OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 10 December 2009[1]

1. Council Directive 2003/86/EC[2] determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States. One requirement which a Member State may impose when a family member applies for authorisation to join such a resident is that the latter should have stable and regular resources sufficient to maintain the family, 'without recourse to the social assistance system of the Member State concerned'.

2. The main proceedings concern an application by a Moroccan national to join her husband, also of Moroccan nationality, who has been lawfully resident in the Netherlands since 1970, and whom she married in1972. The husband has stable and regular resources sufficient to meet general subsistence costs but not to render him ineligible for certain types of special assistance. In that context, the Raad van State (Council of State) seeks more detailed guidance on the criterion 'without recourse to the social assistance system' and asks whether the directive allows a distinction to be drawn according to whether a family relationship arose before or after the resident's entry into the Member State.

Legal background

Directive 2003/86

3. In the preamble to the Directive, inter alia:

— recital 2 stresses the obligation to protect the family and respect family life, enshrined in particular in Article 8 of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union;

1 — Original language: English.

2 — Directive of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12, hereinafter 'the Directive'). It does not apply to Denmark, Ireland or the United Kingdom (see recitals 17 and 18 in the preamble).

— recital 3 refers to the meetings of the European Council in Tampere in October 1999 and Laeken in December 2001, which stated that the European Union should ensure fair treatment of third country nationals residing lawfully on the territory of the Member States and should aim at granting them rights and obligations comparable to those of citizens of the European Union;

— recital 5 affirms that Member States should give effect to the Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation;

— recital 6 refers to protecting the family and establishing or preserving family life on the basis of common criteria determining the material conditions for exercising the right to family reunification;

— recital 8 states that more favourable conditions should be laid down for the exercise of the right of refugees to family reunification, on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there;

— recital 11 affirms that the right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States.

4. Under Article 2(d) of the Directive, 'family reunification' means 'the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry'. In that case, under Article 2(c), the resident is referred to as a 'sponsor'.

5. Article 3(5) states that the Directive is not to affect the possibility for the Member States to adopt more favourable provisions.

6. Article 4(1) provides:

'The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor's spouse;

…'

7. Chapter IV comprises Articles 6 to 8. Article 6, which is not directly in issue in the present case, allows Member States to refuse, withdraw or refuse to renew a residence permit for a family member on grounds of public policy, public security or public health, after considering the factors listed in Article 17 and the severity or type of offence committed or danger posed.

8. Article 7(1) provides that, when an application for family reunification is submitted, the Member State concerned may require evidence that the sponsor has (a) normal accommodation for the family, meeting general health and safety standards, (b) sickness insurance for the whole family and

'(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.'

9. Article 7(2) allows Member States to require compliance with integration measures, and Article 8 allows them to impose a qualifying period of residence for the sponsor. Those provisions are, again, not in issue here.

10. Chapter V of the Directive contains specific, and more favourable, provisions concerning family reunification of refugees recognised by the Member States, which are indirectly relevant to the present case. Under Article 9(2), Member States may confine the

application of that chapter to refugees whose family relationships predate their entry. Under Article 12(1), they are precluded from requiring evidence that the refugee fulfils the requirements set out in Article 7, although they may require fulfilment of the conditions in Article 7(1) if the application is not submitted within three months after the granting of refugee status.

11. Article 16, in Chapter VII (which concerns penalties and redress), allows a Member State to refuse, withdraw or refuse to renew a residence permit for a family member on a number of grounds, essentially when the family relationship is not genuine or when the conditions laid down in the Directive are not or are no longer satisfied. In particular, in the latter regard, the second indent of Article 16(1)(a) provides:

'When renewing the residence permit, where the sponsor has not sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income.'

12. Article 17, in the same chapter, provides:

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

Netherlands legislation

13. Rights of residence for aliens in the Netherlands are governed, in particular, by the Vreemdelingenwet (Law on Aliens) 2000 ('the Vw 2000') and its implementing decree, the Vreemdelingenbesluit (Aliens Decree) 2000 ('the Vb 2000'). Unlike the Community legislation, the Netherlands legislation distinguishes between family reunification and family formation.

