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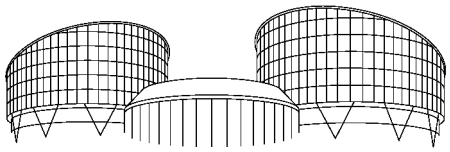

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF EL GHATET v. SWITZERLAND

(Application no. 56971/10)

JUDGMENT

STRASBOURG

8 November 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of El Ghatet v. Switzerland,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
Helen Keller,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 11 October 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 56971/10) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of both Switzerland and Egypt, Mr Saleh El Ghatet ("the first applicant"), and an Egyptian national, Mr Mohamed Saleh El Ghatet ("the second applicant"), on 28 September 2010.

2. The applicants were represented by Mr T. Hassan, a lawyer practising in Zurich. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, of the Federal Office of Justice.

3. The applicants alleged that the Swiss authorities' refusal of their request for family reunification constituted a breach of their right to respect for family life as provided in Article 8 of the Convention.

4. On 18 January 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1952 and lives in Hausen (Canton of Aargau). The second applicant, who was born in 1990, is the son of the first applicant. He lives in Egypt.

A. The background to the case

6. The first applicant entered Switzerland in 1997, where he applied for asylum in the same year. At that time, the second applicant remained in Egypt, where he was cared for by his mother. The first applicant's asylum application was rejected by the competent authorities.

7. In March 1999 the first applicant married a Swiss national and obtained a residence permit. In 2000 a daughter was born to the couple.

8. In 2002 the second applicant visited his father in Switzerland for three months based on a tourist visa valid for that period.

9. In July 2003 the second applicant re-entered Switzerland for purposes of family reunification with his father.

10. In February 2004 the first applicant was granted a permanent residence permit. In August 2004 he obtained Swiss nationality and has since held nationality of both Switzerland and Egypt.

11. After encountering difficulties in school and with his step-mother, the second applicant returned to Egypt in January 2005, where he was cared for by his mother and his paternal grandmother.

12. In 2006 the first applicant separated from his spouse. The latter continued to live in Switzerland with the couple's daughter.

B. The proceedings at issue

13. On 1 March 2006 the first applicant lodged a request for family reunification with the second applicant, who was 15 and a half years old at the time and for whom he had custody according to Egyptian law.

14. On 15 February 2007 the Migration Office of the Canton of Aargau refused that request.

15. On 12 March 2007 the applicant lodged an appeal against that decision with the Legal Unit of the Migration Office of the Canton of Aargau.

16. On 6 June 2007 that authority dismissed the appeal.

17. On 26 June 2007 the applicant lodged an appeal against that decision with the Court of Appeal in Foreigners' Law (*Rekursgericht im Ausländerrecht*) of the Canton of Aargau.

18. On 7 September 2007 that court granted the applicant's appeal. In a very detailed decision it noted that the requirements for family reunification under Article 17 § 2 third sentence of the Act on the Residence of Foreign Nationals (Bundesgesetz über Aufenthalt und Niederlassung der Ausländer, ANAG) were not met (see relevant domestic law and practice paragraphs 31-33 below). Largely basing its reasoning on Article 8 of the Convention, it considered, however, that the applicants' interests in respect for their family life prevailed over those of the public. It ordered the Migration Office of the Canton of Aargau to arrange for a residence permit for the second applicant.

19. Subsequently, the Migration Office of the Canton of Aargau declared that it would grant a permanent residence permit to the second applicant for purposes of family reunification and, on 28 January 2008, transferred the file to the Federal Office of Migration to seek the required consent. On 4 March 2008 the latter refused to give its consent, finding that the requirements for family reunification were not met and that the decision of the court of the Canton of Aargau was in contradiction to the case-law of the Federal Supreme Court.

20. On 4 April 2008 the first applicant lodged an appeal against that decision with the Federal Administrative Court, both in his own name and in that of his son.

21. On 30 July 2009 the applicants informed the authorities that the situation of the second applicant had changed. His mother had moved to Kuwait with her new spouse and he was now cared for exclusively by his paternal grandmother.

22. On 2 February 2010 the Federal Administrative Court dismissed the appeal. It noted, first, that the requirements for family reunification under Article 17 § 2 third sentence of the Act on the Residence of Foreign Nationals were not met (see relevant domestic law and practice paragraphs 31-33 below). It found, second, that the applicants could not rely on Article 8 of the Convention, as the second applicant had reached the age of adulthood and was not dependant on the first applicant (see relevant domestic law and practice paragraph 33 below).

23. On 8 March 2010 the applicants lodged an appeal against that decision with the Federal Supreme Court.

24. On 5 July 2010 the Federal Supreme Court dismissed that appeal. It considered, in particular, that the relationship between the two applicants was not paramount ("*vorrangig*"), even though the first applicant had the right of custody for the second applicant according to Egyptian law. It noted that the first applicant had not applied for family reunification immediately after his arrival in Switzerland, that the second applicant was cared for by his mother and his grandmother in Egypt until he turned 18 years, that the second applicant had lived almost all of his life in Egypt and had more important social and personal ties to his country of origin, which would be negatively affected if he moved to Switzerland, and that he had returned to Egypt after having stayed with his father in Switzerland for one and a half years. It observed that the first applicant had, thus, at that time, preferred that the second applicant lived with his mother and that the second applicant would face even more severe challenges to integration now than he had during his first stay in Switzerland, given his age. While noting that the first applicant had a close relationship to his daughter in Switzerland and that he could, thus, not be expected to relocate to Egypt to live there with the second applicant, the court noted that the applicants had not submitted sufficient reasons to justify the second applicant's reunion with his father in Switzerland.

