

# Assignment on Migration Law

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European Migration Law and Citizenship

## Introduction and Scope of Application

In the case at hand, Manish, who is an Indian doctorate holder in medicine, has received a tempting job offer from a private non-profit-making organisation located in Amersfoort, Netherlands (NL) to participate in a medical research project and offers him an annual salary of EUR 50.000. Yet, the HR manager insists that the Foundation has the responsibility to verify Manish's qualifications and check that he has valid sickness insurance, before entering into an agreement with him.

Before examining these arguments, we should check which European legal instrument will be applied. It can be argued that both the Directive 2009/50/EC (Blue Card Directive) and the Directive 2016/801/EC are applicable in this situation. Although, the Blue Card Directive is older than the Directive 2016/801/EC, I will apply the latter, provided that Manish falls within the scope thereof. The main reason for this decision is that the effectiveness of the Blue Card Directive is strongly disputed, while the Directive 2016/801/EC is recently recast to amend the inconsistencies of previous Directives 2004/114/EC and 2005/71/EC<sup>1</sup>.

For a person to fall under the scope<sup>2</sup> of this Directive, he has to be a third-country national<sup>3</sup> (TCN) who applies to be admitted or who have been admitted to the territory of a Member State (MS) for the purpose of research<sup>4</sup>. Manish, who holds a doctorate degree, is from India (not an EU MS) and wants to come to the NL to conduct research after receiving a job offer from a research organization<sup>5</sup>. Manish falls also under the definition of researchers<sup>6</sup> in Article 3(2) of the Directive 2016/801/EC and the latter is applicable in this case.

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<sup>1</sup>Dir. 2016/801/EC Recital (4)

<sup>2</sup>Ibid art. 2(1)

<sup>3</sup>Ibid art. 3(1) 'third-country national' means a person who is not a citizen of the Union within the meaning of Article 20(1) TFEU

<sup>4</sup>Ibid art. 3(9) 'research' means creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this stock of knowledge to devise new applications

<sup>5</sup>Ibid art. 3 (10) 'research organisation' means any public or private organisation which conducts research

<sup>6</sup>Ibid art. 3(2) 'researcher' means a third-country national who holds a doctoral degree or an appropriate higher education qualification which gives that third-country national access to doctoral programmes, who is selected by a research organisation and admitted to the territory of a Member State for carrying out a research activity for which such qualification is normally required

## Requirements for entry and Foundation’s responsibility on Manish’s qualification and sickness insurance.

For a researcher to acquire a residence permit and thus legally enter and reside in the territory of a MS, some requirements shall be met. The admission of a researcher under the Directive 2016/801/EC “*shall be subject to the verification of documentary evidence*”<sup>7</sup> attesting that the TCN meets the general conditions laid down in Article 7 and the specific conditions of Article 8.

First, every MS “*shall determine whether applications are to be submitted by the third-country national, by the host entity, or by either of the two*”<sup>8</sup>. In the NL this is handled by the host entity, here, the Foundation<sup>9</sup>. According to the general conditions of Article 7(1)<sup>10</sup> the TCN has to present a valid travel document (a), evidence that he has or has applied for sickness insurance (c) and has paid the fee(d) for handling the application (if required by the MS) and evidence that he has sufficient resources (a yearly salary of EUR 50,000) to cover subsistence costs without having recourse to the MS’s social assistance system, and return travel costs (e)<sup>11</sup>. “*Third-country nationals who are considered to pose a threat to public policy, public security or public health shall not be admitted*”.<sup>12</sup> Furthermore, MSs may require the applicant to provide the address of the TCN concerned in their territory.<sup>13</sup>

Specifically, now for researchers, the Directive in Article 8(1) requires the applicant to present a hosting agreement or, if provided for in national law, a contract, in accordance with Article 10. Nevertheless, these are all requirements for the admission of a TCN to work in a MS. The application shall be submitted and examined either when the TCN concerned is residing outside the territory of the MS to which he wishes to be admitted or when the TCN is already residing in that MS as holder of a valid residence permit or long-stay visa.<sup>14</sup> “*By way of derogation, a Member State may accept, in accordance with its national law, an application submitted when the third-country national concerned is not in possession of a valid residence permit or long-stay visa but is legally present in its territory*”.<sup>15</sup>

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<sup>7</sup>Ibid art. 5(1); see, also art. 5(2) regarding the language of the documentary evidence

<sup>8</sup>Ibid art. 7(5)