14. Chapter 3 of the Vw 2000 concerns residence permits. Different types of permit are

issued, in particular, for fixed and indefinite periods, and for asylum-seekers and others. Article 14(2) specifies that a fixed-period residence permit is to be granted subject to restrictions related to the purpose for which it is granted, as regulated by administrative provisions. Relevant purposes, according to Article 15, include family reunification and family formation. Under Article 16(1)(c), an application for a fixed-period residence permit may be refused if the alien, or the person with whom he or she wishes to reside, does not have independent, lasting and sufficient means of support.

15. As amended with effect from 3 October 2005, with a view to bringing it into line with the requirements of the Directive, the Vb 2000 contains the following relevant provisions.

16. Under Article 1.1(r), 'family formation' means 'family reunification of the spouse, registered partner or unregistered partner, in so far as the family relationship arose at a time when the principal place of residence of the principal person [3] was the Netherlands'. 'Family reunification' is not itself defined.

17. Under Articles 3.13 and 3.14, a fixed-period residence permit for the purpose of family formation or reunification must be granted, subject to restrictions related to that purpose, to certain specified members of the principal person's family (including the spouse) if the conditions laid down in Articles 3.16 to 3.22 are met. At issue in the present case is Article 3.22.

18. Under Article 3.22(1), the residence permit is dependent on the principal person's having a lasting and independent net income as defined in Article 3.74(a). However, under Article 3.22(2), in the case of family formation, 'by derogation from paragraph 1', that income must be equal to at least 120% of the statutory minimum wage, including holiday allowance.

19. Although not directly relevant to the facts as they stood at the material time in the main proceedings, it may be noted that, by derogation from both paragraphs 1 and 2, Article 3.22(3) provides that a residence permit is to be granted also when the principal person is over 65, or suffers from total and

3 — That is to say, the "person with whom the alien wishes to reside", in Article 16(1)(c) of the Vw 2000. Under Article 3.15 of the Vb 2000, he or she may be a Netherlands national or an alien with a regular residence permit. The latter corresponds to the "sponsor" in the terms of the Directive.

permanent incapacity for work, thus waiving the resource requirement in such circumstances. [4] Pursuant to Article 3.22(4), the requirement is also waived when an application for family members to join a refugee is submitted within three months of the granting of refugee status.

20. Under Article 3.74, defining the income requirement in Article 3.22(1)(a), the means of support referred to in Article 16(1)(c) of the Vw 2000 are sufficient if net income is equal to, inter alia, (a) the statutory assistance criterion, including holiday pay, for the relevant category (single people, single parents or married couples) or (d), in the case of family formation, 120% of the minimum wage, including holiday allowance.

21. The assistance criterion referred to in Article 3.74(a) is that in Article 21 of the Wet werk en bijstand (Law on work and assistance, 'the Wwb'), in Chapter 3 of that Law, governing 'general assistance'. Article 21 is one of the provisions which fix 'assistance criteria' — income levels below which a person is entitled to general assistance. In addition, Chapter 4 of the Wwb, in particular Article 35(1), provides for temporary 'special assistance' to be provided by local authorities to claimants who do not have at their disposal sufficient resources to cover 'essential living costs arising from exceptional circumstances'.

22. The order for reference states that the relevant statutory assistance criterion at the material time was EUR 1 207,91 per month, and the figure for family formation (120% of the minimum wage) was EUR 1 441,44. [5]

Facts, procedure and questions

23. Ms Rhimou Chakroun, the appellant in the main proceedings, was born in 1948 and has Moroccan nationality. She married Mr Chakroun, who was born on 1 July 1944 and also has Moroccan nationality, in 1972.

4 — See also Article 3.28(4), under which an application is not to be refused on the basis of Article 16(1)(c) of the Vw 2000 if the person with whom the alien wishes to live is 65 or over, or unable to work.

