



Misuse of the Right to Family

Reunification:

Marriages of convenience and false
declarations of parenthood

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The European Migration Network, created by Council Decision no. 2008/381/EC of 14 May 2008, has the objective of supplying up-to-date, objective, reliable and comparable information on migration and asylum in the Community institutions, to the authorities and institutions of the Member States and to the general public with a view to support policy- and decision-making with the European Union.



PREFACE

The opinions expressed in this report are those of the authors.

They do not necessarily reflect the positions of the Luxembourg Ministry of Family and Integration or the Ministry of Foreign Affairs.

The present report was produced by the Luxembourg National Contact Point within the European Migration Network (EMN) managed and coordinated by Christel Baltes-Löhr and Adolfo Sommaribas, University of Luxembourg. Members of the EMN NCP LU who were responsible for editing are: Sylvain Besch, CEFIS-Centre d'Etude et de Formation Interculturelles et Sociales (Centre for intercultural and social study and training); Sylvie Prommenschenkel, Ministry of Foreign Affairs, and Marc Hayot, Office luxembourgeois de l'accueil et de l'intégration (Luxembourg reception and integration agency), Ministry of Family and Integration.

METHODOLOGY

National reports are produced by the respective National Contact Points (NCPs) on the legal and policy situation in their Member State according to common specifications. Subsequently, a comparative synthesis report is generated by the European Commission with its service provider giving the key findings from each national report, highlighting the most important aspects and placing them as much as possible within an EU perspective. The various national accounts and the summary report are made publicly available.

The EMN engages primarily in desk research, i.e. it collects and analyzes data and information already available or published at the Member State or international level. The present report was produced by drawing upon a number of different sources of information, all of which are listed in the bibliography by type of document. This includes sources of national and EU legal documents which are referred to in the report. Additionally semi-structured interviews were conducted with government officials, members of parliament, lawyers and law professors.

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Introduction

Marriages of Convenience

Marriages of Convenience is a phenomenon present in some societies and that has been debated in certain western societies. They have been used for migration purposes as well as for professional, society, fiscal and inheritance purposes.

The institution of marriage has changed since the coming into force of the Luxembourgish Civil Code on 27 March 1808.

Marriages of Convenience can be used as one way for third country nationals to overcome the obstacles for entering the European Union by using family reunification. As legislation on migration for third country nationals migrating to the European Union has become more restrictive, legal migration channels are rare. Crudely, there are only two legal channels for third country nationals that do not fulfil the profile of the migration that Luxembourg is promoting (high skilled workers and researchers) which remain in place: international protection or family reunification. The right of asylum and the right of family life are fundamental rights that Member States cannot restrict without a proportional approach as it has been confirmed repeatedly by the European Court of Human Rights.

On the other hand, the legal framework in Luxembourg does not provide efficient instruments to fight against marriages of convenience. The civil registrar officer cannot object to the wedding if all the documents are in order and cannot seize the public prosecutor in case he/she has doubts on the sincerity of the consent of the parties. The public prosecutor cannot persecute the parties except in the case forged documents are used. From the civil point of view the only possibility is to demand the annulment of the marriage because of a vice in the consent or absence of consent, but the persons that have legal standing are the contracting parties and family members¹. From the administrative point of view the Law on free movement of persons and immigration foresees that in case that the authorities discover that the marriage was exclusively concluded with migration purposes to obtain a residence permit, the authorities can revoke or refuse to renew the residence permit, with the inevitable consequence of expulsion and interdiction to re-enter the territory.

However, there are some preventive measures that can be applied to avoid family reunification in these situations: a) the civil registrar officer has the possibility to verify the documents provided by the parties and b) given that family reunification has to be applied from the country of origin of the third country national, the national authorities and diplomatic authorities that represent Luxembourg in that country can conduct necessary interviews and investigations to determine the legitimacy of the marriage.

¹ According to article 172 Civil Code, the parents of one of the contracting parties or, if they are not alive, the grandparents.

The former Minister of Justice, M. Luc Frieden proposed a bill (n° 5908²) that not only extend the role of the civil registrar officer but also will increase the power of intervention of the prosecutor in these cases. It also creates penal sanctions for persons who participate in this kind of marriages. Nevertheless, the bill has been criticized by the Consultative Commission of Human Rights³ in the sense that it can stigmatize third country nationals while leaving other kind of marriages of convenience without punishment and that it can be used as a way for restricting migration or bring into question the fundamental right of marriage. On the other hand, the project has also been criticized by the Council of State that stated in its legal opinion that the project does not punish partnerships of convenience and false declarations of parenthood.

In Luxembourg marriages of convenience are not a regular phenomenon according to NGOs and other institutions (Consultative Commission of Human Rights), even if the government claims the contrary. The fact that there are no statistics on the subject and that in the last decade there has not been a single case treated by the courts demonstrates that this is a marginal phenomenon, even more so if we take into consideration that Luxembourg has an immigration from European Union nationals that represents a large majority of the foreign population (86,1%)⁴.

False Declarations of Parenthood

False declarations of parenthood are not regulated by the law in Luxembourg.

In Luxembourg the recognition of a child by his/her parents is a formal act and it only requires a formal recognition by the parent.

As in the case of marriages of convenience there are legal implications in the law. The only difference at the moment is that family reunification using children even if they are European and Luxembourgish citizens is impossible, because article 6 (1) in accordance with article 12 of the Law of 29 August 2008 on free movement of persons and immigration does not allow family reunification when children are dependent on the parents (with the exception of unaccompanied minors that have been granted refugee status or subsidiary protection status⁵). The application of the Zambrano case can change things but until now the positions of the Directorate of Immigration and of the First instance Court⁶ have upheld a strict application of article 6 (1) and 12 of the law.

² Bill No. 5908/00 of 28 July 2008.

http://chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/034/726/073235.pdf.

³ Parliamentary document No. 5908/02.

⁴ Thill-Ditsch, Germaine, « Regards sur la population par nationalités », STATEC, juillet 2010.

⁵ Article 45 of the Law of 5 May 2006 on asylum and other complementary forms of protection.

⁶ Judgment n° 27509 of 21 September 2011.

There has not been any discussion on false declaration of parenthood and only in the legal opinion of the Council of State on the bill of law n°5908 it is stated that they should be penalized by the law⁷.

⁷ See document n° 5908/03.

2. Definitions

2.1. Marriage and Family

Definition of Marriage

The definition of marriage is not clearly established by the Civil Code⁸. However, given that the Luxembourgish Civil Code is based on the Napoleon's Civil Code, we can define marriage as “the institution by whereby a man and a woman come together and raise a family”⁹. As French law, Luxembourgish law does not recognize same sex marriages.

Definition of Family

As the French Civil Code, the Luxembourgish Civil Code does not define what family is. The word family is used through the code in relation with other words “family council”, “interest of family”, etc. The notion of family has changed since the implementation of the Civil Code on 18 March 1803. Neither the Civil Code neither the Law of 29 August 2008 on free movement of persons and immigration defines the notion of family. However, article 68 c) of the Law of 29 August 2008 defines family reunification as the entry and stay of family members of a third country national who is resident in the member state to maintain family unity, even if the family links back to before or after the entry of the resident third country national and article 70 (1) describes only who the law considers family members that can benefit from family reunification¹⁰.

One of the possible cases of misuse of the right to family reunification are marriages of convenience. In this case the absence of the intention to marry. This misuse may be discerned in the behaviour of the future spouses and in their respective situations. The main purpose of such fraud is to facilitate residence on the territory of the country in which the foreign national wishes to settle¹¹.

In Luxembourg, marriage is a contract where there has to be the mutual consent of both parties¹². This means that no marriage is possible without mutual consent¹³. It can be

⁸ Interview with the rapporteur of the Committee on Legal Affairs of the Luxembourgish Parliament. The discussion in Luxembourg turns around if marriage has to be considered as an institution or as a contract.

⁹ Dictionnaire du droit privé de Serge Braudo. See <http://www.dictionnaire-juridique.com/definition/mariage.php>

¹⁰ Article 78 (1) of the Law of 29 August 2008 also considers that some persons that are not contemplated by Article 70 (1) can obtain a residence permit based on family or personal links. In these cases the authorities will analyze the intensity, seniority and stability of these links in regard to the impact a refusal can have on the right of family and private life.

¹¹ Fraud with respect to Civil Status in ICCS member states, Commission Internationale de l'Etat Civil (CIEC), France, December 2000, p. 10. It is important to mention that this type of fraud began increasing when the acquisition of nationality became subject to more stringent conditions (in France?????).

¹² Article 146 Civil Code.

¹³ Article 146 Civil Code.

considered lack of consent the situation where the parties are willing to go on with the ceremony in order to obtain a result different from a sustainable long-lasting relationship foreseen by articles 203 ss of the Civil Code, and to avoid the legal consequences of it.

However the annulment of the marriage can only be asked by the contacting party whose consent was not given freely.¹⁴ If the marriage has been celebrated without the free consent of one of the parties the marriage can be subject to annulment, but this action can only be taken by the parties itself, or by any other person that has an interest or by the public prosecutor¹⁵.

The jurisprudence considers that error can only be a cause for annulment if there is an error on the person itself. The error can be on the physical identity as well as on the civil identity of the contracting party (i.e. if the party hides to the other that he is already married or the fact that he was divorced)¹⁶. Nevertheless, the action for annulment will not be accepted if the parties have lived together for six months after the party has recovered his freedom or after he has recognized the situation to the other party¹⁷.

It is important to mention that in Luxembourg the courts cannot declare the annulment of a marriage on the sole basis that there had not been publications of banns with the exception if this omission was made to commit a fraud¹⁸.

Relations covered by marriage and Luxembourg and procedure to get married

Marriage in Luxembourg is only authorized between a man and a woman (article 144 of the Civil Code). As a consequence, in accordance with this definition, marriage does not cover:

- a) Partnerships. However, family reunification is permitted in partnerships defined by the Law of 9 July 2004¹⁹. This law was modified by law of 12 August 2010²⁰ that included article 4-1 that allows registering a partnership concluded in a foreign country. Partnerships are possible between people of different sex and people of the same sex²¹. Same sex marriages are forbidden by law.
- b) Cohabitation: Marriage does not cover simple cohabitation.

A) Marriage: Procedure for getting married:

¹⁴ Article 180 Civil Code.

¹⁵ Article 184 Civil Code.

¹⁶ Judgment of 25 February 1970.

¹⁷ Article 181 Civil Code. The third party or the Public Prosecutor can attack the marriage only in the cases of violations to articles 144, 147, 161, 162 and 163 of the Civil Code.

¹⁸ Cour de Cassation, 2 August 1889, 3, 120.

¹⁹ <http://www.legilux.public.lu/leg/a/archives/2004/0143/a143.pdf>.

²⁰ <http://www.legilux.public.lu/leg/a/archives/2010/0134/a134.pdf>.

Article 4-1 allows that partnerships that were celebrated abroad can be registered in Luxembourg. For doing it the parties must address a formal request to the public prosecutor office. However, both of the parties must prove that they do not have a forbidden family link as foreseen by articles 161 to 163 and 358 § 2 of the Civil Code and reside legally on the territory. A Grand-ducal regulation can determine the formalities of the application and the documents that must be filed.

