23 European Dilemmas of Family Reunification

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23.1 Introduction

Since the amendments brought about by the Amsterdam Treaty, the EU can legislate on immigration. The very first rules adopted on the basis of this extended EU competence ('common immigration policy') concerned family reunification.[1] This Directive regulates the ways and means for non-EU citizens already established in the territory of the European Union ('sponsors') to (re)unite with their family members who are equally non-EU citizens.

The Directive has been heavily criticised by academics and civil society who consider it too vague and toothless with its many 'may clauses', claiming that it leaves too much discretion in the hands of the EU Member States in designing their respective national family reunification policies.

While these arguments may have some merit, it must also be recognized that the Directive goes way beyond any pre-existing counterpart; in particular the Strasbourg human rights instrument, 'the right to family life' enshrined in Article 8 of the European Convention of Human rights. There, the underlying principle according to the Strasbourg European Court of Human Rights is that 'a State has the right to control the entry of non-nationals into its territory', therefore 'Article 8 cannot be considered to impose on a State a general obligation to respect the choice (of residence) by married couples and to authorise family reunion in its territory.'

23.2 Family Reunification under Union Law

Under Strasbourg logic, the balance between the human right to family life on the one hand, and the national competence to manage migration flows on the other, is drawn on a case by case basis and decided on the basis of numerous factors (e.g., rupture of family life, the social ties in the countries of origin and destination, considerations of public order

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1 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. OJ L 251, 3 October 2003, pp. 12-18.

as well as factors of immigration control, such as earlier breaches of immigration law). The EU context is substantially different. EU law draws a direct correlation between the right to family life on the one hand, and family reunification as an immigration (admission) procedure to a Member State on the other, by stating that 'family reunification is a necessary way of making family life possible'. Therefore, the Directive actually recognises the existence of a right to family reunification. The relevant case-law of the European Court of Justice reinforces this right,[2] stating that the Directive imposes a precise positive obligation on Member States, requiring them in cases determined by the Directive to authorise family reunification of certain members of the sponsor's family.

Why is it then that many still consider the Directive to be vague and controversial?

The answer is simple: the right of family reunification is certainly not without limits, but to be exercised with certain conditions under the Directive. These conditions are: accommodation, sickness insurance, stable and regular resources, integration measures, waiting period, minimum age and the fee of the application procedure. These are optional conditions Member States are free to set, and the limits to these conditions are not clearly drawn by the Directive. As a result, the extent of these conditions lies at the heart of European family reunification policy.

One condition was not listed: quotas, as they are not allowed because of the basic concept of recognising a right to family reunification as opposed to other parts of the world (New Zealand, Canada etc.) where quotas are allowed. Article 79(5) of the EU Treaty guarantees the Member State's right to determine the volumes of admission of non-EU citizens seeking work, but Member States cannot determine the volumes of admission of these citizens' family members (spouse and children) and must admit them if some 'basic conditions' (accommodation, sickness insurance, stable and regular resources, integration measures, waiting period and grounds of public order, security and health) are met.

Soon after the adoption of the Directive, discussions started at Member States level to find ways to 'manage more effectively' (in the absence of quotas, but in view of the effects of the economic crisis, and a more negative public perception) the inflow of migrants under family reunification. Some Member States introduced specific measures to put in place more control and filtering (Germany and the Netherlands). France, under its Presidency in 2008 attempted to bring this issue back to the European level. A legally non-binding document, the European Pact on Immigration and Asylum was endorsed by the Council which calls 'for a more effective regulation of family migration taking into consideration reception capacities of Member States'.

2 Case 540/03, *European Parliament v. Council of the European Union* [2006] ECR I-05769.

Member States cannot be 'blamed'. The provisions of the Directive as far as the conditions are concerned are vague, therefore, certain Member States sought to stretch the limits with the aim of maintaining some national control over family migration.

What happened at EU level? The Stockholm Programme, the last multiannual programme on justice, freedom and security for the period 2010-2014, still called upon the Commission to 'review, where necessary, the Family Reunification Directive, taking into account the importance of integration measures.'

In the meantime, the legal landscape had changed. With the entry into force of the Lisbon Treaty, legal migration, including family migration, became an area covered by co-decision (with a more powerful European Parliament) and the decision-making procedure in the Council also changed from unanimity to qualified majority. These two factors were also essential in respect of the mandate to review the Directive. A deadlock could be predicted between a pro-human rights European Parliament and the Council striving for more margin of manoeuvre. And, in light of the qualified majority voting in the Council, a split among the Member States with very different family migration approaches was also to be expected.

Under the circumstances, the Commission initiated an EU level debate in the form of a Green paper and a subsequent public hearing in 2012. The outcome confirmed that neither the Member States (except for the Netherlands), nor the NGOs/social partners/academia wanted to change the existing legal rules. Instead, some asked for a more determined implementation policy. As a follow-up, non-binding guidelines were recently introduced in 3 April 2014 by the European Commission in further detail with the aim of helping to interpret the provisions of the Directive.