<sup>9</sup><https://ind.nl/en/Forms/7512.pdf>

<sup>10</sup>[https://ind.nl/en/Pages/General\\_conditions.aspx](https://ind.nl/en/Pages/General_conditions.aspx)

<sup>11</sup>See also Dir. 2016/801 art. 7(3)

<sup>12</sup>Dir. 2016/801/EC art. 7(6)

<sup>13</sup>Ibid art. 7(2)

<sup>14</sup>[https://ind.nl/en/work/working\\_in\\_the\\_Netherlands/Pages/Scientific-researcher.aspx](https://ind.nl/en/work/working_in_the_Netherlands/Pages/Scientific-researcher.aspx)

<sup>15</sup>Dir. 2016/801/EC art. 7(4)

Furthermore, assuming that the Dutch Diabetes Research Foundation is a recognized research organization- in the NL, the organization can apply for the admission of a TCN researcher only if it is a recognized sponsor<sup>16</sup>- according to the approval procedure of Article 9, the applicant shall be exempted from presenting one or more of the documents or evidence referred to in paragraph 2 of this Article or in points (c), (d) or (e) of Article 7(1) or in Article 7(2). Although we do not have all the information needed, If all these conditions are fulfilled, Manish is entitled to authorization and the requisite visa<sup>17</sup> without prejudice to the right of the NL to determine in accordance with Article 79(5) TFEU, the volumes of admission of TCNs.<sup>18</sup>

As it is mentioned at the beginning, the HR manager believes that the Foundation is responsible to check that Manish has valid sickness insurance and verify his qualifications before entering into an agreement with him. Article 7(1)(c) requires that the applicant shall provide evidence that the TCN has or if provided for in national law, has applied for sickness insurance for all risks normally covered for nationals of the Member State concerned; the insurance shall be valid for the duration of the planned stay. The Foundation, as a sponsor, must present the evidence but checking the validity thereof is not its task. After all, in the NL, TCNs must take out Dutch health insurance within four months of receiving their residence permit, so it is not a prerequisite for the granting of the permit. Before the recast of the Directive though the organisation was indeed responsible to check the health insurance of the researcher before signing the agreement<sup>19</sup>.

As for Manish's qualifications, according to Article 10(4): *“Research organisations may sign hosting agreements only if the research activity has been accepted by the relevant instances in the organisation, after examination of (a) the purpose and estimated duration of the research activity, and the availability of the necessary financial resources for it to be carried out; (b) the third-country national's qualifications in the light of the research objectives, as evidenced by a certified copy of the qualifications”*. In other words, Article 10(4) obliges the research organisation to check, before signing the hosting agreement, the qualifications of the potential researcher so the HR manager is right to insist on this.

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<sup>16</sup>[https://ind.nl/en/work/working\\_in\\_the\\_Netherlands/Pages/Scientific-researcher.aspx](https://ind.nl/en/work/working_in_the_Netherlands/Pages/Scientific-researcher.aspx)

<sup>17</sup>Dir. 2016/801/EC art. 5(3)

<sup>18</sup>Ibid art. 6

<sup>19</sup>Dir. 2005/71/EC art. 2(c); European Commission 2011, Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, Brussels, 20.12.2011 COM (2011) 901 final p. 4.

## Family reunification: Spouse

After being granted a residence permit of 1 year as a researcher and having worked in Amersfoort for six months, Manish met Elena, a Costa Rican national who is staying in the Netherlands on a tourist visa for 2 months; they fell in love and got married in the Netherlands. They applied then for family reunification, but the residence permit was denied by Dutch authorities on several grounds.

Before checking the validity of these grounds, it is important to establish whether the Directive 2003/86/EC on the right to family reunification (hereinafter FR Directive) is applicable in the situation in question.

The FR Directive is applicable when the sponsor<sup>20</sup> is a TCN<sup>21</sup> legally residing in a MS, who has a residence permit<sup>22</sup> valid for at least one year, irrespective of the title of residence, and has reasonable prospects of obtaining the right of permanent residence. Family members must be TCNs, too.<sup>23</sup> *“This Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions”*.<sup>24</sup>

The Directive 2016/801/EC provides for more favourable rules about family reunification in general<sup>25</sup> and particularly regarding the scope of FR Directive. Article 26(2) envisages that the granting of a residence permit to family members shall not be made dependent on the requirement of the researcher having reasonable prospects of obtaining the right of permanent residence<sup>26</sup> and having a minimum period of residence.