²¹ See article 2 of the Law of 9 July 2004.

For getting married in Luxembourg the couple has to fulfill several steps independent from their nationality. Nevertheless, the steps can vary if the contracting parties are nationals or foreigners. Religious marriages can only be celebrated after the civil marriage. It is forbidden to celebrate a religious marriage without having celebrated the civil marriage.

To get married in Luxembourg the man has to be at least 18 years old and the woman 16 years old²², and one of them has to have his official residence in Luxembourg. In the case of minors the authorization of one of the parents has to be given²³. The marriage must be celebrated in the Municipality where at least one of the contracting parties is resident.

One of the contracting parties has to present himself personally to the civil registrar office to fulfill the requirements for opening the marriage file. He has to present his identification card or passport as well as the one of the other partner. The official will give him the application form and mention the documents that the couple will have to provide.

The documents must be in French, German or English. If they are in any other language they have to be translated in one of the three languages by an official translator. Foreign documents must have the signature authenticated by the Luxemburgish diplomatic authorities or follow the apostil procedure.

All documents must be rendered a month before the date of marriage.

Also the couple must submit to a prenuptial medical test to obtain a medical certificate that is valid for two months (this prenuptial medical test is composed by a blood test and a tuberculin test).

The documents that the parties have to produce are:

- 1) Proof of identity (copy of the passport or the identity card)
- 2) Prenuptial medical certificate
- 3) Full copy of the birth certificate of both parties (with less than three months of issuance if it is Luxembourgish and 6 months if it has been delivered in a foreign country). This document can be replaced by an act of notoriety issued by the justice of peace of the place of birth and which has to be recognized by the District Court (« Tribunal d'Arrondissement) of the place where the marriage will be celebrated.
- 4) Residence certificate
- 5) Personal civil status certificate with less than 3 months of issuance (for foreigners it has to be issued by the competent authority of the country of origin. However, if this document is not issued because of the legal framework of a specific country custom certificate (certificat

²² Article 144 Civil Code. It is important to mention that bill n° 5914 wants to increase the age of women for marrying. The idea is to protect minors to be forced into marriage. Interview with a Member of Parliament and the Rapporteur of the Committee for Legal Affairs of Parliament.

²³ Article 148 Civil Code..

de coutume) has to be issued by the Municipality where the foreigner was domiciled or by his embassy.

6) Other information: Both parties must give declare the place and date of birth of their parents as well as their domicile and profession. If one or the other is deceased it has to be mentioned. The Luxembourgish national identification number of both parties has to be given; the name and address of the doctor that will issue the prenuptial medical certificate, the number of persons that will assist to the ceremony and the future address of the married couple (there are special dispositions for German, Portuguese, and Italian citizens).

The couple has to present itself to the Municipality 2 to 3 weeks before the wedding but after the reception of the prenuptial medical certificate to make the publication for 10 consecutive days in the Municipality of residence of both parties. The marriage must be celebrated 12 months after the last day of the publication of the wedding.

B) Partnerships and procedure for registering a partnership

Any person legally resident in Luxembourg may register a civil partnership. The future partners must be living together and be aged 18 and over.

To begin the preliminary formalities they must present themselves to the civil registrar of their place of residence and make a personal and joint declaration. They will then be given a list of documents to provide. All documents must be in French, German or English, documents in any other language must be translated by an official translator. Foreigners may have to provide additional documents.

Documents required:

- 1) Identity card²⁴ or passport²⁵ .
- 2) Residence certificate²⁶ established by the Municipality of the place of residence.
- 3) Full birth certificate (Acte de naissance intégral), less than 3 months old if supplied in Luxembourg, or less than six months old if supplied abroad.
- 4) A certificate of single-status (certificat de célibat)²⁷ less than three months old.
- 5) An affidavit stating that neither of the future partners is related in any way. A template is available at the Municipality and is generally filled in and signed at the time the partnership is registered.
- 6) Luxembourg residents (whether or not Luxembourg nationals) have to provide a certificate declaring that they are not already in a partnership contract, issued by the Répertoire Civil – Public prosecutor office (Parquet Général) in Luxembourg.

²⁴ Luxembourg nationals.

²⁵ All other nationalities.

²⁶ Certificate of residence. See article 3 § 1 of the Law of 9 July 2004.

²⁷ Article 4.2 of the Law of 9 July 2004.

Foreigners must provide a “certificat de coutume” or a certificate from the appropriate authorities in their country of origin (usually their Embassy) stating that they are not already in a civil partnership of any kind. If either of the couple has been divorced or widowed they should supply proof in the form of a certified copy of the final divorce decree or an “acte de décès” (in the case of widowhood)²⁸.

Procedure:

Once the documents have been verified by the civil registrar the declaration can be registered immediately by the civil registrar. However, it is possible to make an appointment for the declaration to take place at a set time in the room that is used for marriages.

Following the declaration each partner receives a certificate stating that they are officially registered in a partnership. A copy of the declaration is sent to the public prosecutor office (Parquet Général) within three days by the civil registrar.

False Declarations of Parenthood:

This type of fraud usually involves a person declaring him to be the father or mother of a child who is not biologically his, for the purpose of facilitating family reunification or evading the rules relating to adoption. This study is focused on the first situation.

2.2. Legal Framework

Family reunification and marriages of convenience

The only national legislation that regulates family reunification is the Law of 29 August 2008 on free movement of persons and immigration. This law has been recently modified by the Law of 1 July 2011. However, this last law does not modify the rules of family reunification.

Family reunification for third country nationals is defined by article 68 c) of the Law of 29 August 2008 as: “the entry and residence in the territory of family members of third country national residing regularly in the territory to maintain the family unit, the family relationship arose before or subsequent to the resident's entry”.

There are two different types of procedures for family reunification. The first type is when the third country national is a family member of a European Union citizen or a citizen of assimilated countries Iceland, Norway or Switzerland, or a national citizen. The second type is when the third country national is a family member of a third country national that already has a residence permit.

²⁸ Article 4.2. of the Law of 9 July 2004. For nationals of the European Community, the divorce should be evidenced by a "Certificate Referred to in article 39 concerning Judgments in Matrimonial Matters".

A) Family Members of a European national or of citizens of an assimilated country

For this purpose the law considers as a family member the following persons:

- a spouse to whom the European is married
- a civil partner bound by official ceremony
- a direct descendant (child) (or descendant/child of partner) that is not 21 years old
- a direct ascendant (parent) who is dependent on the Luxembourg resident or his/her partner
- certain persons who have lived in the same household as the resident applicant.

The third country national who wishes to apply for family reunification to an EU or similar citizen must file the application for a D visa in the Luxembourg diplomatic representation (this can be a Luxembourg embassy or the embassy of another Member state that represents Luxembourg) in his or her country of origin.

The documents to be submitted to the embassy are:

- an authenticated copy of the full passport, valid for at least six months;
- an extract from the birth certificate;
- an extract from the criminal record, established at least three months ago.

In case the family reunification is for a spouse or partner, then the applicant must also submit:

- an extract from the marriage certificate/copy of partnership.

If it is a child of divorced parents the applicant must submit a copy of the judgment conferring custody of the minor to the parent who is residing in Luxembourg, or a notarized authorization from the other parent attesting his or her agreement that the minor can move abroad.

In case of an ascendant the applicant must submit:

- proof of financial support, in any appropriate means, proving that the ascendant was in a situation of dependency to the descendant living in Luxembourg for a period of at least six months before the application for family reunification.

Family members of Luxembourgish nationals are assimilated to EU nationals²⁹.

²⁹ Article 12(3) of the Law of 29 August 2008. This can also apply to an EU national who was born in Luxembourg and does not have used his free movement right and that will like to apply for a family reunification to bring his Portuguese or Capeverdean wife. Also, it can include the situation in which this person marries a woman who is an irregular migrant in Luxembourg. The Administrative Court has requested a prejudicial question to the European Court of Justice in this sense in accordance with Judgment n° 28952C of 16 February 2012. See www.ja.etat.lu/28952C.doc

B) Family member of a third country national

The second type of family reunification is the case that the Luxemburgish resident is a third country national. In this case the application procedure changes.

The people that can benefit from it are:

- a spouse to whom the third-country national is married ;
- a civil partner bound by official ceremony³⁰;
- a direct descendant (child) (or descendant/child of partner) that is not 18 years old. The resident party should have the legal custody and the responsibility of the minor (if there is joint custody the resident must have the agreement of the other party)³¹;
- a direct ascendant (parent) who is dependent on the Luxembourg resident or his/her partner when he/she is responsible for them and they are deprived of financial support in their country of origin.

The application must be made before entering the country. In exceptional cases with due reason the minister may agree that the application can be made when the family members are already in Luxembourg.

The Luxembourg resident must:

- hold a residence permit valid for at least one year and must have been living in Luxembourg for at least twelve months³²;
- provide proof of stable, regular and sufficient resources to cover his or her own needs and those of dependent family members without using the social security system³³. It is important to mention that article 6 (1) of the Grand-ducal regulation of 5 September 2008 modified by grand-ducal regulation of 11 August 2011 requires that the average income of the Luxemburgish resident is equivalent to the minimum social salary³⁴ for a non-qualified worker, so that this person can apply for a family reunification. If the income is less, family reunification can be authorized by the Minister using his discretionary power³⁵. It is important to mention that the authorities tend to look to the global financial situation of the family and the amount of rent paid for housing³⁶;

³⁰ Article 70 (1) of the Law of 29 August 2008.

³¹ Article 70 (1) c) of the Law of 29 August 2008.

³² Article 69 (1) of the Law of 29 August 2008.

³³ Article 69 (1) 1 of the Law of 29 August 2008.

³⁴ The Minimum social salary in Luxembourg since 1 October 2011 is of 1.801,49 € per month. See <http://www.itm.lu/droit-du-travail/salaire-social-minimum>

³⁵ Mémorial A-180 of 22 August 2011.

- provide proof of adequate housing for the family member(s)³⁷ and health insurance cover for himself or herself and family members³⁸.
- In Luxembourg an integration test is not foreseen for obtaining family reunification.

As in the first type of family reunification the applicant must file the application with the following documents:

- a full copy of his or her passport, certified as true to the original;
- a birth certificate; It is important to mention that different from the case of Luxembourgish law the applicant has to be 18 years old³⁹;
- a document proving the existence of the marriage, the registered partnership or the family relationship (for the children of the non-resident, proof that he or she has custody and responsibility of them)
- an extract of the police record or an affidavit.

The applicant must also enclose the following documents concerning the situation of the person who is a Luxembourgish resident:

- copy of the residence permit of the resident applicant valid for a period of over one year;
- certificate of residence ;
- proof of the resident applicant's resources equivalent to the minimum wage for a duration of 12 months⁴⁰;
- proof of suitable accommodation in Luxembourg;
- proof of health insurance covering all risks on Luxembourg territory.

All of these documents must have an apostil added by the competent local authority in the country of origin or certified by the competent local authority in the country of origin and authenticated by the diplomatic representation of Luxembourg. If the documents are not written in German, French or English, a certified translation by a sworn translator must be enclosed.

