Council of State 23 May 2013, no. 201302213/1/V3, ECLI:NL:RVS:2013:CA1299.

result of the re-entry ban did not contradict the legal purpose of the ban. And, furthermore, the Deputy Minister stated that it was not impossible to exercise family life through holiday visits by family members to the country of origin or any other country. Hence, the interests of the daughter, more specifically the consequences of the two-year separation for her well-being, were not specifically addressed. In this case too, therefore, the Council of State did not apply its own standard of review.

In summary, the questions of contact between parent and child and/or the existence of access arrangements are taken into account. However, as the above case shows, the extent to which they are taken into account may be relatively limited. If the Deputy Minister holds the interests of the state to outweigh the interests of the child and parents in being able to maintain their bonds in the Netherlands, this view will be upheld by the Council of State. The latter therefore follows the Deputy Minister in finding that access rights can be fulfilled through holiday trips or other means.

4.10 Custody and access in free movement and Article 20 TFEU cases

Very few of the cases during the period under review in which an applicant invoked free movement law – more specifically, Directive 2004/38 – in order to be able to remain in the Netherlands actually dealt with the question of what and how close the relationship between children and their parents (or *de facto* parents) have to be in order to be protected.[611] This is different in cases in which Article 20 TFEU is invoked. The Council of State's application of Directive 2004/38 is discussed in par. 4.10.1, while the regulating of custody and access in cases in which Article 20 TFEU is invoked is discussed in 4.10.2 and 4.10.3 respectively. With regard to the Council of State's application of the *Ruiz Zambrano* criterion in cases in which Article 20 TFEU is invoked, it should be noted that the Aliens Circular 2000 has been amended in response to the CJEU ruling of 10 May 2017 in the case of *Chavez-*

611 Those cases may revolve around a third-country national with family members with Union citizenship, but the protection of the family relationship is not an issue. An example is a case where the third-country national had not made it apparent that she and her Dutch husband had resided in Spain for a period of longer than three months and thus fell within the scope of protection of Union law (Council of State 19 February 2015, no. 201306220/1/V2, ECLI:NL:RVS:2015:517). Another example is a case of a third-country national and his Dutch spouse who had been granted a right to remain in Belgium where they went to after he was declared un undesirable alien by the Netherlands (Council of State 16 June 2015, no. 201401560/1/V2, ECLI:NL:RVS:2015:2008). He had requested for his re-entry ban to be cancelled so that he could visit his children who lived in the Netherland and possibly move back to the Netherlands with his spouse. The question that was addressed was whether he posed an actual threat to the Netherlands society, not the closeness of his ties to his children. Last example is a case where the question was whether the marriage of a third-country national and his spouse was a sham marriage (Council of State 26 may 2016, no. 201509212/1/V3, ECLI:NL:RVS:2016:1546). The Council of State concluded that the Deputy Minister had not wrongly concluded that this was the case considering the inconsistent statements regarding important life events, including the pregnancy. However what the relationship between the third-country national and the child precisely entailed was not an issue.

Vilchez.[612] As a result of this amendment, which entered into force in October 2017, the Dutch Immigration and Naturalization Services, and consequently the Council of State, will in future assess these cases differently.[613] Owing, however, to the time limit of 1 January 2017, this development falls outside the scope of this thesis.[614]

4.10.1 Council of State's interpretation of Directive 2004/38

Only one free movement case was of relevance in this respect during the period under review. This concerned a German child who went to primary school in the Netherlands and who was accompanied by his Turkish father, who looked after him.[615] The mother had remained in Germany to look after their other children. According to the Regional Court, it had neither been established that the mother and adult brothers of the child could not accompany the child in the Netherlands and nor that the refusal to allow the father a right to reside in the Netherlands would compel the child to leave the territory of the Union. However, the Council of State ruled that, on the basis of Directive 2004/38 and CJEU case law, the only relevant question was whether the father was in fact responsible for the daily care of the child. If this was the case, the father should be granted a right to reside in the Netherlands.

This case makes clear that when Directive 2004/38 is invoked, the Council of State applies the criteria that follow from EU law. The father was responsible for the daily care of the child and thus enabled the child to exercise his right to free movement and right to pursue education. Consequently the father had a right to remain in the Netherlands. The Council of State's approach to cases concerning free movement law is thus very different from its approach to cases concerning Article 8 ECHR. In Article 8 ECHR cases, the focus is on the parent. If the parent does not have a right to reside, then neither does the child, irrespective of whether the child has Dutch nationality. Free movement legislation, however, grants rights to Union citizen children and, in order to protect these rights, certain rights should also be granted to the children's parents. Thus, whereas children are considered appendages to their parents under Article 8 ECHR, parents can be considered appendages to their children in EU free movement law.

612 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (*Chavez-Vilchez*) and par. B10/2.2 Aliens Circular 2000.

613 The Deputy Minister stated that in 2016 there were 340 applications of which 110 were accepted. In 2015, it concerned 270 applications and 130 of those were accepted. It can be expected that the amount of cases in which an appeal to Article 20 TFEU is made will increase (Parliamentary Papers II 2016-2017, 19637 no. 2338 and Stb. 2017, no. 53847, p. 11-12.

614 Thereby on rechtspraak.nl in 2017 there have not yet been any cases published before the Council of State on the basis of this new policy.

615 Council of State 3 September 2013, no. 201203275/1/V4, ECLI:NL:RVS:2013:2820.

4.10.2 Custody in Article 20 TFEU cases

Before *Ruiz Zambrano*, situations involving Dutch children living in the Netherlands with a parent without a residence status were considered to be internal situations: meaning situations with no link to EU law. As a result, however, of the *Ruiz Zambrano* judgment, a non-EU parent of a Dutch child now has a right to reside in the Netherlands if his or her presence in the Netherlands is necessary for the child's ability to reside within the EU. The main issue, therefore, is when a parent's presence can be assumed to be necessary. The Council of State has since interpreted the *Ruiz Zambrano* criterion very strictly, stating that when establishing whether a third-country parent's presence is necessary, family members' desire to stay in the Netherlands or the Union as a family is of limited importance.[616] The Council of State has held that a situation in which the Union child is, in effect, refused the right to reside in the territory of the Union arises only if the other (Dutch) parent could not feasibly look after the child, if necessary with help of the state or others.[617] Subsequent references to the parent in this context mean the legal parent, who does not necessarily have custody or access rights.

To date, the application of the *Ruiz Zambrano* criterion has been relatively clear-cut in two common situations. On the one hand, in cases where the parents are divorced or separated and the parent without custody is Dutch, Article 20 TFEU can be successfully invoked only if the Dutch parent is completely out of the picture. The Council of State has found that residence rights should be granted to the non-EU parent in cases in which the whereabouts of the parent with Union citizenship are unknown,[618] or the parent with Union citizenship is deceased[619] or serving a prison sentence.[620] In other words, successfully invoking Article 20 TFEU requires there to be absolutely no question that the non-EU parent is indeed the only parent able to care for the child.

In cases, by contrast, where the family still lives together as a unity, the Dutch parent is able to care for the child and no exceptional circumstances exist to demonstrate that the third-country parent's presence is necessary in order to care for the child, invoking Article 20 TFEU has not succeeded.[621] The main rule in this situation is thus that the children can remain with the Dutch parent even if this means that the family will then be split up. Hence, exceptional circumstances are required to demonstrate that the presence of the

616 Council of State 17 October 2012, no. 201110785/1 / V1, ECLI:NL:RVS:2012:BY0833, par. 5.2.
617 Council of State 17 October 2012, no. 201110785/1 / V1, ECLI:NL:RVS:2012:BY0833, par. 5.2.
618 Council of State 7 March 2012, no. 201102780/1/V1, JV 2012, 162, Council of State 11 June 2012, no. 201100852/1/V1, ECLI:NL:RVS:2012:BW8590 and Council of State 15 November 2012, no. 201110635/1/V1, ECLI:NL:RVS:2012:BY4039.
619 Council of State 7 March 2012, no. 201105729/1/V1, JV 2012, 163.
620 Council of State 10 July 2012, no. 201103973/1/V1, ECLI:NL:RVS:2012:BX1345.
621 Council of State 20 January 2016, no. 201502787/1/V2, ECLI:NL:RVS:2016:179, Council of State 15 March 2012, no. 201106038/1/V1, JV 2012, 205 and Council of State 20 March 2012, no. 201103155/1/V1, ECLI:NL:RVS:2012:BW0005.

Dutch parent alone is insufficient to guarantee that the Union citizen child can remain within the EU. Such exceptional circumstances will be accepted in cases in which it is established that a child will be placed in public care if the non-EU parent is not allowed to reside in the Netherlands. This, however, is hard to predict beforehand. The Council of State accepted this reasoning in a case where a child had previously been placed in public care when the third-country parent temporarily resided elsewhere.[622] Another example involved a case in which the parents lived together as a unity and both had responsibility for daily care of their daughter, but where a child protection agency had been awarded custody of the child.[623] In this case, the Deputy Minister reasoned that the main rule applied: in other words, the Dutch father could take care of the child alone or the child could follow the mother abroad.[624] The Council of State, however, did not agree and held that, since the child was under the custody of the child protection agency, it was no longer up to the parents to determine the child's place of residence and that, therefore, the choice of whether the child would follow the mother upon the latter's forced departure to her country of origin or stay with her father in the Netherlands could not be made by the parents. The Council of State consequently ruled that the Deputy Minister had not sufficiently motivated the decision. Hence, the Council of State considers the fact that parents no longer have the power to decide their child's place of residence to constitute exceptional circumstances.

In situations falling between the two situations described above, the application of the *Ruiz Zambrano* criterion has been less clear-cut. In cases where the parents were divorced or separated, but there was a Dutch parent, invoking Article 20 TFEU did not prove successful other than in cases involving the exceptions mentioned above (i.e. where the Dutch parent was completely out of the picture, deceased or in prison).[625] This was no different if the Dutch parent did not (or was not willing to) look after the child. Hence, Article 20 TFEU has not been successfully invoked even when the Dutch parent did not have custody or access rights and had additionally declared that he or she had no interest in rearing the child. The Council of State considered that the mere presence of a parent with Union citizenship in a member state was enough to assume that the genuine enjoyment of EU law rights was guaranteed. According to the Council of State, the non-EU parent had to provide evidence that the Dutch parent could not be awarded custody (or also be awarded custody). It was not enough, for example, for the Dutch parent to be living in the UK and not to have custody of the children[626] or for the non-EU parent to have sole custody of the child and to have taken care of the child alone since birth. The Council of State ruled, for example, that:

622 Council of State 26 April 2013, no. 201110991/1/V1, ECLI:NL:RVS:2013:BZ9025.
623 Council of State 4 December 2015, no. 201410621/1/V3, ECLI:NL:RVS:2015:3807.
624 Council of State 4 December 2015, no. 201410621/1/V3, ECLI:NL:RVS:2015:3807.
625 See for example: Council of State 25 November 2013, no. 201211130/1/V1, ECLI:NL:RVS:2013:2230, Council of State 28 June 2013, no. 201204124/1/V1, ECLI:NL:RVS:2013:131, Council of State 27 June 2013, no. 201201347/1/V1, ECLI:NL:RVS:2013:110 and Council of State 20 December 2012, no. 201200899/1/V1, ECLI:NL:RVS:2012:BY8239.
626 Council of State 2 May 2012, no. 201200988/1/V3, JV 2012, 295.

> *The alien has not made it apparent that the child cannot stay with the father. That the alien has taken care of the child alone since birth and that the child has no contact with the father, who, according to the submitted e-mail correspondence with Spirit Youth Care, has in vain been reminded of his responsibilities, does not lead to another judgment. Thereto, it is deemed relevant that, as the Deputy Minister has stated, the alien mentioned at the hearing of 24 November 2009 that the child has contact with the father once a month, that, if necessary, he can call the father and that the father contributes to the costs of his upbringing. The Regional Court did not acknowledge that, under these circumstances, the alien did not make it apparent that the child is so dependent on her that, as a result of the decision of the Deputy Minister, he has no choice but to leave the territory of the Union.*[627]

In this case, Article 8 ECHR was also invoked and, from the facts disclosed in that respect, it became clear that the child was thirteen years old. Hence, the mother had taken sole care of the child for thirteen years. Similarly the Council of State ruled that a child could stay with its Dutch father in a case where the Dutch father did not comply with his obligation to pay maintenance or his visitation rights. If the child resided with him on the basis of the visitation arrangements, the father almost never spent the whole period with his child, but instead took the child to the mother of two of his other children and departed. The Council of State held that those facts did not detract from the fact that the father occasionally took care of his child with the help of a third party.[628]

The final situation concerns families in which the family was still intact, but where the Dutch parent was unable to take care of the child alone. In such situations, the Council of State has likewise considered that the mere presence of a parent with Union citizenship in a member state was enough to assume that genuine enjoyment of EU law rights was guaranteed. The Council of State held in this respect that Dutch parents in the Netherlands could claim social benefits and that the government or social institutions could also provide support for care and education tasks. According to the Council of State, the *Ruiz Zambrano* criterion would be met only after the Dutch parent had used these options and still could not be considered able to care for the child. It was not enough, for example, that the Dutch parent was mentally retarded and suffered from psychological problems,[629] that the Dutch parent worked and the non-EU parent was responsible for the children's daily care,[630] or that the Dutch parent's mental disorders meant he was only able to care for his children if he took his medication, and the non-EU parent was the person who ensured he took

627 Council of State 27 June 2013, no. 201201347/1/V1, ECLI:NL:RVS:2013:110.
628 Council of State 17 October 2012, no. 201110785/1/V1, ECLI:NL:RVS:2012:BY0833.
629 Council of State 7 March 2012, no. 201108763/1/V2, ECLI:NL:RVS:2012:BV8619.
630 Council of State 24 April 2012, no. 201103346/1/V1, ECLI:NL:RVS:2012:BW4298.

his medication properly.[631] In all these situations, it was the non-European parent who primarily or even completely took care of the child.