It can be easily concluded that the scope of FR Directive is fulfilled. Manish is a TCN as established above and has a 1-year residence permit. He legally resides in Amersfoort, Netherlands and wishes to apply for the residence permit

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<sup>20</sup>Dir. 2003/86/EC art. 2(c): ‘sponsor’ means a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her

<sup>21</sup>Ibid art. 2(a) ‘third country national’ means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty

<sup>22</sup>Ibid art. 2(e) ‘residence permit’ means any authorisation issued by the authorities of a Member State allowing a third-country national to stay legally in its territory, in accordance with the provisions of Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals

<sup>23</sup>Ibid art. 3(1)

<sup>24</sup>Ibid art. 3(5)

<sup>25</sup>Dir. 2016/801/EC arts. 26, 26(1)

<sup>26</sup>Although, the NL has not transposed the criterion of reasonable prospects of obtaining the right of permanent residence; see report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, European Commission, Brussels, 29.3.2019 COM (2019) 162 final, p. 2.

of his spouse who is from Costa Rica and, thus, a TCN<sup>27</sup> on the ground of family reunification. Based on the aforementioned provisions, one of the Dutch authorities' denial claims can also be refuted, that of Manish only being in the Netherlands for 6 months as the condition of a minimum period of residence is precluded by Article 26(2) Directive 2016/801/EC.

*"Family reunification should apply in any case to members of the nuclear family, that is to say, the spouse and the minor children"*<sup>28</sup> is what Recital (9) of FR Directive provides, which, although not a binding part of the Directive, helps one understand the aim thereof. FR Directive sets an obligation to the MSs to authorize entry and residence to the members of the nuclear family, without being left a margin of appreciation<sup>29</sup>. The spouse's right is specifically provided in Article 4(1)(a)<sup>30</sup>.

The first ground on which Elena's residence permit was denied is the fact that she was already in the Netherlands when the application was lodged; specifically, she is lawfully residing in the Netherlands on the basis of a tourist visa for 2 months. Indeed, Article 5(3) FR Directive requires the family members to reside outside the territory of the MS in which the sponsor resides when the application is submitted and examined. Nevertheless, a MS may, in appropriate circumstances, accept an application submitted when the family members are already in its territory.

According to the report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, *"all Member States have correctly transposed this provision, and all (except Romania and Bulgaria) have used the derogation allowing family members to submit their application in the territory of the Member State, if they are already residing lawfully there, or where exceptional conditions justify it, e.g. where there is an obstacle in doing so in the country of origin"*.<sup>31</sup>

In the NL, an application may be submitted while the family members are already resident in the country if the family members are exempt from the visa requirement. Categories exempt from the visa requirement are immigrants from Australia, Canada, Japan or the United States of America, immigrants for whom it is unsafe to travel because of their health condition, victims of trafficking in women and immigrants who qualify for a residence permit under Decision 1/80 (Turkish National)<sup>32</sup>. Dutch authorities have, therefore, the right to deny

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<sup>27</sup>Dir. 2003/86/EC art. 3(1): "...if the members of his or her family are third country nationals of whatever status".

<sup>28</sup>Dir. 2003/86/EC: Recital (9)

<sup>29</sup>Ibid art. 4(1)

<sup>30</sup>Dir. 2016/801/EC art. 3(24)

<sup>31</sup>Ibid Recital 7; report p. 10

<sup>32</sup>K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers, T. Strik, The Family Reunification Directive in EU Member States; the First Year of Implementation, Centre for Migration Law Radboud University, Nijmegen, May 2007 p. 50

the residence permit on this ground.

The third claim of Dutch authorities based on which the permit was denied was that Manish lives in a small studio which is not big enough for the couple. MSs have the discretion to require additional requirements such as *“to provide evidence that the sponsor has accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned”*.<sup>33</sup> National authorities, thus, can rely on such a ground.

Despite the lack of information for the examination of this ground, though, it can be argued that in a city like Amersfoort in the province of Utrecht which is the 2nd most populous city in the province and the 15th in the Netherlands<sup>34</sup>, a studio is the most common type of accommodation that a recently married couple would choose at least for the beginning of its marital life having also in mind how expensive rented houses are in Amersfoort and generally in the Netherlands. However, the Netherlands<sup>35</sup> is one of the MSs that have not implemented this option on their national legislation and as a result, the authorities cannot use this argument in the case of Manish and Elena for this would be a patent discriminatory act with no legal basis.