Family reunification is not accepted in any case of polygamous marriage, if the resident applicant already has another spouse living with him in the Grand Duchy of Luxembourg⁴¹.

³⁷ Article 69 (1) 2 of the Law of 29 August 2008.

³⁸ Article 69 (1) 3 of the Law of 29 August 2008.

³⁹(Article 70 (1) c) of the Law of 29 August 2008 .

⁴⁰ http://www.gouvernement.lu/dossiers/social_emploi/securitesociale/index.html.

Procedure:

There are three stages during the family reunification procedure: a) authorization to stay, b) visa application procedure and c) residence permit.

a) Authorization to stay:

Once the application is completed with all the documents mentioned above and filed with the diplomatic authorities, the file is sent to the Ministry of Foreign Affairs. Once it arrives, the Ministry will transfer it to an examiner. The Ministry can ask for any other information that is relevant to the file. To obtain proof of the existence of family relationships, the minister or the agent of the diplomatic or consular post representing the Grand Duchy of Luxembourg in the country of origin of the family member may carry out interviews with the third party country national, Luxembourg resident or family members, and any examination or investigation considered appropriate.

Once the examiner considers that the file of the authorization to stay is completed he will submit his conclusions to the Minister, who will authorize or refuse the permit of authorization to stay.

b) Visa application

If the application is approved, the person must apply for a long stay visa (D-Visa) at the diplomatic representation of Luxembourg in the country of origin. The embassy will issue the visa based on the authorization to stay.

c) Residence permit

Once the “family member” arrives in Luxembourg, he/she must apply for a residence permit. For obtaining the residence permit, the applicant must present the proof of housing and the medical certificate. Once the requirements are fulfilled the authorities from the Ministry of Foreign Affairs will issue the residence permit.

In a case of family reunification where the third country national obtains a residence permit, a “family member” residence permit valid for a period of one year must be issued, renewable at the applicant’s request, as long as the conditions for obtaining it are still fulfilled. The validity period of the residence permit granted will not exceed the date of expiry of the non-EU resident’s residence permit.

In the opinion of the associations the biggest problems that they are confronted is the fact that the process takes very long and that creates a real stress for the family reunification applicant. Sometimes a year goes by and the person has not received an answer⁴² from the Directorate of Immigration. There is always an administrative justification (the absence of a document that

⁴¹ Article 70(3) of the Law of 29 August 2008.

⁴² Point of view of NGO, Interview N° 9, page 3, lines 124 to 126. . See EMN-NCP-LU, Visa Policy as a Migration Channel, 2011.

is hard to obtain, or the social investigation) for the delay but there is not a real discrimination to several third countries citizens⁴³.

The question of the duration of the separation between the applicant and his/her family members was advanced by different social actors during the parliamentary debates of the Law on free movement of persons and immigration and even during the consultative procedure launched by the Ministry of Immigration before presenting the bill of law to Parliament, to the civil society (including the NGOs)⁴⁴. In general terms the NGOs lobbied for an expeditious handling of applications for family reunification. The waiting period of 9 months seemed too long especially since it adds to the duration of the visa procedure and waiting period of one year to have access to the labour market⁴⁵. In addition they demanded an amount of resources and housing conditions not too restrictive to allow family reunification based on the principle of proportionality. In the parliamentary debates, the conditions of family reunification were more intense than the problems of marriages of convenience that are considered as a marginal phenomenon.

Family reunification and false declarations of parenthood

In Luxembourg natural filiation is legally established either by voluntary recognition or by judicial declaration as a result of an action to establish paternity or maternity⁴⁶.

Recognition is a unilateral act⁴⁷. It can be done in the birth certificate at the moment the child is born. If not the father must appear personally before the civil registrar officer to declare the birth of his child and recognize the infant. It can also be made in a deed, in this case an act of civil status or a separate deed. As it does not require the agreement of the mother⁴⁸ the civil registrar officer must enact the recognition even if it appears to him that it is false. In this case the civil registrar officer will have to inform the mother by certified courier of the situation. However, recognition may be canceled at the request of any interested person, including the public prosecutor⁴⁹. It has no effect (to establish parentage) if another lineage has been previously identified.

However, a family reunification application of an ascendant third country national based on the fact that his/her child that is a Luxemburgish child is not foreseen in the Law of 29 August

⁴³ Point of view of NGO, Interview N° 10, page 9, lines 421 to 432 and point of view of NGO, Interview N° 7, page 24, lines 1121 to 1135. See EMN-NCP-LU, Visa Policy as a Migration Channel, 2011.

⁴⁴ See Document « Recommandations par rapport à une nouvelle loi sur l'immigration de Caritas Luxembourg, SESOPI-Centre intercommunautaire, Commission luxembourgeoise « Justice et Paix », Luxembourg, février 2007, www.cefis.lu. See also, 5802/04 Avis commun de l'ASTI, de la CCPL, de la FAEL, de la FNCTTFEL, de la Fondation Caritas Luxembourg, du LCGB, de l'OGB-L, de Rosa Lëtzebuerg, du SeSoPi-CI et du SYPROLUX avec l'appui ponctuel du CEAL, du LUS et de l'UNEL du 22.02.2008.

http://chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/072/665/067614.pdf.

See also Document 5802/16 Avis de la Commission Consultative des Droits de l'Homme du 02.07.2008.

⁴⁵ See EMN-NCP-LU, "Visa Policy as a Migration Channel", 2011, Luxembourg, pp. 62 – 63 and Satisfying Labour Demand through migration", 2012, pp. 61 and 62.

⁴⁶ Article 334 Civil Code.

⁴⁷ Article 335 Civil Code.

⁴⁸ Except if the mother had been raped. See article 335 Civil Code.

⁴⁹ Article 339 Civil Code.

2008 (articles 6 (1) and 12 in relation with article 70 (1) of the Law of 29 August 2008), because the law requires that the descendant will sustain financially the ascendant. The decision that the European Court of Justice can take to the prejudicial question made by the Administrative Court⁵⁰ in the case 28952 C of 16 February 2012 can change things.

However, with article 20 of the Treaty of Functioning of the European Union together with the Judgment of the European Court of Justice in the Zambrano Case (C-34/09)⁵¹ of 8 March 2011, the acknowledgement of parenthood of an EU citizen child gives the possibility of third country national to demand not only a residence permit but immediate access to the labour market without having to pass the labour market test.

So in this case the only family reunification allowed is when a third country national residing legally in Luxembourg acknowledges the paternity of a third country national child according to article 70 (1) of the Law of 29 August 2008. There has been a discussion about of penalising the false acknowledgement of paternity when a third country national residing legally in Luxembourg recognized a third country national that it is not his/her family member only for the purpose bringing him/her in the country⁵².

The other case will be of a Luxembourgish national that recognized a third country national child only for bringing him/her in the country. Before the modification of the Law of 23 October 2008 on Luxembourgish nationality, the legislation of Luxembourg contained rules that were favourable to foreign children whose paternity is acknowledged by a national even if the child is already resident on the territory. Luxembourg stated that the acknowledgement of paternity of a foreign minor by one of their nationals gives the child the country's nationality and thus removes all difficulties of admission and residence⁵³. Due to the fact that there is an absence of a requirement to prove biological descent this acknowledgement of paternity can be used for purposes of disguised adoption and constitutes another form of fraud⁵⁴.

⁵⁰ www.ja.etat.lu/28952C.doc.

⁵¹ The judgment says : "45....Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=393456>

⁵² See document n° 5908/03. This can be the case when in certain African countries an uncle or aunt of a orphan child adopts him/her to bring him/her to Europe. Information given by a family lawyer on 1 March 2012. However, there are no known cases of this situation in Luxembourg in accordance with the information obtained. It is important to mention that article 78 (1) c) of the Law of 29 August 2008 allows the authorization of stay for private reasons to third country nationals that do not fulfill the criteria to be eligible for family reunification.

⁵³ Fraud with respect to Civil Status in ICCS member states, Commission Internationale de l'Etat Civil (CIEC), France, December 2000, p. 10.

⁵⁴ Fraud with respect to Civil Status in ICCS member states, Commission Internationale de l'Etat Civil (CIEC), France, December 2000, p. 11.

With the Law of 23 October 2008 on Luxembourgish nationality the situation has not changed (it reproduced the principles of the old law).

Article 1 establishes that: A child born to a Luxembourg parent, even if born abroad, is a Luxembourg national, provided the following two conditions are met:

1. the lineage of the child must be established before he or she has reached 18 years of age;
2. the parent must be a Luxembourg national at the time that this lineage is established.

In the event of the declaratory judgement not being rendered until after the death of the father or the mother, the child is a Luxembourg national if the parent was in possession of Luxembourg nationality on the day of his or her death. As we can see it is sufficient to legally recognize the child and not to prove by DNA testing the lineage. Another problem is once that the nationality to a child is granted trying to take it back is quite difficult because of the superior interest of the child and because situations of statelessness are to be avoided according to general international obligations.

There are cases where the Luxembourgish authorities can challenge the acknowledgement of paternity, especially when the civil status documents submitted by nationals of Arab countries are difficult to verify⁵⁵. However, it is important to take into consideration that with the acknowledgement of paternity the tendency of Luxembourg is to try to apply what is more favourable to the best interest of the child, especially after the Judgement of the European Court of Human Rights *Wagner and J.M.W.L. v. Luxembourg*, 28 June 2007 (final – 28 September 2007)⁵⁶.

⁵⁵ Fraud with respect to Civil Status in ICCS member states, Commission Internationale de l'Etat Civil (CIEC), France, December 2000, p. 11 (reference à la France??)

⁵⁶<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=86836724&skin=hudoc-en>

“118. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are, in addition, positive obligations inherent in effective “respect” for family life. 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 *Pini and others v. Romania*, nos 78028/01 and 78030/01, § 149, ECHR 2004-V (extracts)).

130. In this case, a practice existed before the facts in issue, whereby Peruvian judgments pronouncing full adoption were recognized by operation of law in Luxembourg. Thus – and the Government does not dispute this –, several unmarried women had been able to have such a judgment entered in the Luxembourg civil status registers without seeking enforcement of those judgments...Once in Luxembourg, the applicants could legitimately expect that the civil status registrar would enter the Peruvian judgment on the register. However, the practice of entering judgments had been suddenly abolished and their case was submitted for review by the Luxembourg judicial authorities. ...

133. Bearing in mind that the best interests of the child are paramount in such a case (see, *mutatis mutandis*, *Maire*, cited above, § 77), the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention. However, the national authorities refused to recognize that situation, making the Luxembourg conflict rules take precedence over the social reality and the situation of the persons concerned in order to apply the limits which Luxembourg law places on full adoption. ...

On that point, the Court notes, moreover, that a division of the Court of Appeal recently took the best interests of the child into consideration and decided, in a slightly different legal and factual context, that a Peruvian

In this case, a Luxembourg national who is a single woman adopted in Peru a Peruvian child born in Peru. The Luxembourg national is a mother of four children who attend school in Luxembourg. The Luxembourg national brought a civil action to have the Peruvian decision of adoption declared enforceable in Luxembourg for the purposes, in particular, of the child's civil registration and acquisition of Luxembourg nationality.