In summary, the Council of State has held the *Ruiz Zambrano* criterion to be fulfilled only in the absence of any possible – theoretical – dependency on the Dutch parent. Where parents exercise joint custody, the non-EU parent can leave since the presence of the Dutch parent alone is sufficient. And where the non-EU parent has sole custody of the child, it is up to that parent to prove that the Dutch parent could not be awarded custody as well or instead, and then take care of the child. In situations in which Article 20 TFEU has been invoked, the fact that the non-EU parent primarily or even completely took care of the child and that no actual bond existed between the Dutch parent and the child was considered irrelevant.

4.10.3 Access in Article 20 TFEU cases

Access was found to a large extent to be irrelevant in cases in which Article 20 TFEU was invoked. Owing to the interpretation given by the Council of State, the main question arising in these cases was whether there was a Dutch parent who could be awarded custody. The simple fact of that custody was considered sufficient to assure the child of a parent with legal responsibility for him or her. The above cases make clear that the Council of State considered that, in order to make his or her EU rights effective, a child could reside with a Dutch parent with whom he or she has had no or only very limited contact. Likewise the child could reside with a Dutch parent who had made it clear that he or she was not willing to actually care for the child. That the non-European parent was the primary carer, and thus the parent with whom the child had actual ties, did not lead the Council of State to conclude that Article 20 TFEU had been violated.

The relationship between the child and the non-EU parent was relevant only in those cases where there was evidence that the Dutch parent was unable to take care of the child alone. The overview of these cases shows, however, that this inability to care for the child was not readily assumed. Only if it was clear that, without the non-EU parent, the child would be placed in public care was the relationship with the non-EU parent protected.

4.11 Conclusion: migration law

The Council of State considers custody and access to be legal competences, where parents can freely decide where and with whom their child should reside. The Dutch parent having custody is seen as the reason the other parent can leave or the reason the parent can choose

631 Council of State 6 August 2012, no. 201201455/1/V1, ECLI:NL:RVS:2012:BX5044.

to take the child with him or her, in which case family life is not interfered with. The alien needs to prove that custody cannot be awarded to the Dutch parent or the parent with residence rights; likewise the Council of State holds that access arrangements can be altered so that a residence permit does not need to be granted and family life can be exercised from abroad. Hence, custody and access are not considered as means intended to serve the best interests of the child. On the contrary, the Council of State does not actually assess the best interests of the child.

That custody is not considered in relation to the best interests of the child, but instead as a legal competence of parents becomes very clear in cases in which both Article 20 TFEU and Article 8 ECHR are invoked. In these cases, the Council of State completely separated the assessment of these two Articles, with the result that, in one judgment, it held that although there was no family life between a child and his father, that did not mean the child could not stay with his father (Article 20 TFEU). Similarly, there were also no obstacles to prevent the child following his mother abroad, given that there was no family life between the child and his father (Article 8 ECHR).[632] Hence, according to the Council of State, the total absence of family life between a child and his Dutch parent did not justify the assumption that the child would follow his third-country parent abroad.

4.12 Concluding remarks

In both family and migration cases in which Article 8 ECHR was invoked during the period under review, the same criteria were applied in order to establish whether family life existed. And family life was readily assumed to exist in such cases. Where Article 20 TFEU was invoked, the Council of State gave a strict interpretation to the establishment of parent-child relationships. In its case law based on Article 20 TFEU, the CJEU requires a relationship of dependency between the Union citizen and the third-country family member. This dependency is not only a legal, but also a factual dependency and, according to the CJEU, requires an evaluation of emotional ties. The Council of State, by contrast, looks at legal dependency only and thus gives a narrower definition to parent-child relationships than the CJEU.

The difference in the approach adopted by family law courts and by the Council of State, as indicated in the quotations in the introduction to this chapter, was reflected in all the cases concerning the regulating of custody and access. Family law courts provide strong protection of joint custody and access rights, with the idea behind this strong protection being that it is important for a child, also after a separation, to maintain contact with both

632 Council of State 3 April 2013, no. 201200977/1/V1, ECLI:NL:RVS:2013:BZ8706.

parents and that both parents will continue to feel responsible for the child's care, education and development. Where possible, thus where the interests of parents and children coincide, maintaining family unity is the rule in family cases, while awarding sole custody or denying access are the exception. The facts in each case are carefully assessed in order to ensure that parental rights can be exercised effectively. Here, the guiding principle in the event of tension between the interests of children and parents, and thus where sole custody or denying access may be necessary, is the best interests of the child.

As far as the migration court is concerned, however, the right to control migration is the guiding principle. In order to uphold the right to control migration, custody is considered a legal competence available to parents to make decisions regarding the child, and particularly the child's place of residence. However, this legal competence of parents does not reflect the extent of actual ties existing between parent and child. While the focus is thus very much on the responsibility of the parent, this is not to say that decisions are in the interest of either parent or child. If a legal parent has a right to reside in the Netherlands, the legal competence is held to be present, and this is held to be sufficient for the purposes of protecting the child. If the legal parent is the parent without a right to reside, the child can always follow that parent abroad. Likewise, access arrangements can be altered so that a residence permit does not need to be granted. And where a child has two legal parents and, under the competence approach, can thus reside with either parent, either in the Netherlands or abroad, the Council of State does not assess the actual quality of access with the other parent. In migration law, therefore, the focus is thus very much on competences of the parents, with the parents bearing sole responsibility for maintaining the parent-child relationship. By regarding custody and access not as means intended to serve the best interest of the child but as legal competences available to parents, custody and access appear to contribute to the interest of the state.

Given that the Council of State views custody and access as legal competences rather than looking at the consequences that a certain decision has for a particular parent-child relationship, and also the strong focus on the parents, the Council of State's rulings create the impression of involving rather hypothetical situations. This approach of the Council was seen in cases in which either Article 8 ECHR or Article 20 TFEU were invoked, but was particularly striking in cases in which both Articles were at issue. In migration cases, it is not only that the state's interest in controlling immigration has been seen to prevail over the interests of parent and child, but also that the approach adopted by the Council of State leaves little scope for actual balancing of interests.

Chapter 5

Concluding remarks: regulating parent-child relationships in the Council of Europe, the EU and the Netherlands

5.1 Introduction

This thesis compares the ways in which custody and access are regulated in family law and migration law. In the introduction I discussed how, at first sight, it appeared that these two fields of law could not easily be compared, given their different purposes and positions within the Dutch legal system. The assumption throughout this thesis was that despite the different position of custody and access and the different position of the courts in, on the one hand, family law and, on the other hand, migration law, the interests of those involved in maintaining the relationship between parent and child, where the two are separated and irrespective of what caused this separation, would not vary depending on the field of law in which a case situates itself.[633] This thesis consequently focused on cases of separation (or possible separation) between parents and children. However, as the research conducted for this thesis has shown, this assumption proved not to be correct.

Chapters two, three and four of this thesis analysed the approach adopted by various courts – in family and migration law, and at different levels of jurisdiction – in regulating custody and access rights. Now, in this fifth and final chapter, I will first discuss the most important findings regarding the ECtHR (5.2), the CJEU (5.3) and the Dutch courts (5.4), followed by the case law of the Dutch courts in the light of their international obligations (5.5). Lastly, I will address the different approaches adopted by the various courts in mediating tensions between individuals, families and states (5.6). The aim of this conclusion is to demonstrate that the various courts all choose different guiding principles to mediate these tensions between parties and that these different guiding principles have significant consequences for the protection of custody and access.

5.2 Family and migration law at the ECtHR: Best interests of the child vs. behaviour of parent and state as the decisive element for the outcome of a case

The second chapter assessed ECtHR case law on regulating parent-child relationships, and then compared and contrasted the approaches to such regulation in family law and migration law. The hypothesis for this chapter was that it was unlikely that the protection afforded by the ECtHR to the interests of individuals in cases involving the protection of custody and access rights would vary depending on the residence status of one or more of the family members. Yet the analysis revealed that while the ECtHR has recognized the need to protect family unity in both fields of law, the best interests of children are

633 See footnote 39.

paramount to the outcomes in family cases, but are never decisive in migration cases in which Article 8 ECHR is invoked.

5.2.1 Similar starting point in family and migration law

The starting point of the analysis in cases invoking Article 8 ECHR was the same in both family law and migration law. The ECtHR has given a broad interpretation to the ties that amount to family life by readily assuming in both family and migration law that family life between parents and their minor children exists and acknowledging that *de facto* ties may also constitute family life. While family life is not automatically limited to the nuclear family, it is only in exceptional circumstances that family life between biological parents and children can be considered to have become broken. Consequently, it is easily accepted in both fields of law that the relationship between parents and children falls within the scope of Article 8 ECHR. Likewise, the ECtHR still attaches relevance, in both family and migration law cases, to the qualification of a particular situation as entailing either a negative or a positive obligation. Whereas, in certain categories of cases, the perspective from which the case will be analysed by the ECtHR is clear from the outset, there are also cases where this is less clear or entirely unclear. However, this vagueness as to when a situation can be regarded as entailing a negative or a positive obligation is visible in both fields of law. And, in both fields of law, the ECtHR has held states, in principle, to have a large margin of appreciation. A difference is that, in family law cases only, the ECtHR has stated that this large margin may be narrowed where a core right, such as the fundamental right of parents and children to enjoy each other's company, is at stake.

With regard to the ECtHR's analysis of whether the particular circumstances of the case mean that Article 8 ECHR has been violated, the starting point is again the same in both family and migration law. In both fields of law, the ECtHR has recognized that parents and children have the right to live together (or continue living together) and, where this is not or no longer possible, the right to mutually enjoy each other's company. Consequently it has imposed various obligations on states to protect these rights. The ECtHR has stressed in both family and migration law that the domestic authorities involved in the decision-making process have to take all the relevant circumstances into account and that the proportionality of a domestic measure should be carefully assessed in each and every case. In both fields of law, therefore, the domestic authorities must have assessed what the relationship between the parents and children in a particular case entails and have taken the best interests of the children into account. This assessment by the state has to be done in a swift and timely manner. Where the state failed to fulfil these requirements, the ECtHR found a violation of Article 8 ECHR both in family and migration law.[634]

634 See for example: ECtHR 22 June 1989, Appl. no. 11373/85 (*Eriksson v. Sweden*), ECtHR 12 July 2001, Appl. no. 25702/94 (*K. and T. v. Finland*), ECtHR 25 January 2000, Appl. no. 31679/96 (*Ignaccolo-Zenide v. Romania*), ECtHR 26 June 2003, Appl. no. 48206/99 (*Maire v. Portugal*), ECtHR 27 October 2005, Appl. no. 32231/02 (*Keles v.*

5.2.2 Family relationship is never decisive in migration law cases

While it is precisely because states are obliged to assess all the relevant circumstances in both fields of law that the relationships between parents and children and the best interests of the children would seem to be factors attracting considerable weight in both family and migration cases, ECtHR case law reveals that no matter how close the ties between parents and their children are, states always have the right in migration law cases to expel or refuse entry where this is in conformity with domestic immigration regulations. Despite, therefore, the ECtHR having recognized that parents and children have the right to live together and the right to mutually enjoy each other's company, and having repeatedly stated that individual interests may outweigh the state's public interest in controlling immigration, the ECtHR never actually found a violation during the period under review based purely on those individual interests. This contrasts sharply with family law cases, where the obligations that are imposed on states in order to maintain ties between parent and child are far-reaching and very detailed.[635] Indeed, in family law, this obligation ceases to exist only for reasons related to the best interests of the child.