25. Moreover, the Federal Supreme Court considered that the circumstances of the present case differed from those of *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, 1 December 2005. The latter concerned a situation where only one parent, the child's mother, was still alive. The mother had tried to bring her child to the Netherlands as soon as possible after her arrival. Moreover, the child's grandmother who cared for her in Ethiopia had taken the child out of school against the mother's will and planned a forced marriage.

26. On 7 October 2010 the Court refused to apply Rule 39 of the Rules of the Court.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. International law

27. Article 3 § 1 of the United Nations Convention on the Rights of the Child of 20 November 1989, which came into force in respect of Switzerland on 26 March 1997, read as follows:

Article 3

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

28. The principle of "the child's best interests", which stems from the second principle of the Declaration of the Rights of the Child adopted by the United Nations on 20 November 1959, is also embodied in Articles 5 and 16 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women and was referred to in relation to other international treaties, *inter alia*, in General Comments Nos. 17 and 19 of the United Nations Human Rights Committee, which monitors the International Covenant on Civil and Political Rights. For a more in-depth discussion of the concept of the "child's best interests", see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, §§ 49-55, ECHR 2010.

B. Domestic law

1. Constitution of the Swiss Confederation

29. Article 11 of the Constitution of the Swiss Confederation of 1999, entitled "Protection of children and young people", provides, in so far as relevant:

> "1. Children and young people have the right to the special protection of their integrity and to the encouragement of their development. ..."

2. Legislation and Practice on Family Reunification

30. Article 126 § 1 of the Foreign Nationals Act (*Bundesgesetz über die Ausländerinnen und Ausländer*, *AuG*) of 16 December 2005, which entered into force on 1 January 2008, provided that the previously applicable provisions remained applicable to applications which were lodged prior to the entry into force of that Act. Prior to 1 January 2008 family reunification of children of foreign nationality with a parent living in Switzerland was governed by the Residence of Foreign Nationals Act of 26 March 1931 (*Bundesgesetz über Aufenthalt und Niederlassung der Ausländer*, *ANAG*).

31. Article 17 § 2 third sentence of the Residence of Foreign Nationals Act provided that unmarried children of foreigners who had a permanent residence permit in Switzerland had a right to be included in that permanent residence permit, if they lived together with the parents and were under 18 years of age. This provision applied by analogy to foreign children of Swiss nationals (see, among others, Federal Supreme Court, no. 2 A 457/2003, judgment of 16 January 2004, BGE 130 II 137). The case-law of the Federal Supreme Court provided that the decisive date for determining whether child was under 18 years of age was the date on which the application was lodged (Federal Supreme Court, no. 2A 246/2002, judgment of 17 January 2003, BGE 129 II 249).

32. The Federal Supreme Court established that different criteria applied, if the application for family reunification was not filed shortly after the parent arrived in Switzerland (Federal Supreme Court, no. 2A 316/2006, judgment of 19 December 2006, BGE 133 II 6). In that case, it had to be distinguished whether reunification with both parents was sought or with one parent who lived separately from the other parent (*ibid*.). In the former scenario no particular justification was, in principle, required for the delay in lodging the application for family reunification. In the latter scenario, referred to as "partial family reunification", a child would only be allowed to join his or her parent in Switzerland if, having regard to all circumstances of the case, particular family reasons or a change in the care arrangement so required (*ibid*.). The assessment must take particular account of the personal situation of the child, such as family and social ties to and care available in the country origin, his or her chances to integrate in Switzerland in light of his or her age, level of education and language skills, the duration of the separation from his or her parent living in Switzerland, that parent's personal situation and the intensity of the ties between the child and that parent (*ibid*.). Where alternative care arrangements in the country of origin existed that corresponded better to the best interests of the child, because the child would not be taken out of his or her familiar environment and network of relationships, reunification with the parent living in Switzerland would, as a rule, not be granted (Federal Supreme Court, no. 2C_8/2008, judgment of 14 May 2008).

33. The case-law of the Federal Supreme Court further provided that these criteria not only applied in relation to Article 17 § 2 third sentence of the Residence of Foreign Nationals Act, but also by analogy when an application for family reunification was based on Article 8 of the Convention (*ibid*.). In such cases, however, the date on which the decision was taken by the Swiss courts was decisive for determining whether or not a child was under 18 years of age, rather than the date on which the application was lodged (Federal Supreme Court, judgment of 16 January 2004, cited above). If the child was 18 years or older, a relationship of dependency between the child and the parent was required for there to be a right to family reunification (Federal Supreme Court, no. 2A 315/2002, judgment of 11 October 2002, BGE 129 II 11).

34. In its first judgment concerning reunification of a child with one parent in Switzerland under the Foreign Nationals Act, the Federal Supreme Court departed from its case-law on partial family reunification under the Residence of Foreign Nationals Act (Federal Supreme Court, no. 2C 270/2009, judgment of 15 January 2010, BGE 136 II 78). It found that a request for reunification of a child with one parent living in Switzerland was to be granted, if that parent had the sole right of custody and the application was not abusive, except where such reunification would be manifestly against the child's best interests.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

35. The applicants complained that the Swiss authorities' refusal of their request for family reunification violated their right to respect for family life as provided in Article 8 of the Convention, the relevant parts of which read as follows:

> "1. Everyone has the right to respect for his (...) and family life (...).
>
> 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 (...) 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 rights and freedoms of others."

36. The Government contested that argument.

A. Admissibility

37. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes

that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

38. The applicants submitted that the domestic authorities had failed to strike a fair balance between the conflicting interests, as they should have concluded that the applicants' interest in family reunification outweighed the public interest to control immigration. Relying on the Court's judgment in the case of *Tuquabo-Tekle and Others,* cited above, they submitted that the decisive date for determining the age of a child in the context of family reunification proceedings was the date on which the request was filed. They submitted that the second applicant was fifteen and a half years old when the first applicant, in March 2006, lodged the request for family reunification at issue. They added that the first applicant had the right of custody for the second applicant, that the second applicant had previously lived with the first applicant in Switzerland for one and half years, from July 2003 to January 2005, and that the second applicant's return to Egypt had, from the start, been meant to be temporary. They argued that they had, thus, already previously had the intention to live together in Switzerland.