On 2 June 1999 the district court dismissed the applicants' application for an order to enforce the Peruvian adoption judgment, on the ground that the latter was contrary to Article 367 of the Civil Code, whereby full adoption was not available to a single woman. The applicants appealed, and the decision was upheld by the appeal court as well as the Court of Cassation.

The European Court of Human Rights (ECHR) held unanimously:

- that there had been a violation of Article 6 (right to a fair hearing) of the European Convention on Human Rights;
- that there had been a violation of Article 8 of the Convention (right to respect for family life) on account of the failure of the Luxembourg courts to recognise the family ties created by the judgment of full adoption delivered in Peru;
- that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8, since the child (and, as an indirect result, her mother) had been penalised in her daily life on account of her status as a child adopted by an unmarried mother of Luxembourg nationality whose family ties created by the foreign judgment were not recognised in Luxembourg⁵⁷.

2.3. Prevention of misuse of residents' permits for family reunification in this context

Marriages of Convenience

In Luxembourg the misuse of resident's permits for family reunification is not expressly regulated by the law. There are not legal provisions for preventing it before the marriage has been celebrated. However, the law foresees several actions once it has been celebrated. Article 264 of the Criminal Code and it sanctions the civil registrar officer that does not verify

adoption judgment pronounced in favour of a Luxembourg woman should be recognized by operation of law. In the judgment in question, the Court of Appeal emphasized, inter alia, the need to give the child the most favourable status. The Court of Appeal further stated that the fact that the Peruvian decision produced the effects of a Luxembourg full adoption, in particular by severing the child's pre-existing legal parent-child relationship and by its irrevocable nature was not prejudicial to Luxembourg's international public policy (see paragraph 65 above).

135. The Court concludes that in this case the Luxembourg courts could not reasonably refuse to recognize the family ties that pre-existed *de facto* between the applicants and thus dispense with an actual examination of the situation.

⁵⁷ See Press Release n° 458 of 28 June 2007 issued by the Registrar of the European Court of Human Rights.

the existence of the parties' consent. From the administrative perspective, article 75 of the Law of 29 August 2008 foresees in case of verification of a marriage of convenience the annulment of the residence permit and according to articles 111 (1) and 120 the expulsion of the country and the placement in a holding facility for waiting for expulsion. Article 112 foresees the possibility of an interdiction for entering the territory up to 5 years. As we mention in section 2.1, the only provisions for the annulment of the marriage are article 146 and 180 of the Civil Code but the only parties that have the legal standing to act are the parties and some family members. Neither the civil registrar officer nor the public prosecutor has legal standing to annul the marriage. There are only two reported law cases where marriage of convenience ("Mariage de complaisance") is mentioned. Case No. 13027⁵⁸ of the First instance Administrative Court of 28 May 1998 and case No. 15844 of the First instance Administrative Court of 12 May 2003. Both cases are previously to the Law of 29 August 2008 on free movement of persons and immigration.

However, we can extract some elements from the jurisprudence in case 15844 to determine in which cases the authorities are confronted with a marriage of convenience.

In case no. 15844⁵⁹ the First instance Administrative Court concluded that:

- 1) The couple was in getting a divorce and that the Diekirch judge had authorised separated residence for both parties and that the judge had granted an alimony of 250 € per month to the woman.
- 2) The marriage had not been dissolved at the moment of the request. In the request the third country national who was the wife of a French national who is resident in Luxembourg argued that she was entitled to obtain the residence permit.
- 3) The police report that establishes that the woman has an extramarital relationship is not sufficient to declare a marriage of convenience because from the file there is

⁵⁸ See Arrêt du Tribunal Administratif no. 13027 du 28 mai 1998, Pas. Adm. 2002, V° Etrangers, n° 107.

⁵⁹ Tribunal Administratif, 2^{ème} Chambre, n° 15844 du 12 mai 2003. See www.ja.etat.lu/15844.doc case where a Ukrainian woman married a French national resident in Luxembourg on 20 July 2001. She was authorized to stay on family reunification basis and a first resident permit was issued that was valuable from 12 September 2001 to 31 August 2002. On 23 August and 2 October 2002, the woman asked for the issuance of a new residence permit of the same duration of her husband. However, none of her demands were answered by the Ministry of Justice. The woman filed an appeal on 9 January 2003 but the government rejected arguing that the procedure was not foreseen by law. She argued that her legal basis were article 3.2 of the Grand-ducal regulation of 28 March 1972 on condition of entry and stay of certain categories of foreigners and article 10 of the Regulation 1612/68 of the European Council of 15 October 1968. The government answered that in accordance with a report of the Grand-ducal police from Ettelbruck of 27 December 2002, it is proven that the woman had an extramarital relationship with another man since September 2001 and that she had only married to benefit from the residence and working rights that are reserved exclusively to a family member of a EU national. In accordance seen that the authorization of stay derived from the free circulation of an EU national that is based on the marriage, that right is going to last as the marriage is not dissolved, with the exception of the "marriage of convenience." The court considers that it is necessary to analyze the legality of the administrative decision not only in the legal context but also in the factual context and the administration case is proved beyond doubt.

sufficient evidence that establishes a common household and an intimate life together⁶⁰.

On 29 July 2008, the former Minister of Justice, M. Luc Frieden, presented a bill of law that intends to fight against the forced marriages and partnerships or of convenience⁶¹.

To obtain its objectives the bill of law proposed to modify certain articles of the Civil Code⁶², the new Civil Procedural Code⁶³ and the Criminal Code⁶⁴.

Control mechanism and legal standing of the public prosecutor:

The modification to the Code tends to permit the civil registrar officer to review and verify the validity of any civil status certificate or document if he considers that the document is false, irregular or it does not respond to reality⁶⁵. The bill of law introduces the requirement of an audition of the contracting parties by the civil registrar officer⁶⁶ if he considers that it is necessary. The officer can be entitled to conduct the interview individually. Also the law foresees a sanction to the officer that does not comply with the new disposition⁶⁷.

Article 146-1 requires the physical presence of the contracting parties at the moment of the wedding even abroad.

⁶⁰ This jurisprudence can be contested based on article 75 (3) of the Law of 29 August 2008. It is important to mention that the jurisprudence was stated in 2003.

⁶¹ Bill of law n° 5908/00.

http://chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/034/726/073235.pdf

In his opinion on this bill of law, the Council of State mentions the recent jurisprudence of the European Court of Human Rights of 14 December 2010 in which the court recognizes the legality of the States to fight against marriage of convenience but it maintains that the mechanisms put in place by government must provide a way to verify the sincerity of the marriage:

“83. The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage. However, the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice (see *Hamer v. the United Kingdom*, no. 7114/75, Comm. Rep. 13 December 1979, D.R. 24, pp. 12 et seq., §§ 55 et seq.; *Draper v. the United Kingdom*, no. 8186/78, Comm. Rep., 10 July 1980, D.R. 24, § 49; *Sanders v. France*, no. 31401/96, Com. Dec., 16 October 1996, D.R. no. 160, p. 163; *F. v. Switzerland* cited above; and *B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005, §§ 36 et seq.) but they do not have to derive in excessive obstacles to the effective exercise of the right of marriage.” See O'DONOGHUE AND OTHERS v. THE UNITED KINGDOM (no. 34848/07) (final 14/03/2011). However, such mechanisms do not have to derive in insurmountable obstacles to the effective exercise to the right to marry.

⁶² Articles 47, 63, 70, 71, 176 and 177. It introduces two new articles 146-1 and 175-1.

⁶³ Introducing a new urgency procedure. Articles 1007-1, 1007-2 and 1007-3.

⁶⁴ Introducing three criminal offenses. See articles 387, 388 and 389.

⁶⁵ Proposed Article 47 of the Civil Code.

⁶⁶ Proposed Article 63 (2) 2. In the opinion of a Member of Parliament, who is member of the Judiciary Commission that is treating the bill, giving the powers to the civil registrar officer to become a prenuptial inspector is not pertinent, especially that they do not have any formation or training for fulfilling this function.

⁶⁷ The sanction is a fine of 250 to 5000 euros (art. 264 of the Criminal Code). Proposed Article 63 (3)

Article 175-1 introduces the possibility that the public prosecutor office can make opposition to the marriage and that has legal standing for asking the annulment of the marriage.

Article 175-2 allows the civil registrar's officer after the interview to refer the case to the public prosecutor, if he considers that there are serious presumptions that the marriage is susceptible to be annulled. He must notify the parties. In this case the prosecutor has a month to oppose the marriage or to let the celebration to go on⁶⁸. In case of opposition he will suspend the marriage for a period of one month that he can renew for a similar period. Once the deadline is past the prosecutor has to take a decision if he allows the marriage to go on or if he opposes to it.

New urgency procedure for lifting the opposition

However, the parties can ask the court to lift the suspension on the marriage⁶⁹. The procedure is foreseen in article 176 of the Civil Code and described in articles 1007-1 to 3 of the new Civil Procedure Code and its intention is to protect the rights of the contracting parties.

Introduction of new criminal offenses

Finally, the bill of law foresees three new criminal offences to punish people that participate in a marriage of convenience or forced marriage. Article 387 sanctions marriages of convenience contracted with the sole aim to obtain a residence permit with 6 months to two years of prison and a fine from 10 to 20.000 euros. The court can decide to apply only the prison term but it cannot apply the fine alone. Article 388 foresees the aggravation when one of the contracting parties had received money in exchange (1 to 3 years of prison and a fine of 10 to 30.000 euros). Article 389 punishes the forced marriages with 1 to 5 years of prison and a fine of 20 to 40.000 euros. In case that there is an attempted forced marriage or attempted marriage of convenience the punishment is reduced.

False Declarations of Parenthood

At the moment there is no law or bill of law that tackles false declarations of parenthood (see section 2.2). The only case in which the authorities can prosecute is when there has been use of forged documents⁷⁰.

2.4. Impact of European Law

Marriages of Convenience

Until now there has not been any impact of the European Court of Justice case law which has focused on family reunification⁷¹.

⁶⁸ Proposed Article 175-2 (2).

⁶⁹ Proposed article 175-2 (3).

⁷⁰ Articles 193 to 209-1 of the Criminal Code.

False Declarations of Parenthood

According to an NGO, the Directorate of Immigration is applying *Zambrano* only if the concerned person has a permanent relationship in a couple with the parent of his/her European child⁷². Therefore apparently *Zambrano* only is applied by the authorities if the family unit is proven, and if the father is financially engaged and the type of residence permit that is issued is for private reasons.