The above does not imply that the ECtHR has never found a violation of Article 8 in migration cases; where, however, it found such a violation, this related to the choices made by the state and/or the parents rather than to the closeness of the ties between the family members or the best interests of the child. This focus on individual interests obscures the fact that it was not the parent-child relationship itself that was decisive for the outcome of the case. Indeed in expulsion cases, it was only where the state had not behaved irreproachably that the interests of the individuals were used in the ECtHR's argumentation as necessitating a right to reside. Likewise, in admission cases where parents had not complied with immigration regulations, the only occasions on which a violation was found was when the state had made mistakes in the domestic proceedings. Hence, there needs to have been a particular failure on the part of the state for the ECtHR to rule that Article 8 ECHR has been violated. The ways in which the state can fail can include, for example, the incompatibility of various decisions taken by the domestic authorities, a long period of inaction by the state, or failure to recognize that migrants could have had legitimate expectations as to their right to reside.[636] Whereas the last of these three failures is specific to migration law, parallels can be drawn with family law cases in the other two situations.

Germany), ECtHR 27 September 2011, Appl. no. 39417/07 (*Alim v. Russia*), ECtHR 10 July 2014, Appl. no. 19113/09 (*Senigo Longue and others v. France*).

635 ECtHR 12 April 2011, Appl. no. 21188/09 (*Glukahović v. Croatia*).

636 In some cases the mistake that was made by the state was specific for that particular case. Namely in the case of *Keles*, wherein the state had expelled the migrant for an unlimited duration (ECtHR 27 October 2005, Appl. no. 32231/02 (*Keles v. Germany*)) and the case of *Hamidovic* (ECtHR 4 December 2012, Appl. no. 31956/05 (*Hamidovic v. Italy*). The state had herein expelled a migrant despite there being an interim measure in place.

5.2.3 Incompatibility of state decisions, inaction by the state and legitimate expectations of migrants as the basis for a violation of Article 8 ECHR

The incompatibility of decisions taken by the domestic authorities becomes visible when the case of *Udeh* is compared with that of *Onur*. The ECtHR found a violation in *Udeh*, where the children lived with the mother but where the father was granted access rights one afternoon at least every two weeks. The ECtHR noted that, in this case, exercising family life from abroad could not replace the right to live together. It should be noted that while the father in this case had visitation rights, the father and his children did not actually live together. In *Onur*, on the other hand, the child likewise lived with her mother, but the father saw his daughter on an average of two to three days a week. Here, however, the ECtHR held that while the expulsion may have a disruptive effect on the daughter, it was unlikely to have had the same effect as it would have done if the father and daughter had been living together. What distinguished the two cases was that, in *Udeh*, the state had granted the father a residence permit after he had been convicted.[637] The incompatibility of decisions taken by the domestic authorities – on the one hand, the family law court and, on the other hand, the immigration authorities – was an important factor in several cases in which a violation of Article 8 ECHR was found.[638]

Another failure by the state that was seen in certain cases was a very long period of inaction by the state, i.e. a period in which the state was aware of an individual's illegal residence, but did not actively try to remove that individual from its territory, thus enabling the individual to build stronger family ties.[639] In family law cases, the ECtHR likewise found violations where the state's inaction in a procedure had affected private or family life. However, these cases involved situations where the state's inaction had irreparably damaged the relationship between parent and child, bearing in mind that it may be impossible for a parent and child to be reunited after a long period of time. Consequently, whereas states in family law cases are expected to act to protect the relationship between parent and child and to enable ties between parent and child to develop, states in migration law cases are held responsible if their inaction leads to a further development of ties between parent and child.

637 A violation was found for the same reason in *Omojud*i, who had been granted a resident permit after his conviction for a serious crime (ECtHR 24 November 2009, Appl. no. 1820/08 (*Omojudi v. UK*).

638 See ECtHR 11 July 2000, Appl. no. 29192/95 (*Ciliz v. the Netherlands*), ECtHR 31 January 2006, Appl. no. 50252/99 (*Sezen v. the Netherlands*), ECtHR 31 January 2006, Appl. no. 50435/99 (*Rodriguez da Silva and Hoogkamer v. the Netherlands*), ECtHR 28 June 2011, Appl. no. 55597/09 (*Nunez v. Norway*) and ECtHR24 July 2014, Appl. no. 32504/11(*Kaplan and others v. Norway*).

639 ECtHR 11 February 2010, Appl. no. 11870/03 (*Zakayev and Safanova v. Russia*) and ECtHR (GC) 3 October 2014, Appl. no. 12738/10 (*Jeunesse v. the Netherlands*).

A final reason that came to the fore in a few cases was where the state had failed to recognize that the migrant concerned could have had legitimate expectations as to his or her residence rights.[640] This ground for finding a violation is specific to migration law.

5.2.4 Consequences of ECtHR decisions for the Netherlands

The conclusion that the ECtHR will not find a violation of Article 8 ECHR, providing the state has behaved irreproachably and has merely applied its immigration regulations, confirms what Hilbrink noted. She argued that the state's interest in controlling immigration is a non-variable factor and that the focus is therefore on the individual interest at stake. Hence, no actual balancing of interests takes place. Where the violation is based on the specific facts of the case, states have no need to adjust their domestic immigration regulations. Although the ECtHR's rulings in migration law resulted in certain procedural adjustments in domestic immigration regulations,[641] the focus on the individual interests enabled the ECtHR to leave the underlying substantive immigration regulations of the member states intact.[642] In family law, by contrast, the ECtHR also mentions in its case law that the diverging views on the role of the family and family law in the different member states mean the latter have a large margin of appreciation.[643] Nonetheless, the ECtHR has not been reticent about issuing rulings with far-reaching consequences for child and family law in the member states.[644] Thus, whereas the ECtHR is concerned in migration law with the integrity of the border rather than with the integrity of the family, in family law the ECtHR plays an active role in developing the protection of parent-child relations at the domestic level.

5.3 CJEU: Strong protection of Union citizens' family rights falling within the scope of Union law

The thesis then assessed the approach of the CJEU in regulating parent-child relationships in free movement and citizenship case law. The hypothesis was that it was likely that the CJEU is more concerned with facilitating mobility and economic activity than with protecting human rights, i.e. the right to family life. However, whereas the ECtHR in Strasbourg construes the right to respect for family life in opposition to public interests that

640 ECtHR 4 December 2012, Appl. no. 31956/05 (*Hamidovic v. Italy*), ECtHR 11 February 2010, Appl. no. 11870/03 (*Zakayev and Safanova v. Russia*) and ECtHR (GC) 3 October 2014, Appl. no. 12738/10 (*Jeunesse v. the Netherlands*).

641 The Netherlands has for example decided that in light of rulings of the ECtHR a full Article 8 ECHR test is necessary whenever the authorities reject granting a provisional residence permit, see concerning the requirement of a provisional residence permit in the Netherlands: Boeles 2011, Reneman, Reurs and Van Walsum 2009b and Van Walsum 2007.

642 Hilbrink 2017.

643 See for a critique of this "cultural constraints argument" where it concerns the harmonization of family law in Europe, Antokolskaia 2006.

644 ECtHR (PC) 13 June 1979, Appl. no. 6833/74 (*Marckx v. Belgium*), ECtHR (GC) 11 July 2002, Appl. np. 28957/95 (*Christine Goodwin v. UK*), ECtHR 1 June 2004, Appl. no. 45582/99 (*L. v. the Netherlands*).

may limit it, the CJEU in Luxembourg sees these two goals as intrinsically linked: in other words, the facilitating of migration and economic activity should be seen in conjunction with the right to respect for family life.[645] As Bierbach notes, "In the Luxembourg Court's reading of Community law, the right to family life dovetails with, and even augments the public interest that the Community has in the freedom of movement (...). The protection of family life is part of, not at odds with, the public interest at stake".[646]

5.3.1 Narrow definition of family members, but broad protection of family rights

It should be noted that the CJEU has a narrower definition of family members than the ECtHR. In addition, and unlike in ECtHR case law, the persons constituting family members in CJEU case law may also vary depending on the context. With regard to the Citizenship Directive, which regulates free movement for Union citizens and their family members, and CJEU case law, it is in principle only the nuclear family that automatically falls within the scope of the Directive. And the nuclear family then also means only heterosexual couples who are either married or in a registered partnership. For those falling outside this definition – i.e. unmarried or same-sex couples in a durable relationship – whether they can also benefit from EU law is dependent on the national legislation of the member states. Nonetheless, for those Union citizens falling within the definition of a family member or who otherwise fall within the scope of Union law, the protection provided for their family rights is very strong. Family life arguments have consistently entered the arena in CJEU case law, with that result that children's primary carers have been granted permission to reside in the host state with them or children have been allowed to reside with their parents and/or primary carers. In establishing its case law, the CJEU has attached importance to the social, emotional and financial interdependence existing between family members.

Over the years, the CJEU's judgments have considerably extended the boundaries of EU freedom of movement and EU citizenship law and increasingly reduced the discretion available to member states in matters of immigration. A very broad interpretation has been given to the cross-border requirement, while rights have also been granted to economically inactive Union citizens and their family members. In order to protect the family rights of Union citizens and the rights of the child, the CJEU has referred to ECtHR case law based on Article 8 ECHR in cases concerning residence rights of third-country nationals. From the analysis of the case law of the ECtHR, however, it follows that the parent-child relationship and the best interests of the child are not decisive for the outcome of a case at the Strasbourg court. By comparison with their treatment at the ECtHR, therefore, these rights are afforded much stronger protection by the CJEU within the context of EU law.

645 CJEU 17 September 2002, C-413/99, ECLI:EU:C:2002:493 (*Baumbast and R.*) and CJEU 11 July 2002, C-60/00, ECLI:EU:C:2002:434 (*Mary Carpenter*).

646 Bierbach 2015, p. 327.

5.3.2 Family rights for stationary, economically inactive Union citizens and their primary carers

The CJEU has continued along the above path in the most recent line of Union citizenship cases. This started with the *Ruiz Zambrano* ruling, in which the CJEU further extended its earlier rulings so that they now also cover the situation of Union citizen children in internal situations. The Ruiz Zambrano children had never been outside their country of origin, and neither did their situation involve any other cross-border aspects. It follows, therefore, that the CJEU made it possible for Union citizens to rely on Union law against their own member state. This protection is broader than that laid down in the Citizenship Directive, with the CJEU ruling that besides third-country national parents of Union citizens being granted residence rights, they should also be granted the possibility to obtain sufficient means of subsistence. Again, this protection is broader than that laid down in the Citizenship Directive as although the latter regards the origins of the subsistence as irrelevant, a person needs to comply with the requirement for sufficient means of subsistence before being able to rely on the rights laid down in the Directive.[647]

Nonetheless, while the implications of the *Ruiz Zambrano* judgment could potentially have been enormous, later rulings by the CJEU significantly limited its scope. While it seemed probable immediately after the *Ruiz Zambrano* ruling that stationary Union citizens could invoke their right to family life in order to claim that they could not otherwise enjoy the substance of their EU citizenship rights,[648] the CJEU ruled in later cases that there needs to be a relationship of dependency between the Union citizen and the third-country national, and that the mere desirability for family members to live together as a unity does not necessarily lead to the conclusion that not living with a specific family member will deprive a Union citizen of his or her citizenship rights. With reference to the need to respect the division of competences between the EU and the member states, the CJEU applies a full proportionality and family life test only *after* it has been established that a particular situation is covered by EU law. And there is still a link with the cross-border requirement, albeit a link that is readily established. According to the CJEU, if it is possible to make use of your citizenship rights by moving to another EU member state, you first have to make use of that possibility. It is only where moving to another EU member state is not considered an option that the invoking of Article 20 TFEU will be taken into account.

5.3.3 Family rights are relevant when Ruiz Zambrano criterion is invoked

Although the Charter (and thus the right to family life and respect for the best interests of the child) applies only after it has been established that EU law applies, elements of the right to family life nevertheless play a role in the CJEU's assessment of whether a *Ruiz*

647 Lansbergen and Miller 2011, pp. 298 – 300.
648 Lansbergen and Miller 2011, p. 298.

Zambrano-like situation actually exists to begin with. Family life arguments are used to determine whether Union law covers a particular situation as no-one is ever literally forced to leave the territory of the Union, not even a child. *Ruiz Zambrano* concerned two parents without a right to reside in the specific member state; in such cases, a child can potentially be left in the care of the state, or other family members. However, the CJEU apparently considered that, for the children, the only reasonable way to be able to benefit from their citizenship rights was to be accompanied by their parents. In later cases, the CJEU ruled that the application of the *Ruiz Zambrano* criterion was not confined to relationships between children and their biological parents, but also included *de facto* family life, with the decisive factor being the level of dependency between the Union citizen and the third-country national. Aside from legal and economic dependency, the CJEU rulings also mentioned emotional dependency. And emotional dependency necessarily requires an evaluation of the presence of *de facto* family life.