Therefore it has been, and still is, up to the European Court of Justice to provide additional legal clarity to some of the basic questions of European family reunification rules. To date, there are only a small number of such cases, mainly preliminary rulings.

As analysed above, not being allowed to set quotas, other ways of keeping control on the admission of family members was sought of in some Member States. The European Court of Justice however seems to clearly set the limit to these attempts, delimiting Member States' possibilities in this regard:

23.2.1 Fees

Starting with a procedural aspect, fees are normally required for processing an application. Fees are not regulated specifically in the Directive, therefore, positive law does not guide

the Member States. However in an analogical infringement case[3] initiated by the Commission against the Netherlands in relation to the EU Long-term resident Directive,[4] the European Court of Justice found that in accordance with the general principles of EU law such fees should not be excessive and disproportionate to an extent as to discourage application for EU long-term resident status. This ruling can easily be used as an analogy for family reunification, given that in this context there is a conferred right to family reunification, where excessive fees could create an additional non-admissible condition and therefore an obstacle to the exercise of said right. To give an impression of the magnitude of these fees, it may be mentioned that for example the fees for family reunification were 800 EUR in the Netherlands.

23.2.2 Financial Conditions

A substantive condition, specifically referred to in the Directive is the possibility to require stable and regular financial resources for exercising the right to family reunification. There are some reference points in the Directive, when checking whether these rules (if applied in the Member States) are satisfied, such as minimum national wage and pensions or the number of family members, as well as the absence of a recourse to the social assistance system (Article 7(1)c). A very important preliminary judgment of the European Court of Justice[5] further clarified the above rules and confirmed the principle, that the authorisation of family reunification is the general rule. Therefore, the Member States' possibility to require proof of certain financial means must be applied restrictively way and this margin of manoeuvre must not be used in a manner which undermines the objective of the Directive.

23.2.3 Minimum Age

Another possibility is for Member States to require a minimum age (not more than 21 years), before the family member can join the sponsor: Such a minimum age can be set and applied only in order to ensure better integration and to prevent forced marriages (Article 4(5)). The directive does not, however, specify the point at which the sponsor and his or her spouse must have reached that minimum age limit. There is also a relevant preliminary ruling pending[6] which may clarify this issue based on an Austrian case. In

3 Case C-508/10 *European Commission v. Kingdom of the Netherlands* [2012] not yet published.
4 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23 January 2004, pp. 44-53.
5 Case C-578/08 *Rhimou Chakroun v. Minister van Buitenlandse Zaken* [2010] ECR I-01839.
6 Case C-338/13 *Marjan Noorzia v. Bundesministerin für Inneres* [2014] not yet published.

Austria, the spouse must necessarily have reached the minimum age of 21 at the time the application for family reunification is submitted. In his very recent opinion of 30 April 2014, the Advocate-General found[7] that it is contrary to the general principles and the objective of this provision to require that the minimum age already be reached at the time of the application, in case the age limit will be reached by the time the authorities' decision is adopted. The European Commission, in its guidelines (COM(2014)210), goes even beyond this interpretation and argues for the need for an individual assessment and the possibiliy of making exceptions to the rule, if it is evident from the facts of the case that there is no forced marriage or abuse in the case (e.g.: children in common).

23.3 Language Tests

The most politicised and mediatised optional substantive competence of the Directive is the possibility of the Member States to require third-country nationals to comply with integration measures. These can take place pre-departure, or upon admission. The controversial ones are those applied before admission of the family member.

What are these measures? Typically a language test (such as the one in Germany) or a language test coupled with knowledge on the destination country (such as the one applied in the Netherlands).

NGOs and scholars have questioned the compatibility of these provisions on pre-departure language/country knowledge testing, claiming that these measures do not comply with the general principles of EU law and the main objective of the Directive.

What does the European Commission say?

In its Implementation report on the Directive (COM(2008)610) the Commission already noted that the admissibility of these tests depends on whether they genuinely serve the purpose of facilitating the integration process of family members or used as a filter and whether they respect the principle of proportionality. Their admissibility can be questioned on the basis of the accessibility of such courses or tests, how they are designed and/or organised (test materials, fees, venue, etc.). In its guidelines (COM(2014)210) the Commission goes further, pointing out the choice of word in the Directive, which uses the term 'measure' in Article 7(2) and not the 'condition', which is only allowed in a specific case.[8] This difference of wording implies a difference in interpretation: while integration

7 The Advocate-General's Opinion is not binding on the Court of Justice. It is the role of the Advocates-General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible.

8 Art. 4 – as a stand still clause only – allows Member States to verify for children over twelve years arriving independently of the rest of their families whether they meet a condition for integration.

measures would require the third-country national to make a certain effort to demonstrate the willingness to integrate, such as attending a course, integration conditions would require the third-country national to perform at a certain level, or to achieve a certain result, such as passing an examination or a test. In addition the Commission guidelines argue for a hardship clause to take into account specific individual circumstances (e.g.: lower literacy, inaccessibility of teaching facilities) and make exceptions to the general rule on this basis.