5 — It would appear, from a comparison with the relevant Netherlands legislation, that these figures are for net income, and that the statutory assistance criterion corresponds to the net minimum wage, which is specified as a gross amount in the Wet minimumloon en minimumvakantiebijslag (Law on the minimum wage and minimum holiday allowance).

24. Mr Chakroun has resided in the Netherlands since 21 December 1970 and has had a residence permit for an indefinite period since 1975. Since July 2005 he has received unemployment benefit which, if circumstances remain unchanged, will continue until July 2010. It is not disputed that the benefit in question, paid because Mr Chakroun contributed to unemployment insurance while he was employed, is not 'social assistance' which would prevent him from being joined by his wife pursuant to the Netherlands legislation implementing the Directive.

25. Following the marriage, Ms Chakroun continued to live in Morocco but, on 10 March 2006, she applied to the Netherlands Embassy in Rabat for a provisional residence permit [6] in order to live with her husband.

26. By decision of 17 July 2006 (an objection against which was rejected on 21 February 2007), the Netherlands Minister for Foreign Affairs refused the application on the ground that, at the relevant time, the husband's unemployment benefit was only EUR 1 322,73 net per month, inclusive of holiday allowance, whereas the applicable income standard for family formation was EUR 1 441,44 net per month, inclusive of holiday allowance.

27. The refusal referred to an administrative circular stating that Article 7(1) of the Directive does not require Member States to choose a test on the basis of assistance criteria, the minimum wage or a percentage of the minimum wage. The latitude granted to the Member States was used in Articles 3.22 and 3.74(d) of the Vb 2000. And, while the Directive was equally applicable to both family reunification and family formation, the 'principal place of residence' criterion ruled out 'family reunification' where a marriage was entered into during a holiday abroad by a Netherlands resident.

28. Ms Chakroun's appeal against the minister's decisions was dismissed by the Rechtbank 's-Gravenhage (Hague District Court), sitting in Zutphen, on 15 October 2007. Her further appeal is now before the Raad van State.

29. One issue in those proceedings concerns the way in which the applicable income

6 — Possession of such a permit is, in principle, a precondition for applying for a regular (fixed-period) residence permit (see *Family reunification and family formation in the Netherlands during the period 2002-2006*, European Migration Network, 2007, pp. 7 and 22).

criterion is defined. Ms Chakroun does not dispute that Article 7(1)(c) of the Directive allows such a criterion but argues, essentially, that it does not allow a higher threshold to be set than that which is generally used for determining what is necessary to meet essential subsistence costs — namely, in the Netherlands, the statutory minimum wage for the relevant category of person and family situation, income below which entitles the person to general assistance. However, the referring court explains, various kinds of special assistance (and remission of local taxes) can also be granted by local authorities, not only to those whose income is less than the minimum wage, but also to those who, while having resources equal or superior to that wage, are unable to meet essential costs arising from exceptional circumstances. Such special assistance is granted on a sliding scale and is no longer available at all once income reaches 120% to 130% of the minimum wage. The question is therefore whether Article 7(1)(c) allows a Member State to set an income threshold at a level which rules out any possibility of recourse to special assistance of that kind.

30. Another issue concerns the distinction drawn in the Netherlands between family reunification and family formation. The threshold of 120% of the minimum wage applies only in the latter case. In Ms Chakroun's view, Article 2(d) of the Directive rules out any distinction on the basis of whether the family relationship arose before or after the sponsor's entry into the Member State concerned. The minister, on the other hand, argues that such a distinction can be drawn in the case of refugees (Article 9(2) of the Directive) and is also drawn in the case of third country nationals who are long-term residents in the Community and who exercise their right of residence in a second Member State. [7]

31. The Raad van State has therefore referred the following questions to the Court for a preliminary ruling:

'(1) Should the phrase "recourse to the social assistance system" in Article 7(1)(c) of [the Directive] be interpreted as permitting a Member State to make an arrangement in respect of family reunification which results in family reunification not being granted to a sponsor who has provided evidence of having stable

7 — Article 16(1) and (5) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents (OJ 2004 L 16, p. 44) allows such a person to be accompanied by his or her family only if the family was already constituted in the first Member State.

and regular resources to meet general subsistence costs, but who, given the level of such resources, will nevertheless be entitled to claim special assistance to meet exceptional, individually determined, essential living costs, income-related remission of charges by municipal authorities, or income-support measures in the context of municipal minimum income policies?