It remained unclear for some time as to whether the *Ruiz Zambrano* criterion could also be applied in cases where only one of the parents had no right to reside in a member state. Again it could be argued that a child can stay with the parent with Union citizenship and is therefore not sufficiently dependent on the third-country parent. This reasoning would, in principle, accord with the Article 8 ECHR case law of the ECtHR. Yet the CJEU has since ruled that it is important to determine which parent is the child's primary carer and whether a relationship of dependency in fact exists between the child and the third-country national parent. As part of that assessment, account must be taken of the right to respect for family life and the best interests of the child, with the mere presence of a Union citizen parent constituting insufficient grounds to assume that EU rights are protected.[649]

5.3.4 Consequences of CJEU decisions for the Netherlands

In the *Ruiz Zambrano* series, the CJEU once more made it clear that where it is necessary to protect Union citizens' family rights so as to make their EU rights effective, the CJEU will provide such protection. And when seeking to establish whether granting those rights is necessary, states must take into account all individual circumstances, including family ties and the interests of the child. While the CJEU is not a human rights court, the logic of the CJEU – according to which migration, citizenship and family life are intertwined – has led to an exceptionally strong degree of protection being afforded to the right to respect for family life – and, more specifically, the parent-child relationship – of Union citizens falling within the ambit of Union law. Where the interests of an individual coincide with the goals of the EU, such as when residence rights are granted to family members of Union citizens where this is deemed to benefit and encourage the use (or potential use) of free movement, CJEU case law has major consequences for the member states. Indeed, this case

649 CJEU 10 May 2017, C133/15, ECLI:EU:C:2017:354 (*Chavez-Vilchez*), par.71.

law has often resulted in changes in national immigration regulations. While the CJEU seems aware, in the *Ruiz Zambrano* series, of the sensitivities surrounding immigration and the division of competences between the Union and the member states, it does not consider the expulsion of Union citizens' primary carer(s) an option where this interferes with citizenship rights.

5.4 The Netherlands: Different perspective on the meaning of parent-child relationships in family and migration law

Lastly, the approach adopted by the Dutch courts in regulating parent-child relations was assessed. In this part, I likewise worked from the hypothesis that the Dutch authorities' assessment of individuals' interests in the protection of custody and access rights would not vary depending on the residence status of one or more of the family members.

5.4.1 Approach in Dutch family law

Joint custody and access are particularly strong rights in Dutch family law. The current approach in Dutch family law is that parent-child relationships should not be adversely affected by divorce, the break-up of a relationship or the fact that no relationship between the parents ever existed.[650] It is assumed to be beneficial for a child to grow up in the presence of and be reared by two parents. According to Dutch family law and the family courts, awarding sole custody or denying access are appropriate only in exceptional circumstances related to the best interests of the child. The state is required to justify decisions to deny parental rights, not only in situations concerning established relationships, but also in situations relating to the ability to develop such relationships. Parents are thus forced in different ways to give actual meaning to the exercise of their parental rights. A telling example of this is that family courts often deny permission for the resident parent to move away from the place where the family lived together since this would adversely impact on the other parent's ability to give meaning to access rights. And the family courts may and indeed do impose various coercive measures on parents who do not comply with their access obligations.

Four aspects stand out when comparing the case law of the Council of State with family courts' case law on the protection of parent-child relationships. These are discussed below.

5.4.2 Best interests of the child vs. behaviour of migrant parent

The first of these aspects is that whereas the family court is always concerned with the best interests of the child, the Council of State's sole focus is on the parent's behaviour. If the

650 Jeppesen de Boer 2008, p. 320.

family court looks at the parent's behaviour, this is only to the extent that this behaviour adversely affects the child. In migration law cases, on the other hand, the parent's behaviour relates to compliance with immigration regulations, not to the interests of the child. If family life started without the migrant having a residence permit, this 'choice' by the parent to start family life can be held against both the parent and child.[651] The situation in which the migrant and his or her partner (or ex-partner) and children find themselves is seen as being due to choices made by the migrant in the past. It is therefore the migrant, not the Dutch state, who bears responsibility for the separation after the parents get divorced. Consequently, the Council of State does not assess the best interests of the child.

5.4.3 Best interests of the child vs. behaviour of the Dutch or legally residing parent

Moreover, even the behaviour of the other parent can be held against the migrant parent and child. In a case, for example, where access between the migrant father and child was limited because the mother was obstructing the access arrangements in place, the Council of State held that because access was already limited, this limited level could continue to be maintained. The fact that the limited access was due to the mother's behaviour was regarded as irrelevant. It is difficult to imagine a greater contradiction with family law, where, as said, the rule that access is in principle beneficial for the child means that family courts often impose various coercive measures to force both the resident parent and the parent with access rights to comply with existing access arrangements.

5.4.4 Custody as a means to serve the child's best interests vs. custody as a legal competence of parents

Another striking aspect is that whereas family law sees custody as a means to serve the best interests of the child, namely the right to be cared for and raised by two parents since this is in the best interests of both child and parent, migration law views custody merely as a legal competence for parents to freely decide where and with whom the child should reside, regardless of what this means for the best interests of the child. In a case where the parents had divorced, but had both retained custody, the Council of State found that the parents could either choose to let the children stay in the Netherlands with only the father or the father could choose to follow his children and soon-to-be ex-wife to a country with which he had no ties whatsoever. Where the migrant parent has sole custody, that parent can choose to take the child to his or her country of origin. No account is taken of a *de facto* relationship between the child and the Dutch parent, or the right to enjoy each other's company and develop the relationship. And in another group of cases in which EU law was invoked, the Council of State held that the total absence of an actual relationship between a child and

651 Spijkerboer 2014 and see for example: Council of State 25 November 2013, no. 201211130/1/V1, ECLI:NL:RVS:2013:2230, Council of State 17 May 2013, no. 201204087/1/V4, ECLI:NL:RVS:2013:CA0620 and Council of State 19 July 2010, no. 200909876/1/V3, ECLI:NL:RVS:2010:BN2232.

his or her Dutch parent (in other words, where the Dutch parent did not play any role in the child's life or have custody) did not justify the assumption that the child would follow the non-Dutch parent abroad since the latter had not provided evidence that the Dutch parent could not be awarded custody. Hence, if there is a legal parent who can potentially be awarded custody of the child, no matter what the relationship between that parent and the child is like or even whether a relationship exists to begin with, the Council of State regards there as being someone who legally has the right to make decisions on the child's behalf.

5.4.5 Assessments of facts vs. theoretical approach

Lastly, and closely related to the earlier findings, is that whereas family courts carefully look at the facts of the case in order to establish what a certain decision will mean in concrete terms for a particular relationship, the Council of State conducts only a marginal review of the decisions taken by the state.[652] And while, according to the Council of State, its task is to review whether the Deputy Minister has taken all the relevant circumstances into account, several examples can be found in which the Deputy Minister and the Council of State remained silent on circumstances that had been brought to the fore.[653] A clear example of this theoretical, rather than realistic, approach is that when the Council of State considers whether family life can be exercised abroad, either in a migrant's home country or a third country, the state has no obligation to prove that the family members will actually be admitted to that third country. This reasoning enables the Council of State to uphold the option of exercising family life abroad, even when no family member has the nationality of or a right to reside in that third country.[654] And, as the previously discussed examples showed, in cases in which parents are divorced, the Council of State has simply held that the Dutch parent can follow the ex-partner abroad. Although the Council of State does not elaborate on this in the grounds for its decision, it seems rather unlikely that all divorced couples will be on such good terms with each other that this will be a realistic option. By purely mentioning the legal option without establishing whether it is realistic in the light of the particular facts of the case, the Council of State shows that it deals only with hypothetical options for exercising family life.

5.5 Relationship between the Dutch and international courts

Having scrutinized the case law of two different international courts, I will now discuss the relationship between the case law of Dutch courts and that of the international courts.

652 Geertsema 2012.

653 Council of State 18 November 2014, no. 201406140/1/V1, ECLI:NL:RVS:2014:4296 and Council of State 23 May 2013, no. 201302213/1/V3, ECLI:NL:RVS:2013:CA1299..

654 Council of State 14 September 2015, no. 201501234/1/V2, ECLI:NL:RVS:2015:3011 and Council of State 17 September 2015, no. ECLI:NL:RVS:2015:3021.

5.5.1 Dutch law and the ECtHR

If only the outcomes in cases in which Article 8 ECHR was invoked are considered, the different protection of access and custody under Article 8 ECHR in Dutch family law, on the one hand, and Dutch migration law, on the other hand, would seem to be in line with the ECtHR's case law on Article 8 ECHR. Indeed, neither the ECtHR nor the Council of State commonly finds a violation of Article 8 ECHR in migration law cases. Yet the approaches adopted by the two courts in the two fields of law differ.

The ECtHR takes the facts of the case into account in both fields of law. In family law cases, the guiding principle applied by the ECtHR to determine which parent-child relationships should be protected and under which circumstances on the basis of Article 8 ECHR is the best interests of the child. The best interests of the child may coincide with the interests of the family as a whole, or with the interests of the parents or the state, but, if not, the child's best interests are leading. In migration law cases, however, the ECtHR takes the rights of states to control migration as given. Where, therefore, the interests of the state, individuals and/or parents do not coincide, the ECtHR regards protecting the state's interest in regulating migration as the guiding principle. In migration law cases, therefore, the ECtHR seeks to establish whether the individual concerned has complied with domestic immigration legislation and whether the state, in turn, has complied with the ECtHR's requirements regarding the decision-making process. The outcome of this assessment consequently determines whether a particular parent-child relationship should be protected. Although the ECtHR itself states that individual interests may outweigh the interests of the state, migration law cases show the question of how the parent-child relationship has developed in fact to be irrelevant.

Like the ECtHR, the Council of State takes the state's interest in regulating migration as the guiding principle for mediating tensions between individuals, families and states. In Article 8 ECHR cases, the Council of State conducts a marginal review of the state's decisions, has a limited reasoning and does not assess the best interests of the child. As a court for subsidiary protection, the ECtHR also requires member states to carefully consider the facts of a case whenever they perform a balancing exercise under Article 8 ECHR. The ECtHR takes migration law as a given and, on that basis, determines whether a particular parent-child relationship is worthy of protection. But while the Council of State readily acknowledges a particular parent-child relationship to be worthy of protection, presenting the facts of the case as choices of the parent (or migrant parent) places sole responsibility for protecting the parent-child relationship on the migrant and his or her family (or ex-family) members. By contrast, the Dutch family courts, just like the ECtHR, take the best interests of the child as the guiding principle in the event of a conflict of interests. And these best interests may override those of other family members and the state.

Thus, the fact that the protection afforded by the ECtHR in family law cases, on the one hand, and migration law cases, on the other hand, diverges in the same way as in the case law of Dutch family courts and Dutch migration courts is because the guiding principles applied by these courts when mediating tensions between the interests of children, families and the state also differ. While the primacy of the child's best interests is undisputed in family law cases, the state's interest in controlling migration is undisputed in migration law. In cases in which Article 8 ECHR is invoked and the state has taken the position that a right to reside should be denied, neither the Council of State nor the ECtHR is likely to find a violation in migration law cases. For the ECtHR, this differs only when the migrant is able to convince the ECtHR of mistakes made by the domestic authorities.

5.5.2 Dutch law and the CJEU

Situations involving EU free movement and citizenship case law give rise to much stronger protection of family rights at the domestic level. While the Council of State admittedly applies the Union principle that limitations to the protection of EU rights should be interpreted strictly, this applies only where it is certain that a particular situation is covered by EU law and where, therefore, the proportionality test and a fundamental rights test are applied. The Council of State has given a very narrow interpretation of CJEU case law in situations where it is not entirely clear whether EU law applies, namely in cases where *Ruiz Zambrano* is invoked and the migrant parent is the primary carer of a Union citizen child, but where a Union citizen parent is also in the picture, albeit sometimes to a limited (or even very limited) extent. Whereas the CJEU has repeatedly held that a child can function as an anchor for parents' right to remain, the focus in the case law of the Council of State is on whether a child can follow parents abroad. And whereas the CJEU has consistently stressed the importance of Union citizen children's primary carers being present in order for the children to make effective use of Union law, the Council of State has not so far given any regard to the dependency between the child and the non-EU parent, but has instead regarded the mere presence of a Dutch parent with whom the child has no relationship at all to be sufficient. The CJEU recently confirmed that the right to family life and the best interests of the child, as laid down in EU law, should be taken into account in such situations. In stating this, the CJEU stressed that although the existence of a Dutch parent is relevant, this does not constitute sufficient grounds for concluding that Union rights are guaranteed. Where the non-Dutch parent is the primary carer, it is that relationship that is particularly relevant.

Hence, the Council of State's narrow reading of the *Ruiz Zambrano* criterion and theoretical style of analysis cannot be upheld in cases where family law rights are at stake. Until now, the Council of State has only considered whether the Dutch parent could be awarded custody, with the issue of access so far being taken to be entirely irrelevant in *Ruiz Zambrano* cases. On the basis of the most recent CJEU case law, the Dutch authorities,

including the Council of State, are obliged to carefully consider with whom the child has a meaningful relationship, just as the CJEU and family court would do.