However, there is a case in front of the Administrative Court (case n° 29435) where the plaintiff is a third country national (Togo)⁷³ who has two children with French nationality but does not have any relationship with the father of the children since they were born. She had asked the Directorate of Immigration to issue a residence permit and according to *Zambrano* to grant her access to the labour market. The Directorate of Immigration rejected her application arguing that articles 6 (1) and 12 of the Law of 29 August 2008 do not apply to this case because these articles apply only to family reunification of parents where the children are financially responsible of them. The plaintiff during the closing arguments in front the First instance Administrative Court Third Chamber (Judgment n° 27509) argued that her situation fell in the scope of *Zambrano*⁷⁴. The government responded that the facts in the *Zambrano* case are radically different from the ones of this case, saying that in this case there are two children who are French nationals with a third national country mother residing in Luxembourg and that in this case the children are not compelled to leave the territory of the European Union. In consequence, the family reunification must be asked in France and not in Luxembourg. The First instance Administrative Court decided in the government sense arguing that the children do not have a unlimited right to reside in Luxembourg in accordance with article 6 (1) of the Law and that the mother is an irregular migrant and in consequence she is not entitled to benefit from the free movement of persons as an UE national.

The judgment was appealed at the Administrative Court. The plaintiff asked to the Administrative Court to ask the European Court of Justice three prejudicial questions as part of her case. The Administrative Court has decided to suspend the proceedings by judgment of 16 February 2012⁷⁵ and asked the European Court of Justice the following prejudicial questions:

⁷¹ See Jurisprudence administrative au Grand-Duché de Luxembourg en matière d'immigration et protection internationale, www.emn.lu Last reviewed on 23 February 2012.

⁷² Answer from an NGO of 14 November 2011 referring to a case of a Cape Verdian mother that has a Portuguese child (the father of the child is Portuguese). The Cape Verdian mother can obtain an authorization of stay for private reasons but only under the condition that she provides the ministry with the financial responsibility form signed by the Portuguese father in the mother's favor. If the couple is not together or if the father does not want to be financially engaged, the third country national cannot have the possibility of obtaining the authorization to stay.

⁷³ The woman is a rejected asylum seeker. See Judgment n° 27509 of 21 September 2011 of the First instance Administrative Court, Third Chamber. www.ja.etat.lu/27509.doc.

⁷⁴ See Judgment n° 27509 p. 9.

⁷⁵ See www.ja.etat.lu/29435C.doc.

"Does Article 20 TFEU, as needed and 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights, one or more of them taken separately or combined, must be interpreted in meaning that it precludes a Member State, a) on the one hand, that denies a third country national, which is the sole support of his young children, citizens of the Union, to stay in the Member State of their residence where they live with him since birth, without having the nationality (of the Member State), and, b) on the other hand, refuses the third country national a residence permit, further, a work permit?"

c) Such decisions are they to be considered as likely to deprive those children, in their country of residence where they lived since birth of the enjoyment of most of the rights attaching to citizenship of the Union also in the given circumstance where their other direct ancestor, with whom they have never had any joint family life, resides in another State of the Union, which itself is a citizen?"

3. The situation in Luxembourg

3.1. Scope of the problem

Marriages of Convenience

Marriages of convenience ("mariage de complaisance") are considered as examples of misuse of the right to family reunification⁷⁶ by the authorities⁷⁷, the Council of State⁷⁸ and even by administrative courts. This situation is foreseen by article 75 of the law of 29 August 2008. As it was mentioned above the government affirms that it is a regular phenomenon in Luxembourg and concluded that the marriage of convenience is generally concluded for migration purposes or to obtain a professional, social, fiscal or inheritance advantage⁷⁹. However, there are no statistics⁸⁰ and there are no cases that have been prosecuted. It is important to mention that the Consultative Commission on Human Rights (CCDH) considers that there are isolated cases of marriages of convenience and that it is a marginal issue.

⁷⁶ Conseil d'Etat, Avis sur le projet de loi ayant pour objet de lutter contre les mariages et partenariats forcés ou de complaisance ainsi que de modifier et compléter certaines dispositions du Code civil, du Nouveau code de procédure civile, du Code pénal, n° 5908/03, p. 2. A Member of Parliament said that marriages of convenience are a possible way to get around the law on free movement of persons and immigration. Interview with a Member of Parliament.

⁷⁷ Bill of law n° 5908/00 of 28 July 2008, « Exposé des motifs », p. 6.

⁷⁸ Document n° 5908/03.

⁷⁹ Draft bill n° 5908/00 of 28 July 2008, « Exposé des motifs », p. 6.

⁸⁰ A Member of Parliament and the Rapporteur of the Committee of Legal Affairs of Parliament consider that there are no statistics on the matter that they are trying to legislate and that they cannot conclude that this is a regular phenomenon in Luxembourg. It is a very hazy matter.

However, the CCDH considers that the real problem is forced marriages that are not controlled⁸¹.

The debate turns around the conditions of family reunification⁸² and not marriages of convenience that is considered as a marginal phenomenon.

Different legal opinions concerning the bill of law n° 5908 have been brought to the parliamentary debate. At least one Member of Parliament mentioned that the bill respond to a conservatory vision of marriage⁸³.

There is no mediatisation of the phenomenon⁸⁴.

A. National Council for Foreigners

The first one is the opinion from the National Council for Foreigners (Conseil National pour Etrangers) of 24 September 2009. In principle, the CNE agrees with the objectives that the bill of law tries to obtain. Nevertheless, it points out the following problems:

1) Political considerations:

a. The bill of law foresees only marriage of convenience and forced marriages but does not cover “arranged marriages”

b. The bill does not foresee any prevision to protect the victims of marriages of convenience or forced marriages.

2) Technical considerations:

a. There is in the project a total absence of the definition of marriage of convenience in a country where local authorities, prosecutors and the courts do not have the experience of handling this type of cases. This absence compromises the “preliminary interview” that the civil registrar officer must conduct.

⁸¹ Commission Consultative des Droits de l’Homme, Avis sur le projet de loi ayant pour objet de lutter contre les mariages et partenariats forces ou de complaisance ainsi que de modifier et compléter certain dispositions du Code civil, du Nouveau code de procédure civile, du Code pénal, n° 5908/02, p. 2.

⁸² See the legal opinions given by different actors during the parliamentary debates concerning the bill of free movement of persons and immigration.

<http://chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public&id=5802>

⁸³ Interview with a Member of Parliament.

⁸⁴ The only article published by the newspapers lately is : Kleer, Christiane, “Des liaisons trop suspectes”, Le Quotidien, 11 February 2011. This article was on relation with the legal opinion issued by the CCDH. “Dans ces paragraphes, le législateur indique que «les mariages simulés constituent un phénomène régulier», une affirmation que la CCDH récuse. «Le phénomène existe, d'accord, mais de là à dire qu'il est régulier», lance Olivier Lang, le vice-président de la CCDH et avocat au barreau de Luxembourg, qui rappelle qu'il n'existe aucune donnée précise sur le phénomène au Grand-Duché. En effet, le ministre Luc Frieden avait déjà avoué en 2009, en réponse à une question parlementaire du député DP Claude Meisch, qu'il n'existait «évidemment pas de statistiques sur lesdits mariages», vu «la nature des choses». Le ministre avait pourtant ajouté que «d'après les autorités concernées et plus particulièrement certaines autorités communales, le phénomène existe au Luxembourg». »

b. The bill wants to make the civil registrar officer a kind of “prenuptial inspector” that has a preventive role in the proceedings. However, he does not have a coercive power. They recommend that this coercive power is given to the civil registrar officer as well as training so they can analyze in an objective manner the files that they must instruct. Also, they propose that the acts of this officer should be subject to judicial review.

c. The public prosecutor office intervention does not have a legal base. If the “moral element” from which the fraud will derive is not foreseen by law, then the prosecutor does not have any right to challenge or prosecute a marriage. Therefore, a legal definition is needed.

3) Legal considerations: The CNE considers necessary the implementation of a Grand-ducal regulation or a circular that list the factors that can be taken into account to make doubt about the sincerity of the marriage intentions of the parties. The CNE proposes the following elements to be taken into consideration:

- a. Anxiety, fear, excessive reverential fear
- b. Presence of a dominant party
- c. Aggressive use of the word by one of the parties
- d. Bad school and academic performances
- e. Illiteracy of one of the parties
- f. Evident signs of depression (attempted suicide, bulimia)

B. Consultative Commission of Human Rights (CCDH) of the Grand-Duchy of Luxembourg.

The CCDH bases its opinion of 19 January 2011 on article 8 of the European Convention of Human Rights. Their critics to the project are the following:

a. The criminal offenses that are foreseen by the project are totally inapplicable for the Partnerships because according to the law it is impossible for a third country national to conclude partnerships if he does not have a residence permit. In consequence, the possibility of concluding a partnership with migratory purpose is excluded.

b. It considers also that family reunification of partnerships is almost impossible because the law of 9 July 2004 requires a legal residence as a preliminary condition for registering a partnership of a third country national⁸⁵.

c. The CCDH notes that the project considers marriage of convenience a regular phenomenon. However, the CCDH points out the fact that after the parliamentary question made by Claude Meisch (above mention) the Minister recognized that there are no statistics on the matter. The CCDH considers that there are rare cases that they are aware of and that

⁸⁵ Article 4 (4).

the ORK⁸⁶ mentioned certain cases of minors but the fact is that the phenomenon is residual and that there is a real need to legislate on forced marriages, especially involving minors.

d. The CCDH regrets that the project is completely repressive and it does not include anything about measures of prevention and information. They consider that the action must be preventive and repressive and must play at the socio-educative level (i.e. schools, family planning or sexual education organizations, youth movements, integration and reception contracts, associations against domestic violence, local governments)

e. The CCDH criticizes the absence of definition of marriages of convenience and forced marriages, especially that there are criminal sanctions. Also, that the two situations are totally different because in the marriages of convenience there is a defect of the consent and in the forced marriages there is a lack of consent.

f. The CCDH criticizes that even if the project defines a marriage of convenience as the one that is exclusively contracted for migration purposes or to obtain a professional, social, fiscal or heritage advantage, the project only focuses on the marriages contracted for migratory purposes. This is a real stigmatization for foreigners. The CCDH considers that is not only necessary to define the marriage of convenience but also to sanction all type of marriage of convenience.

g. The proposed modification of article 47 of the Civil Code is a clear violation to the Hague Convention on the celebration and reconnaissance of marriages of 14 mars 1978 (Luxembourg is a signatory country). In consequence this article has to be suppressed.

h. The CCDH criticizes that the authors of the project mention that they take into consideration the fact that the European Convention of Human Rights (ECHR) forbids subordinating the celebration of marriage to having a residence permit for one of the contracting parties in the national territory. Or, the truth is that the proposed article 63 establishes that the parties must produce an official document that proves their domicile or residence. In consequence this requisite of subordinating the celebration of marriage to the regularity of stay of the third country national is violating article 8 of the ECHR.

i. The CCDH fears that the public prosecutor's right to oppose to a marriage can become systematic. They consider that if the government wants to keep this disposition in the bill they shall include also the principle of legal responsibility of the State in case of unfounded opposition.

j. The CCDH considers that the preliminary interview carried out by the civil registrar officer has to be deleted.

C. Opinion of the Council of State of 15 February 2011.

The opinion of the Council of State is positive to the project but it made the following critics to it:

⁸⁶ Ombudsman for the rights of Children.