(2) Should [the Directive], in particular Article 2(d), be interpreted as precluding national legislation which, in applying the resource requirement pursuant to Article 7(1)(c), makes a distinction according to whether a family relationship arose before or after the entry of the resident into the Member State?'

32. Written observations have been submitted by Ms Chakroun, by the Greek and Netherlands Governments and by the Commission. At the hearing on 21 October 2009, oral argument was presented on behalf of Ms Chakroun, the Netherlands Government and the Commission.

Assessment

Introductory remarks

33. I note that, since the order for reference was made, Mr Chakroun has reached the age of 65 years, so that no income threshold should now apply when considering an application for family reunification. [8] However, the main proceedings concern a decision taken when a threshold did apply, and the Court has been given no indication (even following a question at the hearing) that those proceedings are affected by the change in situation. I shall therefore proceed on the basis that the applicability of the threshold is still relevant to the settlement of the dispute before the Raad van State.

34. That court's two questions are separate but interdependent. Although there seems to be no imperative reason to address them in one order or the other, I find it more helpful to consider first whether a differentiated resource requirement may be imposed, before examining what level of resources may be required. I shall therefore begin with question 2.

8 — See point 19 above.

Question 2

35. The national court asks, essentially, whether Article 2(d) of the Directive — pursuant to which 'family reunification' covers all situations in which the sponsor is joined by a family member, whether the family relationship arose before or after the sponsor became resident in the Member State concerned [9] — precludes national legislation which imposes a higher resource requirement in the latter case.

36. The phrase 'whether the family relationship arose before or after the resident's entry' does not explicitly contemplate the drawing of a distinction according to when the family relationship arose. Indeed, the most obvious reading is perhaps, as Ms Chakroun, the Greek Government and the Commission all submit in substance, that it militates against any systematic distinction on that basis which is not authorised by some more specific provision (such as Article 9(2), with regard to refugees).

37. However, the Netherlands Government argues that Article 2(d) does not *explicitly* preclude such a distinction. It merely defines a general concept, without ruling out the possibility of further subdivisions within that concept.

38. I am not convinced by that argument.

39. With specific reference to the Directive, the Court has recalled its settled case-law that the requirements flowing from the protection of general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements. [10]

9 — It may be noted that the definition in Article 2(d) covers only situations in which the family relationship arose before the family member seeks to join the sponsor, and the Netherlands definition of 'family formation' is similarly limited. Neither covers the situation of a third country national wishing to travel to a Member State in order to marry the sponsor there. The Commission's original proposal for the Directive (COM(1999) 638 final) did cover such a situation (Article 2(e), at pp. 12 and 25). However, in January 2001, the words 'form or' were deleted from the phrase 'in order to form or preserve the family unit' (Council document 5682/01 of 31 January 2001).

10 — Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 105.

40. One of those general principles is the principle of equal treatment or non-discrimination, which has been consistently defined as requiring that 'comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'. [11]

41. In that context, it might seem foolhardy to assert that the difference between a family relationship which arose before the sponsor's entry into the Member State and one which arose later can never justify different treatment in some regard.

42. However, as the Commission has pointed out, there appear to be no grounds on which it could justify setting a higher resource requirement in one case than in the other. The amount necessary in order to maintain the sponsor and his or her family without recourse to social assistance — which is what Article 7(1)(c) authorises Member States to require — can, of course, be affected by various factors, such as the number and ages of family members, their need for care or their capacity for work. But, whatever that amount, it cannot normally be affected by whether the family relationship arose before or after the sponsor became lawfully resident in the host State.

43. Consequently, if the principle of equal treatment or non-discrimination is respected in implementing the Directive, a distinction such as that drawn by the Netherlands legislation is precluded.