39. The applicants further submitted that the domestic authorities did not correctly assess the second applicant's situation in Egypt. They argued that the remarriage of the second applicant's mother and her subsequent move to Kuwait with her husband, and corresponding changes in the care arrangement for the second applicant, had not been sufficiently taken into account. It was not true that the second applicant's strongest social and family ties were to Egypt. Rather, his mother lived in Kuwait and his father, the first applicant, lived in Switzerland. In any event, the Swiss authorities did not seem to be concerned about disrupting the second applicant's ties to Egypt when they granted the previous request for family reunification which allowed him to stay in Switzerland from 2003 to 2005.

40. Moreover, the applicants submitted that it would be unreasonable to ask the first applicant, who also enjoyed family life with his daughter, who was a Swiss national and lived with her mother in Switzerland, to relocate to Egypt to live together with the second applicant there. Denying the second applicant to live with the first applicant in Switzerland would thus result in a permanent separation of the two applicants.

(b) The Government

41. The Government accepted that a family life within the meaning of Article 8 § 1 of the Convention existed between the applicants. It submitted

that the case-law of the Court was not clear as regards the decisive date for determining the age of a child in the context of family reunification, as the Court had relied on the date the request was first introduced on the domestic level in the case of *Tuquabo-Tekle and Others,* cited above, whereas it had relied on the date of the last domestic decision in the case of *Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003. It argued that the present case more closely resembled that of *Chandra* than that of *Tuquabo-Tekle and Others*, emphasising that the request for family reunification was lodged years after the first applicant arrived in Switzerland. It submitted that the first applicant left the second applicant behind when he moved to Switzerland in 1997 and that he did not provide a sufficient explanation why he did not lodge a request for family reunification as soon as he got a residence permit in Switzerland. The Government emphasised that the second applicant had then been granted family reunification with the first applicant in Switzerland, but that the first applicant chose to send him back to Egypt after one and a half years due to a conflict between the second applicant and the first applicant's spouse. It submitted that there were no indications that this second separation was meant to be temporary and argued that the separation of the two applicants was nothing but the result of the first applicant's deliberate choices.

42. The Government maintained that the care arrangements for the second applicant in Egypt were adequate, emphasising that this constituted a significant difference to the case of *Tuquabo-Tekle and Others,* cited above. It added that the second applicant had experienced integration difficulties when he lived in Switzerland for the first time and that there were no indications about him facing any problems in Egypt. It argued that, considering also that he was 15 and half years at the time the request for family reunification was lodged, it was not evident that taken the second applicant out of his social, cultural and linguistic environment in Egypt to reunite him with the first applicant in Switzerland would in fact be in the best interests of the child, not least because the material living conditions of the first applicant, who lived in a one-room apartment and was unemployed at the time the request was lodged, were not ideal. Adding that the present case did not concern the reunification of a child with both of his or her parents, unlike in the case of *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001, the Government concluded that the domestic courts struck a fair balance between the conflicting interests and did not overstep their margin of appreciation.

2. The Court's assessment

(a) General principles

43. The Court recalls that it recently summarised the pertinent principles concerning family reunification of children of foreign nationality with parents settled in a Contracting State in the case of *I.A.A. and Others v. the United*

Kingdom (dec.), no. 25960/13, §§ 38-41, 8 March 2016. It reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, 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; and in both contexts the State enjoys a certain margin of appreciation (see *Ahmut v. the Netherlands*, 28 November 1996, § 63, *Reports of Judgments and Decisions* 1996-VI).

44. In order to establish the scope of the State's obligations, the Court must examine the facts of the case in the light of the applicable principles, which it has previously set out as follows (see *Gül v. Switzerland*, 19 February 1996, § 38, *Reports* 1996-I; *Ahmut*, cited above, § 67; and *Berisha v. Switzerland*, no. 948/12, § 48, 30 July 2013):

(a) the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest;

(b) as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory;

(c) where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunification in its territory.

45. In this context it must be borne in mind that cases like the present one do not only concern immigration, but also family life, and that it involves aliens who already had a family life which they left behind in another country until they achieved settled status in the host country (contrast *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 68, Series A no. 94). In such cases, it must determine whether, in refusing to issue residence permits for the applicants, the Government can be said to have struck a fair balance between their interest in developing a family life in the respondent State on the one hand and the State's own interest in controlling immigration on the other. In conducting this assessment, the Court has first asked whether the parents irrevocably decided to leave their children in the country of origin, and thereby abandoned any idea of a future family reunion (see, for example, *Şen*, cited above, § 40). Secondly, it has asked whether allowing the children to enter the Contracting State would be the most adequate means for them to develop their family life with the parents settled in that State. In answering this question, it has had regard to the existence of any "insurmountable obstacles" or "major impediments" to the parents' return to the country of origin (see *Tuquabo-Tekle and Others*, cited above, § 48).

46. The Court has further held that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010; *M.P.E.V. and Others v. Switzerland*, no. 3910/13, § 52, 8 July 2014; see also *Tarakhel v. Switzerland* [GC], no. 29217/12, § 99, ECHR 2014 (extracts)). For that purpose, in cases regarding family reunification the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents (see *Tuquabo-Tekle and Others*, cited above, § 44). While the best interests of the child cannot be a "trump card" which requires the admission of all children who would be better off living in a Contracting State (*I.A.A. and Others v. the United Kingdom*, cited above, § 46; see also *Berisha*, cited above, §§ 60-61), the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it (see, *mutatis mutandis*, *Mandet v. France*, no. 30955/12, §§ 56-57, 14 January 2016).