5.6 Courts' approach in regulating tensions between individuals, families and states

This thesis has explored the approach adopted by various courts in regulating relationships between parents and their minor children, with the focus being on situations of actual or possible separations between parents and children. As stated in the general introduction and the introduction to this conclusion, the underlying assumption in the thesis was that the assessment of the interests of parents and children in maintaining their relationship in the event of a possible separation would not vary depending on the field of law in which a case is situated, i.e. family law or migration law. This assumption was based on the vast amounts of research showing that the most important conditions for a child's upbringing are stability and continuity in the child's living conditions and stability in the child's attachment to its primary carers.[655] Indeed, research has shown that any separation between parents and children or substantial change in the parent-child relationship constitutes a risk factor for the child's future development.[656] Since the development of children is relevant for the future development of society, the state has an important role to play in regulating family relationships. Considering the damage that separations entail for the family members, and in particular children, it would seem that states seek to avoid splitting up families wherever possible. Nonetheless, this thesis has shown that although international human rights, EU and national legislation and case law indeed all acknowledge the importance of protecting family unity, the way in which the protection of family unity is interpreted varies considerably, depending on the field of law in which a case is situated.

Tensions may arise between the interests of children, families and the state in the event of a possible separation between parents and their children. Parents are first and foremost responsible for the well-being of their children. But while states should respect this parental autonomy, they also have an obligation to safeguard the interests of the child and so to assist parents with caring for their children, where this is necessary. This obligation may even result in the state removing children from the care of their parents. Each court scrutinized adopts its own specific approach to mitigating tensions arising between children, parents and the state.

655 See footnote 39.
656 Wolfsen report 2016, p. 40.

In family law cases, the best interests of the child are considered to be of paramount importance for the outcome of a case. These best interests often coincide with those of the parents, given that, in principle, it is in the interests of both parents and children for them to maintain their relationship. And states are obliged to serve those interests. Where tensions exist between the interests of children and those of their parents, hence where custody or access are not considered beneficial to a child, the ECtHR and the Dutch family courts carefully assess the various interests at stake. However, the decisive factor for the outcome is the best interests of the child. In migration law, by contrast, the state not only has an interest in protecting the best interests of children, but also an additional interest in controlling immigration. What is at issue in migration law, therefore, is not only the regulation of custody or access, but also the right to reside in a particular state. However, this right to reside is of great relevance for the ability to exercise parental rights. In view of the additional interest at stake, my hypothesis was that while, in migration law cases, this interest of the state could in some cases outweigh the best interests of the child and/or those of the parents, the family law court's assessment of the interests of the parent and child in maintaining their relationship would not differ from that of the migration law court. Yet the investigation found such a discrepancy between the approach of the ECtHR in family cases compared with the approach in migration law cases, and likewise between the approach of Dutch family law courts and the Council of State in family and migration law cases respectively.

In both fields of law, the same right is invoked, namely the right to respect for family life as laid down in Article 8 ECHR. In both fields, too, the ECtHR defines the parent-child relationship in the same manner. Yet the approach the ECtHR choses to take in family law cases differs from its chosen approach in migration law cases. In the latter, the ECtHR is guided by the state's interest in controlling immigration. As soon, therefore, as a certain family relationship is regulated not only by family law, but also by migration law, the interests of the family members in seeing their parental rights protected more or less disappear from the stage in many cases. Here, the protection of custody and access is made dependent on whether the state's decision-making process has been careful and whether the parents have complied with domestic immigration regulations. In other words, the reason for protecting custody and access is not because protection is deemed necessary for a particular family. Where the Council of State is involved, the same applies as in the approach adopted by the ECtHR. However, the Council of State has also given an entirely different meaning to the parent-child relationship.

It follows from CJEU case law that dependency is highly relevant in establishing a parent-child relationship. The CJEU's focus is very much on who the child's carer is. Hence, the CJEU attributes considerable weight to the actual quality of the relationship. The CJEU's approach is, in general, very much focused on regulating mobility. In that sense, the CJEU

is a migration court. Nonetheless, the CJEU has taken the view that protecting family and children's rights facilitates mobility. In other words, people are more likely to move within EU territory if they know they can bring their family members with them. Although the CJEU appears to be aware of the sensitivities surrounding migration law, this has not led to an approach in which states' right to control immigration is taken as a starting point. Indeed, free movement rights and the possible exercising of these rights, and the associated family and children's rights, have often outweighed the interests of the state in situations in which the CJEU regards those rights as contributing to the goals of the EU.

The approach taken by the courts has not been prompted by their institutional position or by the tasks assigned to them. Instead, the approaches adopted by the courts and, therefore, the interests that generally prevail in the event of a conflict are choices that have been made by those courts themselves. Although courts' rulings often appear to be the logical outcome in a case, another outcome could have been equally valid. A good example of this was the CJEU's ruling in *Ruiz Zambrano*, when the CJEU could equally well have ruled that this was an internal situation outside the scope of EU law. And consequently have acted more as a migration court than a family or even children's court. Hence, it is important to examine and expose the exact reasons given by courts in order to establish which relationships are protected and under which circumstances.

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ECLI:NL:GHSHE:2013:5670.
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ECLI:NL:GHSHE:2012:BV6414.
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ECLI:NL:RBARN:2012:BW5825.
Regional Court Breda 3 June 2012, no. 240519 FA RK 11-4587,
ECLI:NL:RBBRE:2012:BW2459.

Regional Court Breda 20 February 2012, no. 242621 FA RK 11-5491, ECLI:NL:RBBRE:2012:BV7585.
Regional Court Dordrecht 22 August 2012, no. 98248 / FA RK 12-7878; 98625 /FA RK 12-8066 and 98698 / FA RK 12-8103, ECLI:NL:RBDOR:2012:BX7272.
Regional Court Dordrecht 30 May 2012, no. 96428 - FA RK 12-7076, ECLI:NL:RBDOR:2012:BW8371.
Regional Court Groningen 29 November 2011, no. 124470, ECLI:NL:RBGRO:2011:BV1547.
Regional Court Haarlem 30 May 2012, no. 189183 - JU RK 12-106, ECLI:NL:RBHAA:2012:BX0503.
Regional Court Roermond 24 December 2008, no. 90815 / KG ZA 08-274, ECLI:NL:RBROE:2008:BG8982.
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Council of State 26 May 2016, no. 201509212/1/V3, ECLI:NL:RVS:2016:1546.
Council of State 20 January 2016, no. 201502787/1/V2, ECLI:NL:RVS:2016:179.
Council of State 17 December 2015, no. 201503890/1/V1, ECLI:NL:RVS:2015:4011.
Council of State 4 December 2015, no. 201410621/1/V3, ECLI:NL:RVS:2015:3807.
Council of State 27 October 2015, no. 201500617/1/V2, ECLI:NL:RVS:2015:3402.
Council of State 22 October 2015, no. 201407641/1/V3, ECLI:NL:RVS:2015:3332.
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Council of State 14 September 2015, no. 201501234/1/V2, ECLI:NL:RVS:2015:3011.
Council of State 16 June 2015, no. 201401560/1/V2, ECLI:NL:RVS:2015:2008.
Council of State 17 April 2015, no. 201403069/1/V3, ECLI:NL:RVS:2015:1227.
Council of State 13 April 2015, no. 201409835/1/V3, ECLI:NL:RVS:2015:1298.
Council of State 4 March 2015, no. 201403808/1/V3, ECLI:NL:RVS:2015:733.
Council of State 20 February 2015, no. 201404470/1/V1, ECLI:NL:RVS:2015:539.
Council of State 19 February 2015, no. 201306220/1/V2, ECLI:NL:RVS:2015:517.
Council of State 2 December 2014, no. 201404725/1/V1, ECLI:NL:RVS:2014:4515.
Council of State 18 November 2014, no. 201406140/1/V1, ECLI:NL:RVS:2014:4296.
Council of State 5 November 2014, no. 201307172/1/V2, ECLI:NL:RVS:2014:4029.

Council of State 3 October 2014, no. 201402866/1/V2, ECLI:NL:RVS:2014:3655.
Council of State 28 August 2014, no. 201403279/1/V1, ECLI:NL:RVS:2014:3323.
Council of State 18 August 2014, no. 201402385/1/V1, ECLI:NL:RVS:2014:3248.
Council of State 12 August 2014, no. 201311362/1/V3, ECLI:NL:RVS:2014:3081.
Council of State 29 July 2014, no. 201307042/1/V4, ECLI:NL:RVS:2014:2928.
Council of State 24 July 2014, no. 201310108/1/V3, ECLI:NL:RVS:2014:2856.
Council of State 3 June 2014, no. 201400439/1/V1, ECLI:NL:RVS:2014:2136.
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Council of State 21 March 2014, 201208328/1/V1, ECLI:NL:RVS:2014:1197.
Council of State 21 February 2014, no. 201300418/1/V1, ECLI:NL:RVS:2014:607.
Council of State 19 February 2014, no. 201308112/1/V1, ECLI:NL:RVS:2014:690.
Council of State 7 January 2014, no. 201304707/1/V1, ECLI:NL:RVS:2014:58.
Council of State 24 December 2013, no. 201307043/1/V3, ECLI:NL:RVS:2013:2707.
Council of State 23 December 2013, no. 201300783/1/V1, ECLI:NL:RVS:2013:2693.
Council of State 20 December 2013, no. 201211046/1/V3, ECLI:NL:RVS:2013:2558.
Council of State 25 November 2013, no. 201211130/1/V1, ECLI:NL:RVS:2013:2230.
Council of State 28 October 2013, 201209198/1/V1, ECLI:NL:RVS:2013:1814.
Council of State 3 September 2013, no. 201203275/1/V4, ECLI:NL:RVS:2013:2820.
Council of State 28 June 2013, no. 201204124/1/V1, ECLI:NL:RVS:2013:131.
Council of State 27 June 2013, no. 201201347/1/V1, ECLI:NL:RVS:2013:110.
Council of State 27 June 2013, no. 201200573/1/V4, ECLI:NL:RVS:2013:105.
Council of State 10 June 2013, no. 201205735/1/V1, ECLI:NL:RVS:2013:CA3592.
Council of State 23 May 2013, no. 201302213/1/V3, ECLI:NL:RVS:2013:CA1299.
Council of State 17 May 2013, no. 201204087/1/V4, ECLI:NL:RVS:2013:CA0620.
Council of State 26 April 2013, no. 201110991/1/V1, ECLI:NL:RVS:2013:BZ9025.
Council of State 24 April 2013, no. 201204040/1/V1, ECLI:NL:RVS:2013:BZ9017.
Council of State 3 April 2013, no. 201200977/1/V1, ECLI:NL:RVS:2013:BZ8706.
Council of State 28 March 2013, no. 201201196/1/V1, ECLI:NL:RVS:2013:BZ8698.
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Council of State 15 November 2012, no. 201110635/1/V1, ECLI:NL:RVS:2012:BY4039.
Council of State 17 October 2012, no. 201110785/1/V1, ECLI:NL:RVS:2012:BY0833.
Council of State 6 August 2012, no. 201201455/1/V1, ECLI:NL:RVS:2012:BX5044.
Council of State 10 July 2012, no. 201103973/1/V1, ECLI:NL:RVS:2012:BX1345.
Council of State 11 June 2012, no. 201100852/1/V1, ECLI:NL:RVS:2012:BW8590.
Council of State 2 May 2012, no. 201200988/1/V3, JV 2012, 295.
Council of State 1 May 2012, no. 201101008/1/V1, ECLI:NL:RVS:2012:BW4897.
Council of State 24 April 2012, no. 201103346/1/V1, ECLI:NL:RVS:2012:BW4298.
Council of State 20 March 2012, no. 201103155/1/V1, ECLI:NL:RVS:2012:BW0005.
Council of State 15 March 2012, no. 201106038/1/V1, JV 2012, 205.

Council of State 7 March 2012, no. 201108763/1/V2, ECLI:NL:RVS:2012:BV8619.
Council of State 7 March 2012, no. 201105729/1/V1, JV 2012, 163.
Council of State 7 March 2012, no. 201102780/1/V1, JV 2012, 162.
Council of State 20 February 2012, no. 201200899/1/V1, ECLI:NL:RVS:2012:BY8239.
Council of State 6 February 2012, no. 201203898/1/V1, ECLI:NL:RVS:2013:CA3717.
Council of State 30 November 2011, no. 201002659/1/V3, ECLI:NL:RVS:2010:BO6323.
Council of State 17 November 2011, no. 201008491/1/V4, ECLI:NL:RVS:2011:878.
Council of State 15 July 2011, no. 201005039/1/V2. ECLI:NL:RVS:2011:BR3779.
Council of State 19 July 2010, no. 200909876/1/V3, ECLI:NL:RVS:2010:BN2232.

Summary

This thesis concerned the regulating of parent-child relationships in cases of a (possible) separation between parents and minor children, by national and international courts, in on the one hand family law and on the other hand migration law. Migration law and family law serve different purposes. While family law aims to regulate family relationships, migration law aims to regulate who may or may not reside within a state's territory. Nonetheless, decisions taken in the migration context inevitably have consequences for the ability to exercise parental rights. This thesis aimed to compare the approach of the ECtHR, the CJEU and Dutch family and migration law courts in the regulating of parent-child relationships – and more specifically custody and access – in both fields of law. Thereby the focus has been on situations of (possible) separations between parents and children, since such separations occur in both fields of law, and, in such cases the interests of the individuals concerned in maintaining their family bond is the same. Examples are the separation after divorce, detention, child protection measures (out-of-home placements) or immigration measures (non-admission or expulsion). In cases of separations there may arise tensions between the interests of individuals, families and the state. This thesis aimed to examine how courts mediate such tensions, and which of these interests generally prevails.