44. The Netherlands Government, however, puts forward a further argument. The higher resource requirement, it says, is in fact the norm. 120% of the minimum wage is what is actually required in order to maintain a family without recourse to social assistance. The lower requirement is an exception to that norm. It is a more favourable provision, expressly authorised by Article 3(5) of the Directive, intended to comply with the Netherlands international obligations, in particular the right to respect for family life enshrined in Article 8 of the European Convention on Human Rights — and the Government considers that families already constituted

11 — See, most recently, Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, paragraph 74. The principle of non-discrimination is also referred to in recital 5 in the preamble to the Directive, and forms part of the values and principles recognised by the Member States, referred to in recital 11.

when the sponsor enters the Member State are more deserving of such respect than those yet to be constituted.

45. I am not convinced by that argument either.

46. First — although this is a question of interpretation of national law and thus a matter for the Netherlands courts — it seems to be contradicted by the wording of the legislation itself. Article 3.22(1) of the Vb 2000 sets an income threshold. The higher threshold in Article 3.22(2), for cases of family formation only, is explicitly stated to be 'by derogation from paragraph 1'. I find it very difficult to read those provisions as laying down a general threshold in paragraph 2 and providing for an exception in paragraph 1.

47. If, however, by some quirk of interpretation, that should prove to be the case, I would still not accept the Government's argument. Member States may apply more favourable provisions than those required or authorised by the Directive, [12] but in doing so they must still comply with the principle of equal treatment or non-discrimination. Because the question whether the family relationship arose before or after the sponsor became lawfully resident in the host State cannot provide an objective basis for applying different income thresholds in otherwise comparable situations, it is irrelevant whether the higher threshold is the exception or the rule.

48. That view does not affect the other derogations [13] with which the Netherlands Government seeks to bolster its argument. Both age and incapacity for work are objective factors particularly likely to affect a person's resources, and may thus justify reducing or waiving any income threshold. And the absence of any threshold when family members apply to join a refugee within three months of granting refugee status is not only based on an objective justification (the well-founded fear of persecution which defines refugee status [14] is especially likely to extend to the immediate family and thus militates in favour

12 — Article 3(5); see point 5 above.

13 — Set out in point 19 above.

14 — See Article 2(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

of reunification before the refugee can be assured of stable and regular resources in the host country) but is explicitly required by Article 12(1) of the Directive.

49. Nor does that view affect any adaptation of the threshold which might be decided, on objective grounds, in individual cases. Indeed, where a resource requirement is applied, Article 7(1)(c) of the Directive requires Member States to evaluate the sponsor's resources by reference to their nature and regularity, and allows the number of family members to be taken into account. And Article 17 requires various individual circumstances to be taken into account when any negative decision is taken in relation to family reunification. An individual assessment of each application is thus required by the Directive, precluding the blanket application of any abstract threshold without regard to the circumstances of the case. [15]

50. A further point to be mentioned is the statement in the decision rejecting Ms Chakroun's application, which appears to seek to justify the distinction between family reunification and family formation on the ground that less favourable treatment is called for when a Netherlands resident marries while holidaying abroad. But, even assuming that to be a valid premiss (on the basis, perhaps, that it weeds out marriages of convenience), an individual assessment is still required.

51. I do not see that any objective distinction can be drawn systematically between two third country nationals wishing to live in a Member State in order to work and start a family there, one of whom marries before emigrating while the other saves up to marry on a visit to his or her country of origin. The difference between the two might depend, for example, solely on the bride's parents willingness or otherwise to accept a son-in-law who was not yet financially independent.

52. Moreover, the Netherlands Government states explicitly in its written observations that, even if the family relationship arose after the sponsor's arrival and the income criterion is not met, family members will be given residence permits if Article 8 of the European Convention on Human Rights so

15 — See also Article 6 of the Directive (point 7 above) and Article 16 (point 11), the latter of which requires family members' income to be taken into account when an application for renewal of a residence permit is considered. In addition, I note that all the parties, including the Netherlands Government, accept that Article 8 of the European Convention on Human Rights requires a case-by-case assessment.

requires — implying that individual assessments will be carried out.