47. The Court reiterates 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 (*Neulinger and Shuruk*, cited above, § 138). 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 (*ibid*., with further references; *X v. Latvia* [GC], no. 27853/09, § 101, ECHR 2013). 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 (*Neulinger and Shuruk*, cited above, §§ 133, 141; *B. v. Belgium*, no. 4320/11, § 60, 10 July 2012; *X. v. Latvia*, cited above, §§ 106-107). 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 (*X. v. Latvia*, cited above, § 107). 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 (*ibid*.; see also, *mutatis mutandis*, *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, § 65, 21 June 2012). In such a scenario, the domestic courts, in the Court's opinion, failed to demonstrate convincingly that the respective interference with a right under the Convention was proportionate to the aim pursued and thus met a "pressing social need" (*Schweizerische Radio- und Fernsehgesellschaft SRG*, cited above, § 65).

(b) Application of these principles to the present case

48. Turning to the circumstances of the present case, the Court notes that the first applicant left behind the second applicant, when he left Egypt to seek asylum in Switzerland in 1997. Even though his application for asylum was rejected by the Swiss authorities, caution is called when determining whether he left his child behind of "his own free will" (see *Tuquabo-Tekle and Others*, cited above, § 47). The Court observes, however, that the first applicant did not lodge a request for family reunification as soon as he got a residence permit in Switzerland after his marriage with a Swiss national in 1999, but brought the second applicant to Switzerland only in 2002 for three months on a tourist visa. In July 2003 the second applicant relocated to Switzerland for purposes of family reunification. However, in January 2005 the first applicant sent him back to Egypt in light of conflicts between the second applicant and the first applicant's spouse. Following the couple's separation, the first applicant lodged another request for family reunification in March 2006. The Court considers that these circumstances do not suggest a clear answer to the question whether or not the first applicant had always planned to live with his son in Switzerland.

49. Noting that the first applicant also enjoyed family life with his daughter who lived with her mother in Switzerland, the Court considers that it would be unreasonable to ask the first applicant to relocate to Egypt to live together with the second applicant there, as this would entail a separation from his daughter. The Court concludes that it would be unduly difficult for the applicants to enjoy family life together anywhere but in Switzerland (see *Tuquabo-Tekle and Others*, cited above, §§ 47-48; *Şen*, cited above, § 40; *a contrario I.A.A. and Others v. the United Kingdom*, cited above, § 44; *Chandra and Others*, cited above; *Benamar v. the Netherlands* (dec.), no. 43786/04, 5 April 2005).

50. The Court observes that the case of *Şen* concerned family reunification with both parents and that of *Tuquabo-Tekle and Others* concerned family reunification with one parent in a situation in which the other parent was deceased. The present case, by contrast, concerns the reunification of a child with his father while the child, at least at the time the request for reunification was lodged, lived with his mother. It considers that there was, therefore, no presumption that reuniting with the first applicant in Switzerland was *per se* in the best interests of the second applicant.

51. The Court observes that the first applicant had the right of custody for the second applicant pursuant to Egyptian law. While this legal status suggests that it would be in the best interests of the second applicant to live with his father in Switzerland, it cannot be the sole decisive factor. The Court considers that the second applicant's had lived almost all his life in Egypt and had strong social, cultural and linguistic ties to his country of origin. In Egypt he was cared for by his mother and later, after his mother's relocation to Kuwait, by his grandmother. The Court also notes that the second applicant

was fifteen and a half years old at the time the request for family reunification was lodged and that he was not as much in need of care as young children. The Court previously rejected cases involving failed applications for family reunion where the children concerned had reached an age where they were increasingly able to fend for themselves (see *I.A.A. and Others v. the United Kingdom*, cited above, § 46; *Berisha*, cited above, § 56; *Benamar*, cited above; *Chandra and Others*, cited above). The Court notes that there were no major threats to the second applicant's best interests in his country of origin, unlike in the case of *Tuquabo-Tekle and Others*, where the grandmother who cared for the fifteen year old girl in Eritrea took her out of school against the mother's will and the girl was at risk of being married off (*Tuquabo-Tekle and Others*, cited above, § 50).

52. Having regard to the above, the Court considers that, applying the criteria established in its case-law (see paragraphs 43 to 47 above), no clear conclusion can be drawn whether or not the applicants' interest in a family reunification outweighed the public interest of the respondent State in controlling the entry of foreigners into its territory. Had the domestic authorities engaged in a thorough balancing of the interests in issue, particularly taking into account the child's best interests, and put forward relevant and sufficient reasons for their decision, the Court would, in line with the principle of subsidiarity, consider that the domestic authorities neither failed to strike a fair balance between the interests of the applicants and the interest of the State, nor to have exceeded the margin of appreciation available to them under the Convention in the domain of immigration.

53. The Court notes, however, that the Federal Supreme Court in its judgment of 5 July 2010 (see paragraphs 24 and 25 above) and other domestic courts examined the best interests of the second applicant, who was a child at the time the request for family reunion was lodged, in a brief manner and put forward a rather summary reasoning in that regard. It considers that the Federal Supreme Court did not place the second applicant's best interests sufficiently at the center of its balancing exercise and its reasoning, contrary to the requirements under the Convention (see paragraphs 46 and 47 above) and other international treaties, in particular the United Nations Convention on the Rights of the Child (see paragraphs 27 and 28 above), as well as Article 11 of the Constitution of the Swiss Confederation (see paragraph 29 above) and the case-law of the Federal Supreme Court (see paragraphs 32 and 34 above).