As far as it concerns the ECtHR this thesis has shown that in cases of (possible) separations the starting point for the analysis by the ECtHR is the same in both fields of law, meaning that the ECtHR applies similar general principles in cases in both fields of law. States are obliged to assess all the relevant circumstances in both family and migration cases, including the specifics of the relationship between parents and children and the best interests of the children. While the relationships between parents and children and the best interests of the children would thus seem to be factors attracting considerable weight in both family and migration cases, ECtHR case law reveals that no matter how close the ties between parents and their children are, states always have the right in migration law cases to expel or refuse entry where this is in conformity with domestic immigration regulations. Where, the ECtHR found a violation of Article 8 ECHR in migration cases, this related to the choices made by the state and/or the parents rather than to the closeness of the ties between the family members or the best interests of the child. The focus on individual interests obscures the fact that it was not the parent-child relationship itself that was decisive for the outcome of the case. Hence, there needs to have been a particular failure on the part of the state for the ECtHR to rule that Article 8 ECHR has been violated. The ways in which the state can fail can include, for example, the incompatibility of various decisions taken by the domestic authorities, a long period of inaction by the state, or failure to recognize that migrants could have had legitimate expectations as to their right to reside. In family law cases however, the decisive factor for the outcome in a case has consistently been the best interest of the child. A consequence for the Netherlands is that the family case law of the ECtHR has led to major changes in national legislation, whereas the migration case law of the ECtHR has only led to procedural adjustments but has left the substantive immigration legislation intact.

In the second part the approach of the CJEU in free movement and citizenship case law was under scrutiny. With regard to the Citizenship Directive, which regulates free movement for Union citizens and their family members, and CJEU case law, there is a narrow definition of the family. In principle only, the traditional nuclear family automatically falls within the scope of the Directive. Nonetheless, for those Union citizens falling within the definition of a family member or who otherwise fall within the scope of Union law, the protection provided for their family rights is very strong. Family life arguments have consistently entered the arena in CJEU case law, with that result that children's primary carers have been granted permission to reside in the host state with them or children have been allowed to reside with their parents and/or primary carers. In establishing its case law, the CJEU has attached importance to the social, emotional and financial interdependence existing between family members. The CJEU has continued along the above path in the most recent line of Union citizenship cases. This started with the *Ruiz Zambrano* ruling, in which the CJEU further extended its earlier rulings so that they now also cover the situation of Union citizen children in internal situations. In later cases, the CJEU ruled that the application of the *Ruiz Zambrano* criterion was not confined to relationships between children and their biological parents, but also included *de facto* family life, with the decisive factor being the level of dependency between the Union citizen and the third-country national. This dependency can be a legal, economic and/or emotional dependency. Where the interests of an individual coincide with the goals of the EU, such as when residence rights are granted to family members of Union citizens where this is deemed to benefit and encourage the use (or potential use) of free movement, CJEU case law has major consequences for the member states, including the Netherlands. Indeed, this case law has often resulted in changes in national immigration regulations.

Finally, the approach adopted by the Dutch courts in regulating parent-child relations was assessed. The current approach in Dutch family law is that parent-child relationships should not be adversely affected by divorce, the break-up of a relationship or the fact that no relationship between the parents ever existed. It is assumed to be beneficial for a child to grow up in the presence of and be reared by two parents. According to Dutch family law and the family courts, awarding sole custody or denying access are appropriate only in exceptional circumstances related to the best interests of the child. Joint custody and access are thus particularly strong rights in Dutch family law. This thesis showed that four aspects stand out when comparing the case law of the Council of State with family courts' case law on the protection of parent-child relationships. The first of these aspects is that whereas the family court is always concerned with the best interests of the child, the Council of State's sole focus is on the parent's behaviour. Moreover, even the behaviour of the other Dutch or legally residing parent, that has for example resulted in limited access between the migrant parent and child, can be held against that migrant parent and child. Another striking aspect is that whereas family law sees custody as a means to serve the best

interests of the child, namely the right to be cared for and raised by two parents since this is in the best interests of both child and parent, migration law views custody merely as a legal competence for parents to freely decide where and with whom the child should reside, regardless of what this means for the best interests of the child. Lastly, and closely related to the earlier findings, is that whereas family courts carefully look at the facts of the case in order to establish what a certain decision will mean in concrete terms for a particular relationship, the Council of State conducts only a marginal review of the decisions taken by the state. This has resulted in a theoretical, rather than realistic, approach. By purely mentioning the legal option without establishing whether it is realistic in the light of the particular facts of the case, this thesis showed that the Council of State deals only with hypothetical options for exercising family life.

This thesis has thus explored the approach adopted by various courts in regulating relationships between parents and their minor children, with the focus being on situations of actual or possible separations between parents and children. Each court scrutinized adopts its own specific approach to mitigating tensions arising between children, parents and the state in cases of such separations.

In family law cases, the best interests of the child are considered to be of paramount importance for the outcome of a case. These best interests often coincide with those of the parents, given that, in principle, it is in the interests of both parents and children for them to maintain their relationship. And states are obliged to serve those interests. Where tensions exist between the interests of children and those of their parents, hence where custody or access are not considered beneficial to a child, the ECtHR and the Dutch family courts carefully assess the various interests at stake. However, the decisive factor for the outcome is the best interests of the child. In migration law, by contrast, the state not only has an interest in protecting the best interests of children, but also an additional interest in controlling immigration. What is at issue in migration law, therefore, is not only the regulation of custody or access, but also the right to reside in a particular state. However, this right to reside is of great relevance for the ability to exercise parental rights. In view of the additional interest at stake, my hypothesis was that while, in migration law cases, this interest of the state could in some cases outweigh the best interests of the child and/or those of the parents, the family law court's assessment of the interests of the parent and child in maintaining their relationship would not differ from that of the migration law court. Yet the investigation found such a discrepancy between the approach of the ECtHR in family cases compared with the approach in migration law cases, and likewise between the approach of Dutch family law courts and the Council of State in family and migration law cases respectively.

In both fields of law, the same right is invoked, namely the right to respect for family life as laid down in Article 8 ECHR. In both fields, too, the ECtHR defines the parent-child relationship in the same manner. Yet the approach the ECtHR choses to take in family law cases differs from its chosen approach in migration law cases. In the latter, the ECtHR is guided by the state's interest in controlling immigration. As soon, therefore, as a certain family relationship is regulated not only by family law, but also by migration law, the interests of the family members in seeing their parental rights protected more or less disappear from the stage in many cases. Here, the protection of custody and access is made dependent on whether the state's decision-making process has been careful and whether the parents have complied with domestic immigration regulations. In other words, the reason for protecting custody and access is not because protection is deemed necessary for a particular family. Where the Council of State is involved, the same applies as in the approach adopted by the ECtHR. However, the Council of State has also given an entirely different meaning to the parent-child relationship.

It follows from CJEU case law that dependency is highly relevant in establishing a parent-child relationship. The CJEU's focus is very much on who the child's carer is. Hence, the CJEU attributes considerable weight to the actual quality of the relationship. The CJEU's approach is, in general, very much focused on regulating mobility. In that sense, the CJEU is a migration court. Nonetheless, the CJEU has taken the view that protecting family and children's rights facilitates mobility. In other words, people are more likely to move within EU territory if they know they can bring their family members with them. Although the CJEU appears to be aware of the sensitivities surrounding migration law, this has not led to an approach in which states' right to control immigration is taken as a starting point. Indeed, free movement rights and the possible exercising of these rights, and the associated family and children's rights, have often outweighed the interests of the state in situations in which the CJEU regards those rights as contributing to the goals of the EU.

The approach taken by the courts has not been prompted by their institutional position or by the tasks assigned to them. Instead, the approaches adopted by the courts and, therefore, the interests that generally prevail in the event of a conflict are choices that have been made by those courts themselves. Although courts' rulings often appear to be the logical outcome in a case, another outcome could have been equally valid. Hence, it is important to examine and expose the exact reasons given by courts in order to establish which relationships are protected and under which circumstances.

Annex I: Case law of the European Court of Human Rights

Case law ECtHR: cases without public order element

	date	appl. no.	measure	pos/neg obligation	family intact	decision
2016						
EL GHATET v. SWITZERLAND	08-11-16	56971/10	Refusal RP	positive obligation	parents separated, child with new partner	violation art. 8
I.A.A. AND OTHERS v. THE UNITED KINGDOM	08-03-16	25960/13	Refusal RP	positive obligation	parents separated	inadmissable
NGUYEN v. NORWAY	26-01-16	30984/13	Refusal RP	interference	parents separated	inadmissable
2015						
MURADELI v. RUSSIA	09-04-15	72780/12	Refusal RP (re-entry)	positive obligation	parents together	no violation art. 8
2014						
JEUNESSE v. THE NETHERLANDS	03-10-14	12738/10	Refusal RP	positive obligation	parents together	violation art. 8
SENIGO LONGUE ET AUTRES c. FRANCE	10-07-14	19113/09	Refusal RP	positive obligation	parents separated/single parent	violation art. 8
MUGENZI c. FRANCE	10-07-14	52701/09	Refusal RP	positive obligation	parents separated/single parent	violation art. 8
TANDA-MUZINGA c. FRANCE	10-07-14	2260/10	Refusal RP	positive obligation	parents separated/single parent	violation art. 8
LY c. FRANCE	10-07-14	23851/10	Refusal RP	positive obligation	parents separated/single parent	inadmissable
J.M. v. SWEDEN	08-04-14	47509/13	Application from abroad	interference	parents together	inadmissable
BIAO v. DENMARK	25-03-14	38590/10	Refusal RP	positive obligation	parents together	no violation art. 8
BOLEK AND OTHERS v. SWEDEN	28-01-14	48205/13	Application from abroad	interference	parents together	inadmissable
2013						
POLIDARIO c. SUISSE	30-07-13	33169/10	Refusal RP	positive obligation	parents separated	violation art. 8
BERISHA v. SWITZERLAND	30-07-13	948/12	Refusal RP	positive obligation	parents together	no violation art. 8

	date	appl. no.	measure	pos/neg obligation	family intact	decision
2012						
ÇAKIR c. ROUMANIE	13-11-12	13077/05	Refusal RP	interference	parents together	inadmissable
OLGUN v. THE NETHERLANDS	10-05-12	1859/03	Refusal RP	not necessary (but applies po)	parents separated	no violation art. 8
BIRAGA AND OTHERS v. SWEDEN	03-04-12	1722/10	Expulsion	not necessary	parents together	inadmissable
ANTWI AND OTHERS v. NORWAY	14-02-12	26940/10	Expulsion	not necessary	parents together	no violation art. 8
2011						
ALIM v. RUSSIA	27-09-11	39417/07	Expulsion	interference	parents together	violation art. 8
OSMAN v. DENMARK	14-06-11	38058/09	Refusal RP	not necessary	parents together	violation art. 8
2010						
ZAKAYEV AND SAFANOVA v. RUSSIA	11-02-10	11870/03	Expulsion	interference	parents together	violation art. 8
2008						
DARREN OMOREGIE AND OTHERS v. NORWAY	31-07-08	265/07	Expulsion	interference	parents together	no violation art. 8
M. v. THE UNITED KINGDOM	24-06-08	25087/06	Expulsion	x	parents together	inadmissable
2006						
MUBILANZILA MAYEKA AND KANIKI MITUNGA v. BELGIUM	12-01-06	13178/03	Detention	interference	single parent	violation art. 8
PRIYA v. DENMARK	06-07-06	13594/03	Expulsion	not necessary	parents together	inadmissable
USEINOV v. THE NETHERLANDS	11-04-06	61292/00	Refusal RP	positive obligation	parents together	inadmissable
RODRIGUES DA SILVA AND HOOGKAMER v. THE NETHERLANDS	31-01-06	50435/99	Refusal RP	positive obligation	parents separated	violation art. 8