- a. It regrets that the government has not approved to this date the bill of law n° 5914 raising the minimum legal age for women to get married to 18 years to uniform it with the minimum legal age for men.
- b. There are no statistics or numbers advanced by the author of the project, even though they affirmed that is a regular phenomenon.
- c. The project does not sanction the partnerships contracted only for migration purposes. This situation can generate an increase in the number of partnerships of convenience.
- d. The project does not have any disposition related to the fight of convenience marriages celebrated abroad (there are no modification to articles 170 and 171 of the Civil Code).
- e. They considered that is imperative to add to the proposed article 146-1 that the physical presence of the parties is required to assure the civil registrar officer of the consent of the parties.
- f. The concept of “serious indications” (prima facie evidence) is a very vague notion, so they recommend to copy the example of the Ministry of Justice of France to dress a non-exhaustive list of different elements or objective indications that can make seriously doubt of the reality or the freedom of the parties consent.
- g. They consider that the procedure established in the bill of law must not be systematically used by the civil register officer to ask the intervention of the public prosecutor when he/she has to celebrate a mixed marriage.
- h. They consider that the government has to uniform the period of prescription to demand the nullity of the marriage in this cases with the ones established in bill of laws n° 5155 and 6172, to avoid juridical insecurity.
- i. The council objects the creation of a new judicial procedure different from the urgency procedure already contemplated in the new Civil Procedure Code.
- j. The criminal offenses must be registered in the Law of free movement of persons and immigration and not in the Criminal Code and the sanctions must be extended to every person participating in a marriage of convenience and not only for migration purposes.
- k. The project does not sanction the false declaration of paternity for migration purposes.
- l. They recommend to replace in the criminal offenses foreseen by the proposed articles 387 and 388 of the Criminal Code, to substitute the term “titre de séjour” (“residence permit” that only affects third country nationals) by the phrase “an advantage on the authorization of stay”. This change will allow covering also spouses or partners that are EU nationals.

At the moment with the discussion on the overhaul of Luxemburgish family law this project has been retaken and it been discussed by the Commission of Legal Affairs of Parliament on the meetings of 11 January, 18 January and 25 January 2012. The Ministry is of the opinion

that the approach of the Commission of Legal Affairs is to analyze together all the dispersed dispositions in all the different bills of law (n° 5155, 5914, 5908, 6039 and 6172).

It is important to mention that the main worries around this bill are:

- a) The vice on the consent of the parties. In this subject there is a unanimous opinion that forced marriages must be punished because there is a lack of consent of one of the parties. This is the principle reason that all the people interviewed consider that the legal age of women for getting married must have to be 18 years old and not 16 like it is now⁸⁷. In relation with the vice of consent the position is divided. A Member of Parliament considers that everyone is entitled to get married without questioning his/her reasons, except if there is an illegal motive behind the consent (i.e. the person got paid for getting married, etc.). If there is a free consent the State does not have the right to intervene⁸⁸.
- b) There are no statistics on the matter; therefore the legislator is legislating on a very hazy subject.
- c) The idea that the civil registrar officer becomes a prenuptial inspector that has the power to systematically oppose a wedding worry the persons interviewed, especially seen the fact that they are not trained and don't have any competence on the matter.

Confronted with all these elements the Committee of Legal Affairs has arrived to the following conclusions:

- a) They will include two articles from the Belgian legislation that define the marriages of convenience from the point of view of the consent (they incorporate article 146 bis from the Belgian Civil Code)⁸⁹.
- b) There is no proxy marriage; this means that the parties have to be present at the moment of the marriage so that the civil registrar officer can appreciate the validity of the consent.
- c) The waiver that was granted by the Grand Duke to allow the marriage of a minor will be abrogated and the waiver will be made by the guardianship judge.
- d) They will eliminate the modification to article 63 of the Civil Code. This means that the preliminary audition by the civil registrar officer will be eliminated. However, the civil registrar officer if he has a doubt about the validity of the marriage can seize the public prosecutor.

⁸⁷ The Ombudsman for the Children said that in her experience she had come across several cases where the parents had married their younger daughters to older men (a Montenegrin girl and an Algerian girl who lived in Luxembourg) in their country of origin. Also she mentioned that in the past she was informed of marriages of convenience in the Brazilian community to facilitate family reunification. She added that another issue that had not been taken into consideration is the arranged marriages. She explained that there was a marital agency that arranged marriages with women coming from Eastern Europe. Once the women arrived in Luxembourg they were in a distress situation (this was in the 1980's and 1990's).

⁸⁸ Interview with a Member of Parliament.

⁸⁹ This articles says: "There is no marriage where, although the formal consents have been given to it, it emerges from a combination of circumstances that the intention of one or both spouses is clearly not the creation of a sustainable community of life, but only seeks to obtain an advantage in terms of residence, linked to the spouse status".

- e) The public prosecutor will have legal standing to oppose the marriage.
- f) The urgency procedure will be maintained because it is different from the general urgency, The procedure foreseen by articles 1007-1, 1007-2 and 1007-3 establishes fix deadlines that have to be respected.

The Committee expects to send a draft of the reviewed bill to the Council of State at the end of April 2012 for its legal opinion⁹⁰.

Partnerships of convenience

There is no legislation on the subject. As it is mentioned by the legal opinion of Council of State the partnerships of convenience are not regulated by the bill of law n° 5908. This was also the position of the Ministry of Immigration in an audience of the Commission of European and Foreign Affairs on 7 February 2011⁹¹. The Minister considered that controlling partnerships of convenience is more difficult than marriages because it is less complicated to celebrate and to dissolve and that there can be an overlap of competences between the Ministry of Immigration (Directorate of Immigration) and the Ministry of Justice.

False Declarations of Parenthood

In Luxembourg acknowledgement of paternity is a formal legal act⁹² that can be made by the father and even by the mother⁹³. There is no legislation in Luxembourg that can be used to fight this problem of false declaration of parenthood. In the opinion of the Council of State on the bill of law n° 5908 there is a critic on the proposed article 387 of the Criminal Code in

⁹⁰ Interview with the Rapporteur of the Committee of Legal Affairs of Parliament.

⁹¹ See Procès-verbal P-2010-O-AEDCI-21-01. Réunion de la Commission des Affaires étrangères et européennes, de la Défense, de la Coopération et de l'Immigration du 07/02/2011 The Minister Nicolas Schmit said :
 « En ce qui concerne les partenariats en relation avec le permis de séjour, la Chambre des Députés avait la volonté de traiter cette question de façon restrictive pour éviter les partenariats " blancs ". Il faut considérer dans ce contexte qu'un partenariat peut être très facilement dissout par un des partenaires et que la situation est difficile à contrôler. La condition de résidence telle qu'introduite dans l'article 4, point 4, de la loi du 9 juillet 2004 relative aux effets légaux de certains partenariats (" résider légalement sur le territoire luxembourgeois ") donne lieu à confusion. La Direction de l'Immigration est d'avis qu'un visa ne remplit pas la condition de résidence, mais qu'il faut que la personne concernée dispose d'une autorisation de séjour supérieure à trois mois. La question entrant également dans les compétences du Ministère de la Justice, une solution satisfaisante ne sera pas facile à trouver. Si le Parquet a inscrit un partenariat, il n'est pas dans la compétence de la Direction de l'Immigration de contester sa légalité. »
http://chd.lu/wps/portal/public!/ut/p/c1/jczJDolwFIXhZ_EJ7u1lapdMVkAxpakBNqQxhJAwuDAa315Wxp3mLP98B1rYttjHONj7uC52ghpav0souVSZSyzD5SLlaR4YXTqc-1tv_I4415UMT6kQJsiMY6ZTFRFm9I_-dB6LzUh1LGLmodTOD10e1rmHBtrg60Pke6SSacPV2SmYB83UD_b6gtts6uca7t6WzK08/dl2/d1/L0lJSklna21BL0lKakFBRXlBQkVSOQpBISEvWUZOQTFOSTUwLTVGd0EhIS83X0QyRFZSSTQyMDg5SkYwMk4xU1U4UU8zSzE1L1k5Z2JSNzY3NDAwMzg!/?PC_7_D2DVRI42089JF02N1SU8QO3K15_selectedDocNum=0&PC_7_D2DVRI42089JF02N1SU8QO3K15_secondList=&PC_7_D2DVRI42089JF02N1SU8QO3K15_action=document#7_D2DVRI42089JF02N1SU8QO3K15

⁹² Articles 57 and 62 of the Civil Code.

⁹³ See Chantal NAST, « La reconnaissance et le mariage », Colloque « Droit de la famille en Pologne et en Europe. Perspective de changement », CIEC, Université catholique de Lublin, 12 – 14 mai 2004, pp. 1, 5, 7.

which they say clearly that the authors did not foresee any disposition to sanction a person that make a false declaration of paternity for migratory purposes.

However, in the bill of law n° 6039⁹⁴ there is the proposition to modify articles 55 and 56 of the Civil Code to introduce the requirement of the “Birth Notice” issued by the doctor or the midwife that attended the childbirth that will certify that the child belongs to the woman who gave birth.

This child notice must have to be given the next working day by the doctor or the midwife to the civil registrar office. With this modification the legislators try to close a gap that exists for the false declaration of parenthood.

Also, one has to mention the position that the administrative jurisdictions have taken over this subject, especially in the cases where a third country national applies for family reunification of a sibling. The First instance Administrative Court in its decision 23176 of 27 February 2008⁹⁵ established that even if DNA testing is not compulsory and is not foreseen by the law in case of doubt by the administration about the real lineage of the child the State is entitled to ask for additional evidence that prove the lineage between the applicant and the child to obtain a family reunification. It is important to mention that according to the Court the burden of proof in case of doubt is on the applicant and the demand of the Ministry to require the DNA test cannot be considered as an unreasonable interference with the right to family life.

This case was decided before the Law of 29 August 2008, but the position of the Court has legal standing in article 73 (1) and (2) of the Law.

3.2. Other forms of misuses

Marriage of Convenience

Nothing to report.

False declarations of Parenthoo

Nothing to report.

⁹⁴ Bill n° 6039 of 4 May 2009. Document n° 6039/00.

http://chd.lu/wps/PA_1_084AIVIMRA06I4327110000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/014/820/081139.pdf

⁹⁵ www.ja.etat.lu/23176.doc. In this case a Congolese national legally residing in Luxembourg apply for family reunification of his alleged daughter that lives in the Democratic Republic of Congo. The applicant had filed his application in Luxembourg but the Ministry of Immigration instructed that he had to file it in the country of origin of his alleged daughter and that he had to join the birth certificate duly translated and legalized and a judgment of a court which establishes that he has the guardianship of the child. The Ministry later demanded that the applicant submits voluntarily to a DNA test to establish parenthood. The applicant refused on the basis that the documents joined were sufficient. The Minister refused the authorization of stay based on the refusal

3.3. National means of preventing misuse

Marriages of Convenience

In Luxembourg at the moment there is no way to prevent misuses of residence permits by marriages of convenience. As it was mentioned in section 2.1 and 2.3, the civil registrar officer may not stay the celebration and the Public prosecutor office does not have the competence to oppose it. For the moment, there is no a national policy. It is important to mention that bill of law n° 5908 that tries to solve the problem has encountered certain opposition from different organisations.

The only instruments that the authorities have to prevent this type of marriages are:

There is the practice that the civil registrar officer who receives the marriage file can only control the documents. In case that the civil servant realized that the documents are false or they have been tampered, he can seize the public prosecutor.