54. There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

56. The applicants claimed 8,000 euros (EUR) in respect of non-pecuniary damage for each applicant.

57. The Government submitted that finding a violation would in itself constitute adequate just satisfaction, having regard to the Court's findings in comparable cases, citing *Maslov v. Austria*, no. 1638/03, § 50, 22 March 2007.

58. The Court notes that it awarded non-pecuniary damage in the cases of *Tuquabo-Tekle and Others* (cited above, § 61) and of *Osman v. Denmark*, no. 38058/09, § 85, 14 June 2011, in which a separation of parents and children had occurred. It further notes that the applicants in the case of *Şen* (cited above, § 44) had not claimed non-pecuniary damage. It considers that the applicants in the present case must have suffered non-pecuniary damage as a result of the violation that has been found, which is not sufficiently compensated for by the finding of a violation of the Convention. Making an assessment on an equitable basis, as required by Article 41, the Court awards the applicants together EUR 8,000.

B. Costs and expenses

59. The applicants also claimed the reimbursement of the costs and expenses incurred for the proceedings, without, however, giving further details or submitting supporting documents.

60. The Government submitted that the costs of the applicant's representation in the domestic proceedings had been covered by a respective award made by the Federal Supreme Court. They considered that compensation in the amount of CHF 2,000 would be sufficient to cover the costs and expenses before the Court.

61. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 2,000 for the costs and expenses in the proceedings before the Court.

C. Default interest

62. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 8 November 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Luis López Guerra
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Serghides is annexed to this judgment.

L.L.G.
J.S.P.

CONCURRING OPINION OF JUDGE SERGHIDES

I agree with the majority and adopt the judgment in its entirety.

However, I wish to emphasise that in addition to its breach of Article 8 of the Convention, the Federal Supreme Court, by its judgment of 5 July 2010, violated the rule of law, one of the fundamental principles of democratic society, inherent in all the provisions of the Convention and its Protocols, and specifically mentioned in the Preamble to the Convention.

Respect for the rule of law requires that the exercise of balancing competing interests, especially in cases involving the welfare and the best interests of a child, must be thorough and well-reasoned, something which the Federal Supreme Court failed to provide in the present case.

Without a thorough and well-reasoned balancing exercise by the competent national authority it is hard to guarantee the valid, fair and effective exercise and application of the principle of proportionality, which is inherent in the Convention and is rightly described as "in a sense the alter ego of the principle of effective protection" (see Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights,* Human Rights File No, 17 (Council of Europe Publishing), Strasbourg, 2010, p. 20).

In my view, the principle of effectiveness underpins and is enshrined in all the elements of the balancing exercise, not only in the balancing test itself of assessing the interference with the right, but also in the two sides to be balanced: as regards the right, it helps to determine and protect it by making it practically effective, and regarding the interference, it helps to guarantee that the measure taken will appropriately and effectively serve the aim pursed. Therefore, lack of a thorough and well-reasoned balancing exercise may affect all the above elements, but even if it affects only one of them, the whole machinery of the balancing exercise may be rendered ineffective.

Another issue which I wish to highlight is the specificity of the nature of the balancing mechanism under Article 8 of the Convention where the welfare of a child is concerned.

Unlike, for example Article 2 § 2 of the Convention (concerning the right to life), where strict proportionality is employed between the measure used and the purposed pursued, no such high degree or standard of proportionality is required between the interference and the aim pursued in Article 8 § 2 of the Convention (regarding the right to respect for family life). Where strict proportionality does apply, the adjective "absolutely" or another similar term is used to describe the "necessity" of the interference. No such adjective is used in Article 8 § 2 of the Convention.

Nevertheless, where the welfare of a child is at stake and has to be assessed and balanced with an immigration restriction (as, for example, the restriction in the present case forming the basis of the Swiss authorities' rejection of the applicants' request for family reunification), the balancing test between the

right and the exception under Article 8 gains particular significance, with a status, in fact, similar to that of strict proportionality.

This is because of the particular nature and importance of the welfare of the child, which must be a primary consideration, as provided by Article 3 § 1 of the United Nations Convention on the Rights of the Child of 20 November 1989. Thus, the side of the judicial scale where the child's welfare is placed in support of his or her right to family life receives additional weight, and it becomes more difficult for the other side of the judicial scale, where the restriction to this right lies, to prevail.

It should be noted that the State has an inherent positive obligation to determine and protect the welfare of children in ensuring effective respect for their family life under Article 8 § 1 of the Convention. This obligation takes priority over any other obligation, since, as mentioned above, the welfare of the child is a primary consideration.

Without, obviously, going into the merits of the balancing exercise conducted by the competent national authority, I wish to stress that the finding in the judgment that there was no thorough balancing of the interests in issue, is also supported by the Federal Supreme Court's failure to note and appreciate the fact that the second applicant had an underage half-sister in Switzerland, a fact which could be a relevant consideration in ensuring the welfare of the second applicant. Regard should have been had during the balancing test to whether the interference imposed would prevent the second applicant from retaining or establishing relations with her half-sister. Family life can exist between siblings (see *Moustaquim v. Belgium,* no. 12313/86, 18/02/1991, § 36; and *Moustafa and Armağan Akin v. Turkey,* no. 4694/03, 06/04/2010, § 19), but it can also exist between half-siblings. There is no information, however, on whether there were indeed actual links between the second applicant and his half-sister with whom he had a common bond, namely their father, the first applicant. However, Article 8 of the Convention applies not only when there are actual family links but also in the case of potential family relations or links that may develop (see *Todorova v. Italy*, no. 33932/06, 13/01/2009, §§ 51 and 53).

Finally, retaining or establishing ties between siblings or between a half-brother and a half-sister, as was the case in the present application, is important for their welfare, including their psychological development and support, and States have an inherent positive obligation to respect and protect the welfare of children and take into consideration such ties or potential ties when examining the right of a child to family life, where they have to balance it with an immigration restriction.