	date	appl. no.	measure	pos/neg obligation	family intact	decision
2005						
TUQUABO-TEKLE AND OTHERS v. THE NETHERLANDS	01-12-05	60665/00	Refusal RP	positive obligation	couple together (with children), child erlier relationship	violation art. 8
HAYDARIE v. THE NETHERLANDS	20-10-05	8876/04	Refusal RP	positive obligation	single parent	inadmissable
MAGOKE v. SWEDEN	14-06-05	12611/03	Refusal RP	positive obligation	couple together (with children), child erlier relationship	inadmissable
BENAMAR v. THE NETHERLANDS	05-04-05	43786/04	Refusal RP	positive obligation	single parent	inadmissable
Case law ECtHR: public order cases						
2016						
PAPOSHVILI v. BELGIUM	13-12-16	41738/10	refusal RP	positive obligation	parents together	violation art. 8
SALEM v. DENMARK	01-12-16	77036/11	Expulsion	interference	parents separated	no violation art. 8
USTINOVA v. RUSSIA	08-11-16	7994/14	Expulsion	interference	parents together	violation art. 8
DZHURAYEV AND SHALKOVA v. RUSSIA	25-10-16	1056/15	Exclusion	interference	parents together	violation art. 8
KOLONJA c. GRÈCE	19-05-16	49441/12	Expulsion/re-entry	interference	parents together	violation art. 8
2015						
RAMZI v. ROMANIA	09-06-15	16558/07	Refusal RP (re-entry)	positive obligation	parents together	inadmissable
SARKÖZI AND MAHRAN v. AUSTRIA	02-04-15	27945/10	Expulsion	interference	parents separated	no violation art. 8
VLAS ET AUTRES c. ROUMANIE	06-01-15	30541/12	Extradition	interference	parents together	inadmissable
2014						
ADEISHVILI (MAZMISHVILI) v. RUSSIA	16-10-14	43553/10	Expulsion	interference	parents together	no violation art. 8
LOY v. GERMANY	07-10-14	15069/08	Expulsion	interference	parents separated	inadmissable
KAPLAN AND OTHERS v. NORWAY	24-07-14	32504/11	Expulsion	irrelevant	parents together	violation art. 8
M.E. v. DENMARK	08-07-14	58363/10	Expulsion	interference	parents together	no violation art. 8

	date	appl. no.	measure	pos/neg obligation	family intact	decision
M.P.E.V. AND OTHERS v. SWITZERLAND	08-07-14	3910/13	Refusal RP	interference	parents separated	violation art. 8
GABLISHVILI v. RUSSIA	26-06-14	39428/12	Expulsion	interference	parents together	violation art. 8
SMITH v. IRELAND	24-06-14	52223/13	Expulsion	positive obligation	parents together	inadmissable
FISCHBACHER c. SUISSE	06-05-14	30614/09	Expulsion (refusal renewal RP)	interference	parents separated	inadmissable
PAPOSHVILI v. BELGIUM	17-04-14	41738/10	Expulsion	positive obligation	parents together	no violation art. 8
PALANCI v. SWITZERLAND	25-03-14	2607/08	Expulsion	interference	parents together	no violation art. 8
2013						
UDEH v. SWITZERLAND	16-04-13	12020/09	Expulsion	interference	parents separated	violation art. 8
EL-HABACH v. GERMANY	22-01-13	66837/11	Expulsion	interference	parents together	Inadmissable
SHALA v. GERMANY	22-01-13	15620/09	Expulsion	interference	parents together	Inadmissable
NAIBZAY v. THE NETHERLANDS	04-06-13	68564/12	Expulsion	not necessary	parents together	inadmissable
2012						
HAMIDOVIC c. ITALIE	04-12-12	31956/05	Expulsion	interference	parents together	violation art. 8
KISSIWA KOFFI c. SUISSE	15-11-12	38005/07	Expulsion	interference	parents together, children from earlier marriage	no violation art. 8
BAJSULTANOV v. AUSTRIA	12-06-12	54131/10	Expulsion	interference	parents together	no violation art. 8
F.A.K. v. THE NETHERLANDS	23-10-12	30112/09	Expulsion	interference	parents together	inadmissable
SHAKUROV v. RUSSIA	05-06-12	55822/10	Expulsion (extradition)	interference	parents together	no violation art. 8
2011						
A.H. KHAN v. THE UNITED KINGDOM	20-12-11	6222/10	Expulsion	interference	parents separated	no violation art. 8
ARVELO APONTE v. THE NETHERLANDS	03-11-11	28770/05	Refusal RP	not relevant	parents together	no violation art. 8
NUNEZ v. NORWAY	28-06-11	55597/09	Expulsion	not relevant	parents separated	violation art. 8

	date	appl. no.	measure	pos/neg obligation	family intact	decision
ZULUAGA AND OTHERS v. THE UNITED KINGDOM	18-01-11	20443/08	Expulsion	interference	parents together	inadmissible
HUSSEINI v. SWEDEN	13-10-11	10611/09	Expulsion and refusal access	interference	parents separated	inadmissible & no violation art. 8
2010						
A.W. KHAN	12-01-10	47486/06	Expulsion	interference	parents together	violation art. 8
YESUFA v. UK	26-01-10	7347/08	Expulsion	interference	parents together	inadmissible
2009						
KHAN MANWAR v. THE UNITED KINGDOM	08-12-09	19641/07	Expulsion	interference	parents separated	inadmissible
OMOJUDI v. THE UNITED KINGDOM	24-11-09	1820/08	Expulsion	interference	parents together	violation art. 8
MBENGEH v. FINLAND	24-03-09	43761/06	Expulsion	interference	parents together	inadmissible
ONUR v. THE UNITED KINGDOM	17-02-09	27319/07	Expulsion	interference	parents separated	no violation art. 8
JOSEPH GRANT v. THE UNITED KINGDOM	08-01-09	10606/07	Expulsion	interference	parents separated	no violation art. 8
CHERIF ET AUTRES c. ITALIE	07-04-09	1860/07	Expulsion	interference	parents together	no violation art. 8
NOLAN AND K. v. RUSSIA	12-02-09	2512/04	Expulsion	not necessary	parents separated	violation art. 8
2007						
CHAIR AND J.B. V. GERMANY	06-12-07	69735/01	Expulsion	interference	parents separated	no violation art. 8
KAYA v. GERMANY	28-06-07	31753/02	Expulsion	interference	parents together	no violation art. 8
KONSTATINOV v. THE NETHERLANDS	26-04-07	16351/03	Refusal RP	not necessary	parents together	no violation art. 8
2006						
ÜNER v. THE NETHERLANDS	18-10-06	46410/99	Expulsion	interference	parents separated	no violation art. 8
LAGERGREN v. DENMARK	16-10-06	18668/03	Expulsion	interference	parents separated	inadmissable
ANGELOV v. FINLAND	05-09-06	26832/02	Expulsion	interference	parents separated	no violation art. 8

	date	appl. no.	measure	pos/neg obligation	family intact	decision
EL MESSAOUDI c. FRANCE	30-05-06	33325/02	Expulsion	interference	parents together	inadmissable
DEMIR c. FRANCE	30-05-06	33736/03	Expulsion	interference	parents together	inadmissable
COMERT v. DENMARK	10-04-06	14474/03	Expulsion	interference	parents separated	inadmissable
SEZEN v. THE NETHERLANDS	31-01-06	50252/99	Expulsion	interference	parents together	violation art. 8
2005						
KELES v. GERMANY	27-10-05	32231/02	Expulsion	interference	parents together	violation art. 8
TAJDIRTI v. THE NETHERLANDS	11-10-05	22050/04	Expulsion	interference	parents together	inadmissable
DAVYDOV v. ESTONIA	31-05-05	16387/03	Expulsion	interference	parents together	inadmissable
MCCALLA v. THE UNITED KINGDOM	31-05-05	30673/04	Expulsion	interference	parents together	inadmissable
HUSSEIN MOSSI AND OTHERS v. SWEDEN	08-03-05	15017/03	Expulsion	interference	parents separated	inadmissable
HEADLEY AND OTHERS v. THE UNITED KINGDOM	01-03-05	39642/03	Expulsion	interference	parents separated	inadmissable
HALITI c. SUISSE	01-03-05	14015/02	Expulsion	interference	parents together	inadmissable

Annex II: Case law of the Council of State

Case law Council of State

date	ECLI	what is at issue	purpose of stay	family intact	decision
2016					
09-12-16	ECLI:NL:RVS:2016:3293	RPR, means of subsistence	with partner	couple together, partner has children and access arrangement	no violation Article 8 ECHR
26-09-16	ECLI:NL:RVS:2016:2658	RPR revoked, means of subsistence & incorrect information	with partner and child	parents together	no violation Article 8 ECHR
13-07-16	ECLI:NL:RVS:2016:2062	RPR, means of subsistence	with partner and child	parents together, one child deceased and burried in the Netherlands	no violation Article 8 ECHR
02-06-16	ECLI:NL:RVS:2016:1825	RPR, means of subsistence	with partner and child	couple together, spouse has children	no violation Article 8 ECHR
08-06-16	ECLI:NL:RVS:2016:1623	RPR, means of subsistence	with partner and child	parents together	no violation Article 8 ECHR
02-06-16	ECLI:NL:RVS:2016:1550	RPA revoked, public order	nearby partner and child	parents together, partner and children live in Germany	no violation Article 8 ECHR
24-05-16	ECLI:NL:RVS:2016:1539	RPR revoked	with child	parents separated, no proof family life	no violation Article 8 ECHR
11-05-16	ECLI:NL:RVS:2016:1374	RPR not extended, means of subsistence	with partner and child	parents together	no violation Article 8 ECHR
22-04-16	ECLI:NL:RVS:2016:1231	PRP, means of subsistence	with partner	couple together, spouse has child with handicap	no violation Article 8 ECHR
29-03-16	ECLI:NL:RVS:2016:944	RPR, passport requirement	with father	parents together	no violation Article 8 ECHR
08-02-16	ECLI:NL:RVS:2016:416	PRP	with mother	single parent	no violation Article 8 ECHR
29-01-16	ECLI:NL:RVS:2016:279	RPR, indefinite, revoked	with partner and child	parents together	no violation Article 8 ECHR
20-01-16	ECLI:NL:RVS:2016:179	RPR	with partner	couple together, spouse has children	no violation Article 20 TFEU
06-01-16	ECLI:NL:RVS:2016:81	RPR, passport requirement	with mother	parents together	new decision

date	ECLI	what is at issue	purpose of stay	family intact	decision
2015					
17-12-15	ECLI:NL:RVS:2015:4011	RPR revoked and re-entry ban	with child	parents separated	no violation Article 8 ECHR
04-12-15	ECLI:NL:RVS:2015:3807	RPR	with child	parents together	no violation Article 8 ECHR, violation Article 20 TFEU
27-10-15	ECLI:NL:RVS:2015:3402	PRP, means of subsistence	with partner	couple together, spouse has children	no violation Article 8 ECHR
22-10-15	ECLI:NL:RVS:2015:3332	RPR revoked, means of subsistence & incorrect information	with partner and child	parents together	no violation Article 8 ECHR
17-09-15	ECLI:NL:RVS:2015:3021	PRP, means of subsistence	with parent	single parent	no violation Article 8 ECHR
14-09-15	ECLI:NL:RVS:2015:3011	PRP	with partner and child	parents together	no violation Article 8 ECHR
26-06-15	ECLI:NL:RVS:2015:2096	duration re-entry ban	with child	not specified	no violation Article 8 ECHR
28-05-15	ECLI:NL:RVS:2015:1784	RPA, later PRP	with partner and child	parents together	no violation Article 8 ECHR
17-04-15	ECLI:NL:RVS:2015:1227	RPR	with partner, child and stepchild	couple together, spouse has children	no violation Article 8 ECHR
13-04-15	ECLI:NL:RVS:2015:1298	PRP	with child	parents separated	no violation Article 8 ECHR
30-03-15	ECLI:NL:RVS:2015:1110	RPR	with child	parents separated	no violation Article 8 ECHR
13-03-15	ECLI:NL:RVS:2015:829	RPA revoked, 1F RC	with partner, child and adult children	parents together	no violation Article 8 ECHR
09-03-15	ECLI:NL:RVS:2015:801	re-entry ban, 1F RC	with family	parents together	no violation Article 8 ECHR
04-03-15	ECLI:NL:RVS:2015:733	re-entry ban	with child	unknown	no violation Article 8 ECHR
20-02-15	ECLI:NL:RVS:2015:539	RPR, re-entry ban	with partner and child	parents together	no violation Article 8 ECHR
05-02-15	ECLI:NL:RVS:2015:383	RPR	with grandparents	unknown	new decision
2014					
02-12-14	ECLI:NL:RVS:2014:4515	RPA, 1F RC	with child	parents together	no violation Article 8 ECHR
27-11-14	ECLI:NL:RVS:2014:4366	RPR, re-entry ban	with child	unknown	no violation Article 8 ECHR
18-11-14	ECLI:NL:RVS:2014:4296	PRP, means of subsistence	with child	parents separated	no violation Article 8 ECHR