53. Such assessments seem capable of safeguarding adequately against abusive immigration through marriages of convenience.

54. However, the Chakrouns 'marriage of (at the material time) nearly 34 years can hardly be compared to a marriage of convenience or what might be termed 'bringing back a holiday bride. A reference to that quite different situation in the decision rejecting Ms Chakroun's application seems to indicate that the process fell well short of the individual assessment required both by the Directive and by Article 8 of the European Convention on Human Rights.

55. In the light of those considerations, I take the view that the Directive precludes the drawing of a distinction such as that in issue, to the extent that it is not based on any objective factor related to the level of resources required to maintain the sponsor and his or her family and applies without regard to the circumstances of each case.

Question 1

56. Viewed in the light of my proposed answer to question 2, any consideration of question 1 must be based on the hypothesis that the Member State applies a single threshold which 'results in family reunification not being granted to a sponsor who has provided evidence of having stable and regular resources to meet general subsistence costs, but who, given the level of such resources, will nevertheless be entitled to claim special assistance to meet exceptional, individually determined, essential living costs, income-related remission of charges by municipal authorities, or income-support measures in the context of municipal minimum income policies'.

57. First of all, it seems to me that Article 7(1)(c) of the Directive does not preclude a Member State from specifying a particular resource threshold, provided that it can be applied in such a way as to take account of individual circumstances in each case.

58. Second, Article 7(1)(c) states that Member States 'may take into account the level of minimum national wages and pensions'. That clearly does not require any threshold specified to be fixed at 100% (or any other

percentage) of the minimum national wage — nor indeed could it, since seven Member States do not have national legislation setting a statutory minimum wage. [16]

59. Moreover, the criterion which may be used is that of resources sufficient to maintain the reunited family without recourse to social assistance. Although, where it exists, a minimum national wage, might seem a helpful benchmark in that regard (since one function of such a wage may be to ensure that workers subsistence needs are met by employers and not by the State), it cannot be assumed to coincide with the income level at which social assistance ceases to be available. For various reasons of policy or economics, entitlement to social assistance may cease below the minimum wage level or continue beyond it. [17] What is clear, however, is that Article 7(1)(c) does not authorise Member States to require resources greater than those necessary to maintain the whole family without recourse to social assistance.

60. In their observations, Ms Chakroun and the Netherlands Government have suggested that 'the social assistance system of the Member State concerned' should be more closely defined.

61. Ms Chakroun submits that, since Article 7(1)(c) refers to the social assistance system of the *Member State*, and the level of minimum *national* wages and pensions, [18] it does not allow the use of a criterion based on assistance which varies from locality to locality, as is the case with all the types of special assistance in issue here.

62. I am not entirely convinced by that submission.

16 — Austria, Cyprus, Denmark (which is not bound by the Directive), Finland, Germany, Italy and Sweden have no national statutory minimum wage: see *Minimum wages in January 2009*, Eurostat, Data in focus, 29/2009, p. 1.

17 — Indeed, at the hearing, the Netherlands Government stated that its national minimum wage was enough to cover only the most everyday basics of existence, and that special social assistance is a necessary complement to ensure a minimum standard of living — a statement which may seem surprising in the light of its choice of the net minimum wage as an income threshold in cases of family reunification, and even more so when it is considered that the Netherlands minimum wage is the second highest in the European Union in terms of purchasing power standards (see *Minimum wages in January 2009*, cited in footnote 16, p. 3).

18 — Similarly in Article 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158, p. 77) and, previously, Article 1(1) of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

63. On the one hand, whilst the concept of the social assistance system 'of a Member State' arguably does not include purely local initiatives, a number of Member States have federal or quasi-federal systems of government in which responsibility for areas such as social assistance may be devolved to regional or equivalent authorities. And, in the present case, the types of assistance with which the Raad van State's question is concerned are provided for in national legislation, even if their detailed application is a matter for local authorities.