1. De beslissing die in deze zaak aan de orde was betreft de afwijzing van een verzoek van een vader om gezinshereniging met zijn zoon. De vader werd tegengeworpen dat hij niet, nadat hij zich in Zwitserland had gevestigd, zo snel mogelijk om gezinshereniging had verzocht. Verder werden er geen omstandigheden aanwezig geacht die, ondanks dat er te laat om gezinshereniging was verzocht, toch tot toewijzing van het verzoek zouden nopen. Het Hof concludeert dat artikel 8 EVRM is geschonden, maar niet omdat het vond dat de omstandigheden van het geval wél aanleiding gaven tot toewijzing van het verzoek. In paragraaf 52 van het arrest stelt het Hof expliciet dat "no clear conclusion can be drawn whether or not the applicants' interest in a family reunification outweighed the public interest of the respondent State in controlling the entry of foreigners into its territory". Het probleem zat hem volgens het Hof in de gebrekkige onderbouwing van de afwijzing; de argumentatie in de verschillende nationale procedures was te summier en in de afweging en argumentatie stond het belang van het kind onvoldoende centraal.[1]

De uitspraak in *El Ghatet* kan verwarring wekken, omdat ook het Hof zelf na een uitgebreide bespreking van de omstandigheden van het geval geen uitsluitsel kan geven over welk belang nu zwaarder weegt. Wat betekent het dan dat in de afweging en argumentatie de belangen van het kind meer centraal moeten staan? Welke belangen zijn nu onderbelicht gebleven? En waarom oordeelt het Hof juist in deze zaak dat de argumentatie te kort schiet? Er zijn tal van voorbeelden waarin het Hof met veel minder genoegen neemt, ook als er kinderen in het spel zijn. In deze noot bespreek ik wat mijns inziens de bepalende factor geweest is voor de conclusie van het Hof dat Artikel 8 EVRM is geschonden, en wat dit betekent voor de relevantie van deze uitspraak voor de Nederlandse praktijk. Mijn argumentatie baseer ik op het onderzoek dat ik heb verricht in het kader van mijn proefschrift, waarin ik 151 Straatsburgse artikel 8 EVRM immigratiezaken heb geanalyseerd.[2] Ik zal beginnen met een korte beschrijving van het patroon dat ik heb gevonden in de uitspraken van het EVRM (punt 2). Vervolgens zal ik uitleggen hoe de onderhavige zaak past in dat patroon (punt 3). Ter afsluiting zal ik ingaan op de betekenis van dit arrest voor de Nederlandse praktijk (punt 4).

2. Uit mijn analyse van Straatsburgse rechtspraak is gebleken dat in zaken waarin zogenoemde 'immigratiespecifieke aspecten' een rol spelen, de uitkomst ervan correleert met bepaalde indicatieve factoren. Ik zal hieronder eerst ingaan op de term 'immigratiespecifieke aspecten', waarna ik zal uitleggen wat de indicatieve factoren inhouden. Immigratiespecifieke aspecten zijn aspecten die uitsluitend in de context van migratie bepalend kunnen zijn voor de vraag of iemand van overheidswege fysiek kan worden verwijderd uit de maatschappij als geheel. Het plegen van misdrijven, bijvoorbeeld, is niet een immigratiespecifiek aspect. Het kan leiden tot de uitzetting van een vreemdeling, maar ook in het strafrecht is fysieke verwijdering uit de maatschappij, in de vorm van gevangenisstraf, een mogelijke formele reactie. Het beroep doen op een uitkering, daarentegen, is wel immigratiespecifiek: buiten de migratiecontext geldt deze omstandigheid niet als een formele reden om iemand fysiek uit de maatschappij als geheel te verwijderen. En ook het vermeende ontbreken van bepaalde gezinsbanden is een migratiespecifiek aspect: slechts in de context van migratie kan een formele reactie op deze omstandigheid bestaan uit de fysieke verwijdering van een individu uit de maatschappij als geheel.[3]

Als het Hof de validiteit van nationale immigratiespecifieke criteria ter discussie zou stellen, dan zou het daarmee onvermijdelijk ingrijpen in nationaal migratiebeleid. Als het Hof bijvoorbeeld het vasthouden aan de eis dat het inburgeringsexamen in het buitenland wordt afgelegd, ook wanneer het betrokken familielid al een half jaar in Nederland verblijft, disproportioneel zou achten omdat dat niet meer ten goede komt aan het belang van integratiebevordering, dan zou Nederland dit beleid niet meer als zodanig kunnen toepassen. Ook een schending gebaseerd op een aanzienlijk individueel

1 *El Ghatet*, par. 53.

2 E. Hilbrink, *Adjudicating the Public Interest in Immigration Law, A Systematic Content Analysis of Strasbourg and Luxembourg Case Law on Immigration and Free Movement*, te verschijnen (2017).

3 Enkele andere in het oogspringende immigratiespecifieke aspecten zijn het niet beschikken over een mvv, illegaal verblijf, en een gebrekkige (economische) integratie.

belang zou ingrijpen in het nationale beleid, omdat de bestaande ontheffingscriteria voor het inburgeringsexamen niet meer adequaat zouden zijn. Als echter het Hof stelt dat het met de ernst van een gepleegd misdrijf wel meevalt, of dat de gevolgen van uitzetting voor de individu zwaarder wegen dan het belang bij het voorkomen van criminaliteit, dan raakt dat niet het migratiebeleid in het bijzonder. Bovendien heeft zo'n uitspraak geen invloed op de andere optie tot fysieke verwijdering uit de maatschappij als geheel: het opleggen van gevangenisstraf.