The last ground for the rejection was that Elena has not passed a Dutch language test. Article 7(2) FR Directive is an optional clause according to which the MS can impose integration measures on family members. Especially, in the NL, the family members of a sponsor are required to take a language test prior to their entry in the country and take a civic integration exam after admission – as part of their general integration programme or as part of requirements for permanent settlement in the country.<sup>36</sup> In any way, this cannot be used as a ground of denial, as Elena has never asked to take such a test (as far as we know) and the aim of it is not to make family reunification procedure harder or impossible, but for the TCN to show a commitment and willingness to be integrated in the MS concerned.<sup>37</sup>

Besides, Article 26(3) Directive 2016/801/EC includes a favourable provision according to which the integration conditions and measures referred to in Article 7(2) FR Directive *“may only be applied after the persons concerned have been granted a residence permit”*. Therefore, the Dutch authorities have no right to reject Elena’s application on this ground as it is inconsistent with the Directive 2016/801/EC. As soon as Elena’s residence permit is granted, though, they have

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<sup>33</sup>Dir. 2003/86/EC art.7(1)(a)

<sup>34</sup><https://nl.wikipedia.org/wiki/Amersfoort>

<sup>35</sup>European Commission 2019, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification, Brussels, 8.10.2008 COM (2008) 610 final and 29.3.2019 COM (2019) 162 final, p.6

<sup>36</sup>Ibid

<sup>37</sup>CJEU, Minister van Buitenlandse Zaken v K and A, C 153/14, paras.52, 57

the right to request such a test to be taken by her on the basis of the national integration procedure.

## Employment of Family Members

One year after family reunification being granted, Elena wishes to work as a nurse, but this is denied by the Dutch authorities on the ground that “Manish’s right to work is restricted to activities directly related to the research project”.

Article 14(1) FR Directive provides that the family members of a sponsor have, *inter alia*, the right to access to employment<sup>38</sup> “*in the same way as the sponsor*”, establishing, in this way, equal treatment on the basis of non-discrimination.<sup>39</sup> Furthermore, according to the more favourable provisions of the Directive 2016/801/EC, the MSs shall not apply any time limit<sup>40</sup> in respect of access for family members to the labour market, except in exceptional circumstances such as particularly high levels of unemployment.<sup>41</sup>

Subsequently, the Dutch authorities cannot deny to Elena access to the labour market on this ground, but they can do it only in exceptional circumstances and for a period not exceeding 12 months.<sup>42</sup>

## Family reunification: other family members

In the meanwhile, Elena wishes to bring her minor children (son Alberto (13) and daughter Patricia (17)) and her mother (Camilla) in the Netherlands, too. This request was also denied by Dutch authorities.

Both children of Elena are minors, that is, under the age of 18 years old.<sup>43</sup> Minor children of the spouse are also entitled to family reunification on condition that the spouse has custody and the children are dependent on him/her.<sup>44</sup> The FR Directive provides for two restrictions; the first is about the integration conditions of children over 12 years arriving independently of the rest of their

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<sup>38</sup>Dir. 2003/86/EC art. 14(1)(a)

<sup>39</sup>See n.34 above, p. 14

<sup>40</sup>Dir. 2003/86/EC art. 14(2)

<sup>41</sup>Dir. 2016/801/EC art.26(6); recital 11

<sup>42</sup>*Ibid*

<sup>43</sup><https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/age-majority>

<sup>44</sup>Dir. 2003/86/EC art.4(1)(d)



families<sup>45</sup> and the second about the requirement that applications concerning family reunification of children must be submitted before the age of 15.<sup>46</sup> However, both being standstill clauses and having in mind that the NL has not implemented these derogations, such limitations under national legislation are now prohibited.<sup>47</sup>

Furthermore, MSs are required to assess the applications for reunification in question in the interests of the children<sup>48</sup> concerned and with a view to promoting family life.<sup>49</sup> Yet, a MS may reject an application for entry and residence of family members on grounds of public policy, public security or public health<sup>50</sup> and, if provided by national law, because of lack of proper accommodation, health insurance or sufficient stable and regular resources of the sponsor as provided in Article 7 FR Directive.<sup>51</sup> Nevertheless, a rejection decision must be always reasoned, and, in this case, the Dutch authorities have neither complied with this obligation<sup>52</sup> nor there are grounds to assume that any of the above occurs.

As a result, although, we do not have all the information regarding the status of the custody and dependency of the children,<sup>53</sup> if we assume that these requirements are met as well as those laid down in Chapter IV and Article 16 of the Directive 2003/86/EC<sup>54</sup>, the Netherlands has no right to deny their entrance based on family reunification and Manish and Elena can challenge the decision.<sup>55</sup>

In any case, if, for some reason, the residence permit is not granted, Patricia may apply to the University of Eindhoven and provided that she is accepted by the University, she can apply for a residence permit as a student under the Directive 2016/801/EC.