64. On the other hand, the Netherlands Government stated at the hearing that the 120% threshold had been selected as a national average beyond which it was no longer possible to claim special social assistance, but that entitlement might in fact cease, depending on the municipality responsible, at 110% or at 130% of the minimum wage. Consequently, it would seem, a uniform threshold of 120% will preclude reunification for certain families where there is no entitlement to special social assistance and allow it for certain families where there is such an entitlement. That does not appear consistent with Article 7(1)(c) of the Directive or with the need for individual assessment.

65. The Netherlands Government, for its part, considers that the Directive respects the variety of types and rates of assistance in different Member States but that guidance may nonetheless be derived from the Court's case-law on the distinction between 'social benefit' and 'social assistance' in the context of Regulation (EEC) No 1408/71 of the Council. [19]

66. That suggestion seems, prima facie, reasonable, although, as the Commission pointed out at the hearing, the rationale for the distinction in the context of Regulation No 1408/71 (which is concerned with the exportability of benefits) may not be transposable to other contexts. However, it is not in my view necessary for the Court to take a definite position, since it is not disputed — nor does it appear disputable — that the measures referred to in the Raad van State's question do indeed constitute social assistance within the meaning of the Directive.

67. What appears to me much more significant is the fact that the types of assistance concerned are available only in exceptional circumstances. Even if it is common ground that they may be available to those whose resources are between 100% and 120% of the

19 — Regulation of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416), as amended. See, in particular, Case C-78/91 *Hughes* [1992] ECR I-4839, paragraphs 17 and 18.

minimum wage, it is also clear that they are not available to all such persons. Indeed, the use of the word 'exceptional' in the legislation necessarily implies that they are available to only a minority of the population concerned, and then only intermittently.

68. At the hearing, the Netherlands Government stated that total special social assistance disbursements in 2007 amounted to EUR 243 million, with average payments of EUR 150 in respect of each payment. If each payment was made to a different person, that would account for approximately one tenth of the population of the Netherlands, although a yearly payment of EUR 150 clearly bears no relationship to the difference in net annual income between 100% and 120% of the minimum wage, which, on the figures given by the national court, would be just over EUR 2 800 at the material time. Of course, it is impossible for the Court to draw any firm conclusion from such figures, but it might seem plausible that in fact the bulk of the payments went to a much smaller number of people, of whom a significant proportion might be likely to earn less than the national minimum wage.

69. Whatever the truth of the matter, however, it seems to me that the Government's figures do not credibly support its contention that a uniform income threshold of 120% of the national minimum wage is necessary to ensure that family reunification will not entail 'recourse to the social assistance system' — a contention which also sits ill with the Government's own statement, also at the hearing, that claims for special social assistance were assessed case by case.

70. Having regard to the need for a case-by-case assessment which permeates the Directive, it seems to me that the mere possibility of being able to claim certain types of social assistance in exceptional circumstances (themselves assessed case by case) cannot be a ground for systematically rejecting an application for family reunification. That is in contrast to a level of resources which means that an individual or family will automatically receive social assistance — a situation which clearly falls within the scope of the condition authorised by Article 7(1)(c) of the Directive.

71. I therefore consider that question 1 should be answered to the effect that the Directive does not authorise a resource requirement to be defined in a way such as that in issue.

Conclusion

72. Having regard to all the above considerations, I suggest that the Court should give the following answers to the questions raised by the Raad van State:

'(1) Articles 2(d) and 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, read together, preclude national legislation which, in applying the resource requirement pursuant to Article 7(1)(c), makes a distinction according to whether a family relationship arose before or after the entry of the resident into the Member State, to the extent that such a distinction is not based on any objective factor related to the level of resources required to maintain the sponsor and his or her family and applies without regard to the circumstances of each case;

(2) 'Article 7(1)(c) of Directive 2003/86 does not permit a Member State to set a resource requirement which leads to systematic rejection of an application for family reunification in cases where the reunited family would have no automatic entitlement to social assistance, but merely a potential entitlement in exceptional circumstances.