Uit de analyse van Straatsburgse zaken is een verschil naar voren gekomen tussen zaken waarin immigratiespecifieke aspecten een rol spelen en zaken waarin zulke aspecten ontbreken. In zaken zonder immigratiespecifieke aspecten verricht het Hof de bekende *fair balance* toets. Hoewel het Hof in dit verband een beoordelingsmarge laat aan staten, volgt het in deze zaken niet steeds het standpunt van de staat wanneer het gaat om de ernst van de delicten of de kansen op recidive. Ook het gewicht dat door de staat is toegekend aan de individuele belangen wordt niet als gegeven aangenomen.[4] Dit is anders in zaken waarin immigratiespecifieke aspecten wel een rol spelen. Hier is te zien dat het Hof er consequent voor zorgt dat zijn uitspraken niet de validiteit van de betreffende nationale criteria aantasten. Dit leid ik af uit de vaststelling dat het Hof alleen concludeert dat weigering van toegang of verblijf in strijd is met artikel 8 EVRM als de betreffende immigratiespecifieke criteria incorrect of inconsistent zijn toegepast, of als het niet voldoen aan het immigratiespecifieke criterium aan betrokkene niet kan worden tegengeworpen. In alle zaken die immigratiespecifieke aspecten bevatten en waarin het Hof heeft geconcludeerd dat er een schending was van artikel 8 EVRM is er sprake van een incorrecte[5] of inconsistente[6] toepassing van het betreffende criterium, of kon betrokkene niet verantwoordelijk worden gehouden voor het niet voldoen aan het criterium.[7] Het verband tussen het onaangetast laten van nationale criteria en voornoemde indicatieve factoren zal ik nader toelichten aan de hand van de omstandigheden van de onderhavige zaak.

In *El Ghatet* was de reden voor verblijfsweigering dat de vader te lang had gewacht met het verzoek om gezinshereniging. Omdat deze omstandigheid buiten de context van immigratie niet kan leiden tot de fysieke uitsluiting van de betrokken persoon uit de maatschappij als geheel, betreft het hier een immigratiespecifieke grond voor verblijfsweigering. Stel nu dat het Hof in deze zaak een schending van artikel 8 EVRM zou hebben aangenomen terwijl Zwitserland het voornoemde criterium correct en consistent had toegepast, en er geen excuus zou zijn geweest voor de scheiding tussen vader en kind of de duur van die scheiding. Dat zou hebben betekend dat het Hof de validiteit van dat criterium niet als gegeven beschouwt en dat het zijn eigen oordeel over wanneer er een recht op verblijf is in de plaats stelt van dat van de staat. Bovendien zou de staat dan genoopt zijn om het migratiebeleid met betrekking tot dit criterium aan te passen: normale toepassing zou immers een schending van artikel 8 EVRM kunnen opleveren. Als daarentegen een schending wordt aangenomen terwijl de staat zijn eigen criterium onjuist of inconsistent heeft toegepast, dan kan hetzelfde criterium

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4 Bijvoorbeeld in de zaak *Boultif (JV* 2001/254 m.nt. P. Boeles).

5 Bijvoorbeeld de zaak *Butt (JV* 2013/85 nt M.C. Stronks), waarin het verstrekken van valse informatie van de moeder aan de kinderen werd tegengeworpen, terwijl de moeder, omdat zij was overleden, niet van die handeling kon profiteren. Daarmee handelde Noorwegen in strijd met zijn eigen regels: het kunnen profiteren van de frauduleuze handeling was onderdeel van het criterium.

6 Bijvoorbeeld de zaak *Nunez (JV* 2011/402 nt S.K. van Walsum), waarin het te lang stilzitten door de Noorse autoriteiten maakte dat het Hof niet accepteerde dat uitzetting het belang diende van een voorspoedige afhandeling van migratieprocedures. Of *Sezen (JV* 2006/89), waarin een tijdelijke scheiding van zes maanden volgens het Hof ten onrechte was aangemerkt als een permanente ontbinding van het huwelijk.

7 Bijvoorbeeld in *Osman (JV 2*011/331 nt S.K. van Walsum), waarin betrokkene door haar ouders en tegen haar zin naar het buitenland was gestuurd, zodat haar afwezigheid haar niet werd tegengeworpen. In *Tuquabo-Tekle (JV* 2006/34 nt S.K. van Walsum) kon betrokkene niet worden verweten dat zij haar kinderen had achtergelaten omdat zij haar land verliet om elders asiel te vragen.

– mits correct en consistent – daarna gewoon worden blijven toegepast. Hetzelfde geldt wanneer een schending wordt aangenomen terwijl betrokkene een goed excuus had voor het niet voldoen aan het tegengeworpen criterium. Als een besluit tot handhaving van een norm wordt verworpen omdat er een excuus was waarom niet aan de norm werd voldaan blijft de validiteit van de norm zelf intact. Ook in dat geval is er dus geen reden voor de staat om zijn beleid aan te passen.