date	ECLI	what is at issue	purpose of stay	family intact	decision
05-11-14	ECLI:NL:RVS:2014:4029	RPA, re-entry ban, means of subsistence	with partner and child	unknown	no violation Article 8 ECHR
03-10-14	ECLI:NL:RVS:2014:3655	RPA, re-entry ban	with partner and child	parents together	no violation Article 8 ECHR
18-09-14	ECLI:NL:RVS:2014:3525	re-entry ban, 1F RC	with child	parents together	no violation Article 8 ECHR
05-09-14	ECLI:NL:RVS:2014:3371	RPR	with child	parents together	no violation Article 8 ECHR
28-08-14	ECLI:NL:RVS:2014:3323	PRP	with child	parents together	no violation Article 8 ECHR
18-08-14	ECLI:NL:RVS:2014:3248	RPR	with child	parents separated	no violation Article 8 ECHR
12-08-14	ECLI:NL:RVS:2014:3081	re-entry ban	with child	parents together	no violation Article 8 ECHR
29-07-14	ECLI:NL:RVS:2014:2928	re-entry ban	with child	unknown	no violation Article 8 ECHR
24-07-14	ECLI:NL:RVS:2014:2856	PRP, means of subsistence	with child	parents together	no violation Article 8 ECHR
23-07-14	ECLI:NL:RVS:2014:2900	RPR	with child	parents separated	no violation Article 8 ECHR
25-06-14	ECLI:NL:RVS:2014:2393	RPA, 1F RC	with child	parents together	no violation Article 8 ECHR
03-06-14	ECLI:NL:RVS:2014:2136	PRP	with partner and child	parents together	no violation Article 8 ECHR
22-04-14	ECLI:NL:RVS:2014:1558	PRP	with mother	parents separated	no violation Article 8 ECHR
21-03-14	ECLI:NL:RVS:2014:1197	RPR	with child	parents separated	new decision
14-03-14	ECLI:NL:RVS:2014:960	RPR, re-entry ban	with child	parents separated	no violation Article 8 ECHR
14-03-14	ECLI:NL:RVS:2014:926	PRP, means of subsistence	with child	parents together	no violation Article 8 ECHR
06-03-14	ECLI:NL:RVS:2014:858	RPR	with parent	parents together	no violation Article 8 ECHR
21-02-14	ECLI:NL:RVS:2014:607	re-entry ban	with child	unknown	no violation Article 8 ECHR
19-02-14	ECLI:NL:RVS:2014:690	PRP	with child	parents separated	no violation Article 8 ECHR
06-02-14	ECLI:NL:RVS:2014:428	RPR	with child	parents together	no violation Article 8 ECHR
05-02-14	ECLI:NL:RVS:2014:433	PRP	with child	parents together	no violation Article 8 ECHR
10-01-14	ECLI:NL:RVS:2014:27	duration re-entry ban	with partner and child	parents together	no violation Article 8 ECHR
07-01-14	ECLI:NL:RVS:2014:58	RPR	with parent	parents together	no violation Article 8 ECHR
2013					
24-12-13	ECLI:NL:RVS:2013:2707	re-entry ban	with child	parents together	no violation Article 8 ECHR
23-12-13	ECLI:NL:RVS:2013:2693	RPR	with child	parents separated	new decision

date	ECLI	what is at issue	purpose of stay	family intact	decision
20-12-13	ECLI:NL:RVS:2013:2558	re-entry ban	with child	parents separated	no violation Article 8 ECHR
04-12-13	ECLI:NL:RVS:2013:2361	PRP	with parent	parents together	no violation Article 8 ECHR
29-11-13	ECLI:NL:RVS:2013:2209	RPA, re-entry ban	unclear	not specified	no violation Article 8 ECHR
28-11-13	ECLI:NL:RVS:2013:2223	PRP	with child	unknown	no violation Article 8 ECHR
25-11-13	ECLI:NL:RVS:2013:2230	PRP	with child	parents separated	no violation Article 8 ECHR or Article 20 TFEU
13-11-13	ECLI:NL:RVS:2013:2085	RPR	with parent	age alien unknown	new decision
13-11-13	ECLI:NL:RVS:2013:1998	RPR	with child	parents separated	no violation Article 8 ECHR
31-10-13	ECLI:NL:RVS:2013:1802	PRP	with child	parents together	no violation Article 8 ECHR
28-10-13	ECLI:NL:RVS:2013:1814	PRP, public order	with child	parents together	no violation Article 8 ECHR
01-10-13	ECLI:NL:RVS:2013:1417	re-entry ban	with child	parents together	no violation Article 8 ECHR
27-09-13	ECLI:NL:RVS:2013:1392	re-entry ban	with partner and child	parents together, ex-spouse and children in Germany	no violation Article 8 ECHR
08-08-13	ECLI:NL:RVS:2013:706	RPR, passport requirement, means of subsistence	with father	parents together	no violation Article 8 ECHR
01-08-13	ECLI:NL:RVS:2013:648	RPR	with partner and child	parents together	no violation Article 8 ECHR
24-07-13	ECLI:NL:RVS:2013:532	RPR	with father	parents separated	no violation Article 8 ECHR
28-06-13	ECLI:NL:RVS:2013:131	RPR	with child	parents separated	no violation Article 8 ECHR or Article 20 TFEU
27-06-13	ECLI:NL:RVS:2013:110	PRP	with child	parents separated	no violation Article 8 ECHR or Article 20 TFEU
13-06-13	ECLI:NL:RVS:2013:CA3615	RPR	with child	parents separated	no violation Article 20 TFEU
12-06-13	ECLI:NL:RVS:2013:CA3605	PRP	with child	unknown	no violation Article 8 ECHR or Article 20 TFEU
10-06-13	ECLI:NL:RVS:2013:CA3592	RPR	with child	unknown	no violation Article 8 ECHR
23-05-13	ECLI:NL:RVS:2013:CA1299	re-entry ban	with child	parents separated	no violation Article 8 ECHR
23-05-13	ECLI:NL:RVS:2013:CA1298	PRP	with partner and child	parents together	no violation Article 8 ECHR
17-05-13	ECLI:NL:RVS:2013:CA0620	RPR	with child	parents together	no violation Article 8 ECHR
07-05-13	ECLI:NL:RVS:2013:CA0117	re-entry ban	with child	unknown	no violation Article 8 ECHR

date	ECLI	what is at issue	purpose of stay	family intact	decision
26-04-13	ECLI:NL:RVS:2013:BZ9025	PRP	with child	parents together	no violation Article 8 ECHR, violation Article 20 TFEU
24-04-13	ECLI:NL:RVS:2013:BZ9017	RPR	with child	parents separated	no violation Article 8 ECHR
03-04-13	ECLI:NL:RVS:2013:BZ8706	RPR	with child	parents separated	no violation Article 8 ECHR or Article 20 TFEU
28-03-13	ECLI:NL:RVS:2013:BZ8698	PRP	with partner and child	no proof of family life	no violation Article 8 ECHR
20-03-13	ECLI:NL:RVS:2013:BZ5220	PRP	with child	parents together	new decision
19-02-13	ECLI:NL:RVS:2013:BZ2060	re-entry ban	with partner and child	parents together	no violation Article 8 ECHR or Article 20 TFEU
2012					
20-12-12	ECLI:NL:RVS:2012:BY8239	RPR	with partner and child	parents together	no violation Article 8 ECHR or Article 20 TFEU
15-11-12	ECLI:NL:RVS:2012:BY4039	RPR	with child	parents separated	violation Article 20 TFEU
17-10-12	ECLI:NL:RVS:2012:BY0833	re-entry ban	with child	parents separated	no violation Article 8 ECHR or Article 20 TFEU
10-07-12	ECLI:NL:RVS:2012:BX1345	PRP	with child	parents together	violation Article 20 TFEU
06-08-12	ECLI:NL:RVS:2012:BX5044	RPR	with partner	parents together	no violation Article 20 TFEU
11-06-12	ECLI:NL:RVS:2012:BW8590	RPR	with child	parents separated	no violation Article 20 TFEU, Article 8 not dealt with
02-05-12	ECLI:NL:RVS:2012:BW4921	RPR	with child	unknown	no violation Article 20 TFEU
01-05-12	ECLI:NL:RVS:2012:BW4897	re-entry ban	with child	parents separated	new decision
26-04-12	ECLI:NL:RVS:2012:BW4893	RPR	with child	parents together	no violation Article 8 ECHR
24-04-12	ECLI:NL:RVS:2012:BW4298	RPR	with child	parents together	no violation Article 20 TFEU
13-04-12	ECLI:NL:RVS:2012:BW4347	re-entry ban, 1F RC	with partner and child	parents together	no violation Article 8 ECHR
05-04-12	ECLI:NL:RVS:2012:BW2893	RPR	with child	parents separated	no violation Article 8 ECHR or Article 20 TFEU
20-03-12	ECLI:NL:RVS:2012:BW0005	re-entry ban	with partner and child	parents together	no violation Article 8 ECHR or Article 20 TFEU

date	ECLI	what is at issue	purpose of stay	family intact	decision
15-03-12	ECLI:NL:RVS:2012:BW0011	RPR	with partner and child	parents together	no violation Article 20 TFEU, Article 8 not dealt with
07-03-12	ECLI:NL:RVS:2012:BV8619	RPR	with child	parents together	no violation Article 20 TFEU
07-03-12	ECLI:NL:RVS:2012:BV8623	RPR	with child	parents together	violation Article 20 TFEU
07-03-12	ECLI:NL:RVS:2012:BV8631	RPR	with child	single parent	no violation Article 8 ECHR, violation Article 20 TFEU
30-01-12	ECLI:NL:RVS:2012:BV2890	re-entry ban	with partner and child	parents together	no violation Article 8 ECHR
2011					
01-12-11	ECLI:NL:RVS:2011:BU7530	PRP	with child and brother	unknown	new decision
18-11-11	ECLI:NL:RVS:2011:BU6102	RPR, means of subsistence	with partner and child	parents together	no violation Article 8 ECHR
17-11-11	ECLI:NL:RVS:2011:878	PRP	with child	parents not together, but live together	new decision
10-08-11	ECLI:NL:RVS:2011:BR5032	RPA revoked, 1F RC	with family	unknown	no violation Article 8 ECHR
03-08-11	ECLI:NL:RVS:2011:BR4433	PRP	with child	unknown	no violation Article 8 ECHR
19-07-11	ECLI:NL:RVS:2011:BR3812	PRP	with child	parents separated	no violation Article 8 ECHR
15-07-11	ECLI:NL:RVS:2011:BR3779	RPA, 1F RC	with partner, child and father	parents together	new decision
16-06-11	ECLI:NL:RVS:2011:BQ9503	RPR	with fosterparents	unknown	no violation Article 8 ECHR
03-03-11	ECLI:NL:RVS:2011:BP7481	RPR	with child	parents together	no violation Article 8 ECHR
09-02-11	ECLI:NL:RVS:2011:BP4329	starting date RPR	with child	parents separated	no violation Article 8 ECHR
07-02-11	ECLI:NL:RVS:2011:BP4324	PRP, family reunification refugees	with fosterbrother and family	unknown	no violation Article 8 ECHR
2010					
15-12-10	ECLI:NL:RVS:2010:BO8020	re-entry ban	with family	unknown	no violation Article 8 ECHR
14-12-10	ECLI:NL:RVS:2010:BO8026	re-entry ban, 1F RC	with partner and child	ex-partner and children in Germany	no violation Article 8 ECHR
10-12-10	ECLI:NL:RVS:2010:BO8060	RPR	with partner and child	parents together	no violation Article 8 ECHR

date	ECLI	what is at issue	purpose of stay	family intact	decision
07-12-10	ECLI:NL:RVS:2010:BO7052	RPA	with parent	unknown	new decision
30-11-10	ECLI:NL:RVS:2010:BO6323	PRP	with partner and child	parents together	no violation Article 8 ECHR
17-11-10	ECLI:NL:RVS:2010:BO5978	re-entry ban	with child	parents almost separated	no violation Article 8 ECHR
27-10-10	ECLI:NL:RVS:2010:BO2098	PRP	with partner and child	parents together	no violation Article 8 ECHR
13-10-10	ECLI:NL:RVS:2010:BO0794	PRP	with partner and child	parents together	no violation Article 8 ECHR
19-07-10	ECLI:NL:RVS:2010:BN2232	RPR	with parent	parents together	no violation Article 8 ECHR
01-07-10	ECLI:NL:RVS:2010:BN1165	RPR, means of subsistence	with partner and child	parents together	no violation Article 8 ECHR
09-06-10	ECLI:NL:RVS:2010:BM7422	PRP	with brother/sister	parents together	new decision
30-03-10	ECLI:NL:RVS:2010:BL9912	PRP	with child	single parent	no violation Article 8 ECHR
06-04-10	ECLI:NL:RVS:2010:BM0706	RPR	with partner	couple together, spouse has children	no violation Article 8 ECHR
18-02-10	ECLI:NL:RVS:2010:BL4534	RPR revoked, public order	with partner and child	parents together and partner has children	no violation Article 8 ECHR
16-02-10	ECLI:NL:RVS:2010:BL4540	re-entry ban	with partner and child	No proof of family life	no violation Article 8 ECHR
05-02-10	ECLI:NL:RVS:2010:BL3872	PRP	with family	Unclear whether children involved, only spouse mentioned	no violation Article 8 ECHR

RSP: residence permit, regular migration
RPA: residence pemit, asylum
PRP: provisional residence permit
RC: Refugee Convention