In the case mentioned above the Public prosecutor will open a criminal case against the two contracting parties charging them with using forged documents in accordance with articles 193 to 209-1 of the Criminal Code.

Article 75 of the Law of 29 August 2008, that was mentioned above in relation with articles 111 and 120 of the same law. In case that the marriage of convenience is proved the residence permit will be revoked, and the person will be ordered to leave the territory. Because of this, the law will consider the person as a flight risk and the person can be placed in a holding facility waiting the execution of his/her expulsion.

False declaration of parenthood

In Luxembourg there is no legislation that allows the civil registrar officer from preventing a false declaration of parenthood because the civil registrar officer cannot oppose to the recognition of a child and the agreement of the mother it is not required. That is the reason that the Council of State in its legal opinion regrets that the false declarations of parenthood are not sanctioned.

3.4. Factors that can trigger an investigation on individual cases

Marriages of Convenience

As it is mentioned in sections 2.1 and 2.3, in Luxembourg there is not legal framework for allowing the detection of marriages of convenience. There are only criminal sanctions for the use of forged documents⁹⁶. The legislation in force does not make the celebration of a marriage conditional on the legality of a future foreign spouse's residency with the territory, and consequently, no check are carried out in the matter⁹⁷. Also, the law does not provide any specific measure in the case a marriage of convenience is suspected⁹⁸.

However, article 73 (2) of the Law of allows the ministry to carry out any interviews with the third country national that asks for family reunification, his/her family members and to make any inquiry that they consider necessary to obtain evidence to prove the existence of family links. Just until know there are no cases of marriage of convenience to develop strategic and practical approaches. Also as we mentioned, article 75 of the Law allows the authorities to revoke or to not renew the residence permit to the third country national.

Nevertheless, some of the people interviewed highlighted several elements that can trigger an investigation:

- 1) The parties do not have a common language to communicate at the moment of the ceremony.
- 2) The parties do not have a common household.
- 3) They are really nervous at the moment of the ceremony or when they try to obtain certain documents.
- 4) They are reticent to produce certain documents from their country of origin.

False Declarations of Parenthood

There are no known cases of false declarations of parenthood and in consequence there are no strategic and practical approaches. Seen that Luxembourg was condemned by the European Court of Human Rights on the Wagner Case (see section 2.2) it is clear that in case of a minor that had been subject to a false declaration of parenthood the best interest of the child will prevail.

3.5. Evidence needed to prove the misuse

As we mention in section 2.3 the First instance Administrative Court was clear enough in its judgement 15844 to mention certain elements that can be taken into consideration to prove a marriage of convenience. This judgement mentioned:

⁹⁶ Articles 193 to 209-1 of the Criminal Code.

⁹⁷ International Commission on Civil Status (ICCS), "BOGUS MARRIAGES: A study on marriages of convenience within ICCS member states, Strasbourg, 2010. p. 22. See also the Ombudsman's Annual Report 2009-2010, op. cit., pp. 42 – 43 and Avis de Conseil d'Etat, op. cit, p. 3.

⁹⁸ Ibidem.

- a) There is no will of one of the parties.
- b) The only objective is to obtain a residence permit that otherwise he/she could not had obtained.
- c) There is no intimate life between the parties.
- d) The parties are not in a common household. It is important to mention that in article 73 (2) and article 75 (2) of the Law of 29 August 2008, in family reunification the notion of family life and intimate life are considered central elements to grant the family reunification.

Furthermore,

- a) The Administrative Court in a judgment of 12 October 2003⁹⁹ had indicated that for demanding family reunification the applicant must prove the existence of an effective and stable family life, characterized by real and very close links that existed before entering the territory or that where developed in it¹⁰⁰.
- b) There cannot be a valid marriage if the parties where not present at the moment of the marriage (proxy marriage)¹⁰¹.
- c) Finally, the bill of law 5908 mentions that the civil registrar officer can seize the public prosecutor on basis of serious indicators (that are not defined in the text) of the intentions of the parties, presuming the existence of a marriage of convenience.

If the family reunification is applied by the third country national in a case of a marriage where the Directorate of Immigration has doubts, the burden of proof shifts and it is up to the applicant to prove that the marriage is not a marriage of convenience.

However, if the residence permit had already been granted and there are doubts about the validity of the marriage at the moment of the renewal the burden of proof shifts and it is up to the authorities to prove that the marriage is a marriage of convenience¹⁰².

⁹⁹ Cited by the First instance Administrative Court, 2nd Chamber, Judgment 26916 of 10 march 2011 « S'il est de principe, en droit international, que les Etats ont le pouvoir souverain de contrôler l'entrée, le séjour et l'éloignement des étrangers, il n'en reste pas moins que les Etats qui ont ratifié la CEDH ont accepté de limiter le libre exercice de cette prérogative dans la mesure des dispositions de cette même convention. Dans ce contexte, l'étendue de l'obligation des Etats contractants d'admettre des non-nationaux sur leur territoire dépend de la situation concrète des intéressés mise en balance avec le droit des Etats à contrôler l'immigration.

Il convient dans ce contexte de préciser encore que l'Article 8 CEDH ne confère pas directement aux étrangers un droit de séjour dans un pays précis. Il faut au contraire que l'intéressé puisse invoquer l'existence d'une vie familiale effective et stable, caractérisée par des relations réelles et suffisamment étroites, préexistantes à l'entrée sur le territoire national ou créées sur ledit territoire, le but du regroupement familial étant de reconstituer l'unité familiale, avec l'impossibilité corrélative pour les intéressés de s'installer et de mener une vie familiale normale dans un autre pays. »

¹⁰⁰ This position was reproduced by Article 77 (1) of the Law of 29 August 2008.

¹⁰¹ See judgment of the First instance administrative court, 2nd Chamber, n° 26916 of 10 march 2011.

www.ja.etat.lu/26916.doc.

¹⁰² See Case n° 15844.

False Declarations of Parenthood

Luxembourgish nationality law and the Civil Code allow the legal acknowledgement of paternity by a formal act as it was mentioned in section 2.2. There is a legal presumption in favour of the act and the best interest of the child will make that the burden of proof will fall on the Public prosecutor office and the Directorate of Immigration or any interested person that has legal standing¹⁰³ that wants to object to the recognition¹⁰⁴. It is important to mention that the public prosecutor can proceed if the evidence is such that make the recognition implausible even if the mother does not object.

In this case the issue will be resolved by the court and in case that the action prospers the recognition will be annulled. In this case, the court can order a DNA test from the parties involved. In any case the superior interest of the child will prevail.

Once that the recognition is annulled and if the party that had made the recognition, had obtained a residence permit through family reunification the Directorate of Immigration in accordance with article 75 of the Law of 29 August 2008, can revoke it or not renew it and can expel the third country national from the country.

3.6. National authorities responsible for detecting misuse

Marriages of Convenience

The national authorities that can detect any misuse are the civil registrar officer, the Directorate of Immigration and the public prosecutor (this one in accordance with article 24 of the Criminal Procedural Code).

The bill of law n° 5908 plans to extend the intervention of the public prosecutor before the wedding take place. The public prosecutor can suspend the celebration of the marriage or can oppose it. Also, it gives the civil registrar officer a new role that can make preliminary interviews with the contracting parties and he can seize the prosecutor in case there are serious indicators (prima facie evidence) that is a marriage of convenience. The problem is that the law does not define or list what are those indicators.

When the marriage has only been concluded in order to allow the spouse to enter into and reside in Luxembourg, articles 25 and 75 grant the Minister of Immigration the power to refuse the spouse the authorisation of stay and the residence permit. Furthermore, this authority can revoke the spouse's residence permit (if he/she is a third-country national), or refuse to renew it or, if relevant, refuse to grant a residence permit¹⁰⁵.

¹⁰³ Article 339 of the Civil Code.

¹⁰⁴ See also Cour de Cassation, 9 janvier 1907, 9, 150 et du 27 octobre 1954, 16, 228.

¹⁰⁵ International Commission on Civil Status, "Bogus marriages: A study on marriages of convenience within ICCS member states, Strasbourg, 2010, p. 12. See also Conseil de Etat, Avis sur le projet de loi ayant pour objet

False Declarations of Parenthood

The national authorities that are responsible for detecting such misuses are the public prosecutor office by the mandate given to the institution by article 24 of the Criminal Procedure Code (monopoly of the public action) and as guardian of public order¹⁰⁶.

3.7. National action against those misusing

Marriages of Convenience

There are no specifically criminal or civil sanctions for marriages of convenience and there is no legal framework for prosecuting or prohibiting them. The only possibility of prosecuting this kind of cases will be using generic fraud offenses but this is probably highly unlikely because the “moral element” base of the fraud is not defined by law. In general, the only possibilities for annulment of a marriage are the ones established by articles 146, 180 and 184 of the Civil Code above mentioned¹⁰⁷. That is the reason the government is promoting the bill of law n° 5908, in order to introduce civil and penal sanctions.

However, “penal sanctions relating to false documents and their use (Art.193 to 209-1 of the Penal Code) are likely to apply where they are relevant¹⁰⁸.”

In the administrative field, in case that the authorities detect a misuse of family reunification the Directorate of Immigration is entitled to revoke the residence permit or to reject renewal of the residence permit¹⁰⁹ and the person concerned can be subject to 1 month to 2 years of prisons and a fine of 251 to 3000 euros for making false declarations for entering the country or for obtaining a residence or working permit¹¹⁰. Also, if the false declarations are proven the authorities can order third country national to leave the country and he/she can be detained in a holding facility in preparation for it¹¹¹.

de lutter contre les mariages et partenariats forcés ou de complaisance ainsi que de modifier et compléter certaines dispositions du Code civil, du Nouveau code de procédure civile, du Code pénal, n° 5908/03, p. 2.

¹⁰⁶ Avis du Conseil d'Etat, op. cit., p. 7.

¹⁰⁷ , Avis du Conseil d'Etat, p. 26.

¹⁰⁸ See ICSS, « Bogus Marriages », op.cit., p. 46.

¹⁰⁹ Articles 25, 31 and 77 of the Law of 29 August 2008.

¹¹⁰ Article 141 of the Law of 29 August 2008.

¹¹¹ Articles 100 c, 101 (1) 4, 109, 111 and 120 of the Law of 29 August 2008.

False Declarations of Parenthood

In this case there can be administrative and civil sanctions (see above).

3.8. Right to appeal the decisions

Marriages of Convenience

In the administrative procedure to revoke or to not renew the residence permit the person accused of abusing/misusing family reunification is entitled to appeal the decision of the Directorate of Immigration to the First instance Administrative Court according to article 1 to 4 and 16 of the Law of 21 June 1999¹¹². If he/she receives a negative decision by the First instance Administrative Court he/she can appeal to the Administrative Court.

False Declarations of Parenthood

See above.

3.9. Transnational cooperation

Marriages of Convenience:

There are no examples of trans-national cooperation.

False Declarations of Parenthood:

See above.

3.10. Reasons and motivations

Marriages of Convenience

The bill of law n° 5908 mentions some reasons to consider a marriage of convenience : when the marriage is contracted only for migration purposes or for professional, social, fiscal or inheritance purposes¹¹³.