3. De aanpak van het Hof in *El Ghatet* is dezelfde als in andere zaken waarin toelating van kinderen wordt geweigerd op grond van het feitelijke band criterium.[8] Eerst beoordeelt het Hof of de ouder verantwoordelijk kan worden gehouden voor de scheiding met het kind. Omdat de vader het land van herkomst heeft verlaten om in Zwitserland asiel te vragen durft het Hof niet zonder meer te stellen dat hij zijn kind vrijwillig heeft achtergelaten.[9] Dan onderzoekt het Hof of de ouder inderdaad heeft nagelaten om tijdig om gezinshereniging te verzoeken en de banden met het kind te onderhouden. De vader heeft meermaals stappen ondernomen om te worden herenigd met zijn kind, maar daar staat volgens het Hof tegenover dat het kind werd teruggestuurd naar Egypte toen er conflicten waren tussen het kind en de nieuwe echtgenote van de vader.[10] In het licht van deze omstandigheden kan het Hof niet eenduidig bevestigen of ontkennen dat het criterium op goede gronden aan betrokkene is tegengeworpen.[11]

De factor die het Hof in *El Ghatet* ruimte gaf om tot een schending van artikel 8 EVRM te concluderen zonder te interfereren met nationaal immigratie(specifiek) beleid betreft een inconsistente toepassing van het criterium door het Zwitserse Federale Hof. Op 5 juli 2010 verwierp dit Federale Hof het beroep van de heer El Ghatet. Het toetsingscriterium dat daarbij werd gehanteerd was nog gebaseerd op de oude Zwitserse Vreemdelingenwet van 1931. Het hield in dat een niet-tijdig verzoek om gezinshereniging met een kind in een geval waarin de ouders gescheiden van elkaar wonen – 'gedeeltelijke gezinshereniging' - alleen werd toegestaan als de omstandigheden van het geval hiertoe noopten.[12] Enkele maanden eerder, op 15 januari 2010 had het Federale Hof echter een ander toetsingscriterium geintroduceerd, gebaseerd op de nieuwe Zwitserse vreemdelingenwet die op 1 januari 2008 in werking was getreden. Het nieuwe criterium hield in dat 'gedeeltelijke gezinshereniging' moet worden toegestaan als de betreffende ouder de volledige voogdij over het kind heeft en er geen sprake is van misbruik van recht, tenzij duidelijk is dat het belang van het kind zich tegen gezinshereniging verzet.[13] Als het Zwitserse Federale Hof in de zaak van El Ghatet het nieuwe criterium had gehanteerd, zou het discussiepunt dus niet zijn geweest of er wel voldoende rechtvaardiging was om aan de zoon verblijf toe te kennen. In dat geval had de staat moeten aantonen dat het belang van de zoon zich kennelijk tegen gezinshereniging verzet.

De inconsistentie van het Zwitserse Hof wordt door het EHRM benoemd in de concluderende paragraaf. De uitspraak van 5 juli 2010 wordt hierin aangemerkt als strijdig, niet alleen met het Kinderrechtenverdrag en de Zwitserse constitutie, maar ook met de rechtspraak van het Federale Hof zelf.[14] Hierbij verwijst het Hof naar de paragrafen 32 en 34 van de onderhavige uitspraak, die de omslag beschrijven van het oude naar het nieuwe Zwitserse toetsingskader, die resulteerde in bovengenoemde uitspraak van 15 januari 2010.

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8 Zie bijvoorbeeld *Chandra (JV* 2003/317 nt P. Boeles), *Tuquabo-Tekle*, *Benamar (JV* 2005/198), en *Ahmut (RV 1996, 24).*

9 *El-Ghatet v. Switzerland*, par. 48.

10 *El-Ghatet v. Switzerland*, par. 48.

11 *El-Ghatet v. Switzerland*, par. 48.

12 *El-Ghatet v. Switzerland*, par. 24 en 32.

13 *El-Ghatet v. Switzerland*, par. 34.

14 *El-Ghatet v. Switzerland*, par. 53.

4. Zwitserland hoeft zijn beleid op het punt van 'gedeeltelijke gezinshereniging' niet te wijzigen als gevolg van de uitspraak in *El Ghatet*. Dat beleid was namelijk al gewijzigd.[15] De betekenis van deze uitspraak voor de Nederlandse praktijk is dat het inzicht geeft in de omstandigheden waaronder de toepassing van nationaal migratiebeleid door het Hof als inconsistent of incorrect wordt bestempeld. Het belang van deze uitspraak voor de nationale migratiepraktijk van wat het Hof heeft opgemerkt over de positie van de belangen van het kind in de belangenafweging is mijns inziens beperkt. De betekenis van het centraal stellen van de belangen van het kind in de belangenafweging wordt niet nader geconcretiseerd voor migratiezaken. Als gezegd, ook het Hof zelf kon na een uitgebreide bespreking van de omstandigheden van het geval geen uitsluitsel geven over welk belang nu zwaarder weegt. Verder merkt het Hof op in paragraaf 46 dat de belangen van het kind niet als 'trump card' kunnen worden ingezet om de toelating te bewerkstelligen van alle kinderen die beter af zouden zijn in een van de lidstaten, maar dat nationale rechters deze belangen wel moeten plaatsen 'at the heart of their considerations and attach crucial weight to it'. Al met al weinig richtinggevend.[16]

Als het gaat om motiveringseisen aan nationale besluiten in het kader van gezinshereniging valt meer te verwachten van het Hof van Justitie van de EU. Dit Hof eist consequent dat een concreet besluit tot verblijfsweigering steeds plaatsvindt op inhoudelijke, zaakspecifieke gronden, waardoor migratieregulering niet geldt als een carte blanche algemeen legitiem belang. Uitspraken van dit Hof leiden er dan ook keer op keer toe dat Lidstaten hun beleid moeten aanpassen, ook als het gaat om immigratiespecifieke criteria zoals inkomenseisen en integratievoorwaarden. Het mvv-vereiste is in Luxemburg nog niet aan de orde geweest, maar dat is een kwestie van tijd.

Eva Hilbrink, Erasmus Universiteit Rotterdam

15 Een vergelijkbaar geval is aan de orde in *Berrehab e.a. (RV* 1988, 17 en *RV* 100, 20).
16 Om met de zeer gemiste Tomas Weterings te spreken: De Straatsburgse rechtspraak biedt voor elk wat wils; uit een en dezelfde uitspraak kunnen zowel de advocaat van de vreemdeling als de staatssecretaris putten voor ondersteuning van hun respectievelijke standpunten.