Finally, the FR Directive gives MSs discretion regarding the entry and residence of other family members in their territory. Specifically, Article 4(2) allows MSs, *inter alia*, to "authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the... (a)

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<sup>45</sup>Ibid art. 4(1) last subpara, recital 12

<sup>46</sup>Ibid art. 4(6)

<sup>47</sup>See n.34 above, p. 5

<sup>48</sup>Dir. 2003/86/EC art. 5(5)

<sup>49</sup>See n.34 above, p. 5; CJEU, *Maahanmuuttovirasto*, C-356/11 and 357/11, ECLI:EU:C:2012:776

<sup>50</sup>Dir. 2003/86/EC art. 6(1)

<sup>51</sup>Art. 7(2) cannot be used as a rejection ground because of the more favourable provision of Dir. 2016/801/EC art. 26(3)

<sup>52</sup>Ibid art. 5(4) subpara. 3

<sup>53</sup>for the concepts of custody and dependency based on CJEU jurisprudence see European Commission 2014, Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, Brussels, 3.4.2014 COM (2014) 210 final, pp.5-7

<sup>54</sup>Dir. 2003/86/EC art. 4(1)

<sup>55</sup>Ibid art.18

*first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin”.*

There are, thus, two cumulative conditions to be met; the family member, who is a first-degree relative in the direct ascending line of the sponsor or his or her spouse, e.g. the mother of the spouse, has to be dependent on them within the autonomous meaning of dependency under EU law and does not enjoy proper family support in the country of origin;<sup>56</sup> this requirement is fulfilled if no other family members in the country of origin are by law or de facto supporting the person. The situation should be assessed considering the circumstances of the case in question.

Camilla is a retired teacher who still gives Spanish lectures to tourists in Costa Rica and no legal, financial, emotional or material support for her by her daughter can be inferred by the given facts. In that sense, she cannot be considered being dependent on her daughter, Elena, as she has an income (from her pension and lectures) and she is capable of taking care of her grandchildren. In any case, the Netherlands has not included this option<sup>57</sup> in its national legislation so the Dutch authorities are entitled to reject Camilla’s application as they do not even give the choice of application based on the FR Directive in her case. However, all family members of holders of residence permits in the Netherlands may submit an application for family reunification by relying on the right to family life, as described in Article 8 ECHR.<sup>58</sup>

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<sup>56</sup>See n. 51 above

<sup>57</sup>See n.34 above, p. 5

<sup>58</sup>Laura Cleton, Laura Seiffert, Henrika Wormann 2017, Family Reunification of Third-Country Nationals, EMN, May 2017, p. 25

## References

### Legal instruments

- [1] COUNCIL DIRECTIVE 2003/86/EC on the right to family reunification, *22 September 2003*
- [2] COUNCIL DIRECTIVE 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific, *12 October 2005*
- [3] COUNCIL DIRECTIVE 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *25 May 2009*
- [4] DIRECTIVE (EU) 2016/801 of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast), *11 May 2014*
- [5] European Convention on Human Rights
- [6] The Treaty on the Functioning of the European Union

### Publications – Reports

- [7] European Commission 2011: *Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research*, Brussels, 20.12.2011 COM (2011) 901 final.
- [8] European Commission 2014: *Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification*, Brussels, 3.4.2014 COM (2014) 210 final.
- [9] European Commission 2019: *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification*, Brussels, 29.3.2019 COM (2019) 162 final.
- [10] K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers, T. Strik: *The Family Reunification Directive in EU Member States; the First Year of Implementation*, Centre for Migration Law Radboud University, Nijmegen, May 2007.
- [11] Laura Cleton, Laura Seiffert, Henrika Wormann 2017: *Family Reunification of Third-Country Nationals*, EMN, May 2017

## Websites

- [12] Immigration and Naturalisation Service, Ministry of Justice and Security: [https://ind.nl/en/work/working\\_in\\_the\\_Netherlands/Pages/Scientific-researcher.aspx](https://ind.nl/en/work/working_in_the_Netherlands/Pages/Scientific-researcher.aspx)
- [13] WIKIPEDIA, the free encyclopaedia: <https://nl.wikipedia.org/wiki/Hoofdpagina>
- [14] European Union Agency for Fundamental Rights: <https://fra.europa.eu/en>

## Case Law

- [15] CJEU, *Maahanmuuttovirasto*, C-356/11 and 357/11
- [16] CJEU, *Minister van Buitenlandse Zaken v K and A*, C 153/14