¹¹² <http://www.legilux.public.lu/leg/a/archives/1999/0098/a098.pdf#page=2>.

¹¹³ Bill of law n° 5908/00, op. cit., p. 6.

In general terms, there are no studies over the reasons or motivations of marriages of convenience or false declarations of parenthood.

In Luxembourg as the ICCS noted in its study “Bogus Marriages” that “...it seem that a certain number of asylum seekers have married a Luxembourg or European Community national with the sole aim of obtaining a residence permit.”¹¹⁴

One of the reasons that the authorities are worried is because since the Law of 29 August 2008 came into force, the requirements to obtain a resident permit and to have access to the labour market have become more difficult for third country nationals. The national policy is to promote the migration of high skilled workers but the “normal” salaried worker has to pass the labour market test¹¹⁵ before entering the country. The government policy is reflected in the recent transposition of the Blue Card Directive by Law of 8 December 2011¹¹⁶ and the promotion to attract researchers¹¹⁷. Less qualified or low qualified workers have almost no possibilities to enter legally into the country.

The absence of plausible legal migration channels can have as consequence that migrants will use other channels or ways: the asylum procedure or family reunification.

It is important to mention that irregular migrants have very few changes to regularise their situation in Luxembourg¹¹⁸.

The only possibility where the government cannot forbid the entrance and residency on the territory is in cases of family reunification of third country nationals according to Articles 68 to 77 of the Law of 29 August 2008 that transposed Directive 2003/86/CE and the decision of First Instance Administrative Court n° 23254a of 17 December 2008¹¹⁹ applying Directive 2004/38/CE.

¹¹⁴ ICCS, « Bogus Marriages », op. cit., p. 7.

¹¹⁵ See EMN-NCP-LU, « La Force de l’emploi intérieur et la politique migratoire », Luxembourg, Octobre 2011, pp. 51 – 53. http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do;jsessionid=B510121617C9299CB3B811D84722606D?entryTitle=03_Satisfying%20LABOUR%20DEMAND%20through%20migration and EMN-NCP-LU « Visa policy as a migration channel », Luxembourg, Octobre 2011, pp. 53- 55 http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do;jsessionid=B510121617C9299CB3B811D84722606D?entryTitle=02_VISA%20POLICY%20as%20a%20Migration%20Channel.

¹¹⁶ Published in the Mémorial A-19 of 3 February 2012.

http://chd.lu/wps/PA_1_084AIVIMRA06I4327I10000000/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/184/004/108033.pdf.

¹¹⁷ EMN-NCP-LU, « La Force de l’emploi intérieur et la politique migratoire », Luxembourg, Octobre 2011, pp.36, 54 – 55.

¹¹⁸ EMN-NCP-LU, « Les mesures pratiques mises en œuvre afin de réduire la migration irrégulière », Luxembourg, December 2011, pp. 81 – 83.

¹¹⁹ www.ja.etat.lu/23254a.doc .

False Declarations of Parenthood

There are no studies on the subject but the circumstances that we can consider are the same as the one mentioned above for the marriages of convenience (avoid expulsion, obtaining a residence permit). Also, with the Zambrano case (C-34/09) normally they can have direct access to the labour market without having to pass the labour market test and the one year residence period. However, with the restrictions that the Directorate of Immigration has begun to establish to grant a residence permit on these cases (see Section 2.4), it is important to wait the outcome of the prejudicial question made by the Administrative Court to the European Court of Justice in the judgment n° 29435C of 16 February 2012.

4. Available Statistics, data sources and trends

4.1. General context

Marriages of Convenience

There is no data on marriage of convenience. The civil registrar office in Luxembourg City mentioned that there are no statistics on marriages of convenience, especially because the civil registrar office does not have legal standing to stop a wedding if he/she is suspicious on the intentions of the parties. Nevertheless, he insists that this is not a regular phenomenon and at the most there are 4 to 6 marriages per year that can trigger suspicions as marriages of convenience¹²⁰.

False Declarations of Parenthood

There is no data on false declaration of parenthood.

4.2. Specific indicators of the intensity of the issue

Marriages of Convenience

There are no statistics or estimations on this phenomenon. The public prosecutor office had confirmed that there are to date no cases treated on this matter¹²¹.

¹²⁰ Interview with the Civil registrar Office of Luxembourg City. Luxembourg City is the biggest city in the country and where most of the marriages in the country take place.

¹²¹ E-mail sent by the public prosecutor Office on 23 January 2012.

It is important to notice that in the bill of law n° 5908 presented by former Minister of Justice, M. Luc. Frieden on 29 August 2008, in the exposition of motives it states: “In the Grand-Duchy, simulated marriages constitute a regular phenomenon. In its actual state, Luxembourgish law does not allow to fight efficiently against simulated marriages”¹²².

This affirmation generated a parliamentary question n° 3113 of 3 February 2009 from Claude Meisch, member of the Luxembourgish Parliament to Minister Frieden asking if he can provide the statistics of the sham marriages. Mr. Frieden answered to the question on 2 March 2009 : “Because of the nature of things, evidently, there are not statistics about these marriages. The Minister does not have any knowledge of a judiciary annulation of that kind of marriages.

According to the concerned authorities, especially with some municipal authorities, the phenomenon of marriages of convenience however exists in Luxembourg, but the legal frame does not allow to efficiently fighting against this phenomenon.”¹²³

However, the civil registrar office of Luxembourg city mentioned that this is a marginal phenomenon to the extent that they have suspicion on 4 to 6 marriages per year that can be considered as marriages of convenience.

False Declarations of Parenthood

There is no data on false declaration of parenthood.

4.2.1. Characteristics of those involved

Marriages of Convenience: Not available.

False Declarations of Parenthood: Not available.

4.2.2. Location

Marriages of Convenience: Not available.

False Declarations of Parenthood: Not available.

¹²² Projet de loi n°5908 du 29 août 2008, p. 6. « Au Grand-Duché, les mariages simulés constituent un phénomène régulier. Dans son état actuel le droit luxembourgeois ne permet pas de lutter efficacement contre les mariages simulés ».

¹²³ « Par la nature de choses, il n'existe évidemment pas de statistiques sur lesdits mariages. Le ministre n'a pas connaissance d'une annulation judiciaire d'un tel mariage. »

See http://www.dp.lu/docs/political_actions/20090203_3113_r.pdf; Réponse ASTI / ALOS-LDH –Luxembourg livre vert regroupement familial, 17 February 2012, pp 5-6. <http://www.asti.lu/2012/02/17/reponse-commune-de-asti-et-alos-ldh-au-livre-vert-de-la-commission-europeenne-concernant-le-regroupement-familial>

5. Conclusions

Marriages of Convenience

Marriages of convenience are a phenomenon that is not exclusive to migration purposes. There are marriages of convenience for other reasons as professional, social, fiscal and inheritance purposes. However, through the European Union it had become a possibility for third country nationals to obtain residence permits in countries that otherwise they will not have the right because these persons are not qualified enough to enter legally on the labour market. The European Court of Human Rights recognized the right of the States to fight marriages of convenience but at the same time it maintains its proportionality rule that this power of the state cannot become an excessive obstacle to exercise the right of marriage and in consequence family life as foreseen by Articles 8 and 12 of the European Conventions of Human Rights.

In Luxembourg, there has been a discussion that marriages of convenience are being used to allow the entrance of foreigner by the procedure of family reunification¹²⁴. As the ICCS mentioned in 2010 there was the suspicion that there had been an increase of marriages of convenience between Luxembourgish and EU national with asylum seekers to allow them to obtain a residence permit. Nevertheless, even if the government considers that marriages of convenience are a regular phenomenon there are not statistics and no legal cases before the courts, to the point that the Consultative Commission on Human Rights challenged this argument.

The actual legal framework is considered insufficient by the authorities to fight the marriages of convenience. However, articles 25 and 75 of the Law of 29 August 2008 foresee the possibility to revoke or deny renewal in case that the authorities prove that the third country national has contracted a marriage for obtaining a residence permit. Also the third country national will be ordered to leave the country and he/she can be retained in a holding facility to execute this order.

The government introduced a bill of law to fight the marriages of convenience and forced marriages giving the possibility to the civil registrar officer to contest the validity of foreign documents, to make a preliminary interview with the contracting parties and in case of suspicions, to seize the public prosecutor which can suspend the marriage. Also, the bill of law intends to introduce the possibility that the public prosecutor not only suspend the celebration of the marriage but also allows him to have legal standing for demanding the nullity of the marriage. The project introduces a new procedure in the New Civil Procedural

¹²⁴ See avis du Conseil d'Etat, document No. 5908/03, op. cit., p. 6 and ICCS, « Bogus Marriages », op. cit., p. 7.

Code to allow the parties to contest the opposition of the public prosecutor but also introduces three criminal offenses to sanction the marriages of convenience and the forced marriages.

However, in the three legal opinions that have been produced to the bill of law¹²⁵ there is the fear that this project can grant to the civil registrar officer such a discretionary power to the civil registrar officer that will allow him to use it to oppose in a systematically manner every time he/she is confronted with mixed marriages.

Also, there is the impression that the bill of law tends to stigmatise third country nationals leaving the EU nationals and Luxembourgish nationals out of the scope of the project.

The project does not define the concept of marriage of convenience and does not establish a list of conduct that can be considered by the civil registrar officer as suspicious to seize the public prosecutor, allowing the possibility of future abuse of the procedure.

It is important to mention that even if the bill of law tends to fight against all types of marriages of convenience the modification of the law only focuses on the marriages of convenience for migration purposes, creating a risk of discrimination with regards to third country nationals but also between EU and Luxembourgish nationals.

Another weakness of the bill of law is its non-compatible not only with European Convention of Human Rights but with the jurisprudence of the European Court of Human Rights and the eventual conflict with the Convention of The Hague of 1978 where Luxembourg is a signatory member. These are the points that are going to be discussed in the following months by the Committee of Legal Affairs of the Parliament.

False Declarations of Parenthood

In Luxembourg, false declarations of parenthood have been treated neither by the law nor by the jurisprudence. The debate on the subject has been inexistant, notably given the that parenthood is a formal legal act that is not subject to medical examination or DNA testing. As in the case of Marriages of Convenience, nor statistics neither case law exist on the subject.

The Law of Nationality foresees that the nationality is acquired by a new born by the “right of blood” (jus sanguinis) and not by the “right of birthplace”. However, since the Zambrano decision of the European Court of Justice, the possibility that an irregularly staying third country national can obtain a residence permit and thus immediate access to the labour market has created the impression that this system allows irregularly staying third country nationals to regularise their situation. This is why in his legal opinion the Council of State regrets that in the criminal offenses foreseen by bill of law n° 5908 the authors do not take into account also the false acknowledgement of paternity.

¹²⁵ National Council for Foreigners, Consultative Commission of Human Rights and Council of State.

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The objective of the European Migration Network (EMN) is to provide up-to-date, objective, reliable and comparable information on migration and asylum to Community Institutions, Member States' authorities and institutions, and the general public, with a view to supporting policy-making in the European Union in these areas.