What does the Court say?

The European Court of Justice did not rule on this issue yet. Although two preliminary rulings have been initiated already, the solutions found by the given Member States for the specific cases resulted in the withdrawal of the cases. In the (Dutch) *Imran* case[9] a residence permit was issued at the very last moment right before the court could rule. A similar situation occurred in the (German) *Ayalti* case[10] which was also deleted by the court in 2013.

The *Imran* case was well selected as it duly presented the need for an individual assessment. Bibi Mohammad Imran – an Afghani mother – applied to join her husband in the Netherlands. They have eight children who joined their father in the Netherlands whereas Mrs. Imran was denied entry by the Dutch authorities on the sole grounds of not passing the Dutch civic integration exam, which she took abroad. Other conditions (such as accommodation, stable and regular resources, public health, security etc.) of family reunification have been fulfilled. She provided evidence of her situation; a medical document stating chronic depression and the fact that there is no teaching material in her language. She also insisted on the fact that her children cannot be properly integrated in the Netherlands without her; on the contrary, they needed to be placed under supervision of the state child welfare system due to their threatened social, emotional, cognitive and physical development in the absence of their mother.

In the Netherlands, the national law did foresee some structural exceptions from the obligation to take the exam ('a hardship clause'), but it was rather restrictive, providing for a closed list of exemptions for refugees, minor children below the age of 16, persons who have reached the age 65, those who are permanently unable to pass an integration exam on the ground of physical or mental disability and applicants from certain countries (Suriname, Australia, Canada, US, New Zealand, Japan and South Korea).

However, as mentioned above – at one point, before the European Court's judgment could have been issued – the Netherlands (for unknown reasons, perhaps fearing a non-favourable decision) decided to grant a residence permit to Mrs Imran, thus, the request

9 Case C-155/11 *Mohammed Imran v. Minister van Buitenlandse Zaken* [2011] ECR I-5095.

10 Case C-513/12 *Aslihan Nazli Ayalti v. Federal Republic of Germany.*

for preliminary ruling was withdrawn, and the question on the admissibility and limits of a languages exam remained open.

The possibility of achieving more clarity with the help of the Court has emerged yet again. There is a case currently pending before the European Court of Justice, based on a question from a German court. In this *Dogan* case[11] a family member of a Turkish national has to prove – before entry – that he fulfils the language requirement. Given the fact that he is a Turkish national, the case has two aspects: (a) is the language requirement in compliance with the standstill clauses of the Association Agreement with Turkey, and (b) is the language requirement in compliance with the Family Reunification Directive.

While the Court of Justice Union European has not yet brought its judgment, the Advocate-General's opinion was issued on 30 April 2014. Advocate-General Mengozzi found that the Directive precludes a Member State from making the right of entry to Germany for the spouse conditional on the demonstration of the basic knowledge of the German language in case the national rules do not allow for exemptions on the basis of individual assessment.

It is to yet to be seen, how the case will be adjudicated, however, on the basis of the jurisprudence related to other provisions of the Directive, the following can be said. Article 7(2) of the Directive on family reunification enables Member States to apply an integration test as a requirement to exercise the right to family reunification and be admitted to a Member State on that basis.

However, this possibility of the Member States to introduce such a requirement should be constructed in a way which serves the purpose of facilitating the integration process of family members and fulfils the other obligations set forth under the Directive and the general principles of EU law.

Therefore, provisions regarding the obligation to pass an exam should be applied flexibly and the national authorities should assess the applications on a case-by-case basis. This must be done in accordance with Article 5 of the Directive, taking into account the best interests of minor children, and in accordance with Article 17 of the Directive taking due account of the specificities of each case, in particular the nature of the family relationship. In accordance with the principle of proportionality, the integration measures taken must not be more than what is necessary to achieve their aim, i.e. to facilitate the integration process of family members.

In addition, such integration exams must be constructed in a way that serves the purpose of facilitating the integration process of family members. Decisions on the application for family reunification in relation to passing such a test should take into account whether there are available facilities (translated materials, courses) to prepare for them. Specific individual circumstances (such as proven illiteracy, medical conditions) should also be

11 Case C-138/13 *Naime Dogan v. Federal Republic of Germany* [2014] not yet published.

taken into account. Otherwise these tests can have the effect of preventing family reunification and used as a means of immigration control.

Finally, the exemption of certain nationalities from the obligation to pass such a test should be duly justified[12] demonstrating the relevance of the exemption to the objective (successful integration) in order not to be discriminative on the basis of nationality or indirectly on the basis of race.

23.4 Conclusions

In conclusion, it can be confirmed that the European Court of Justice seems to consequently argue that the possible conditions, requirements to family reunification as stipulated by the Directive cannot be applied in a way which goes against the general principles of EU law, (proportionality, *effet utile* of the Directive) and they should not have an effect which prevents family reunification, used as a means of immigration control serving a certain 'filtering purpose'.

Therefore, in the absence of an alternative control or filtering mechanism, Member States, who wish to cut down on family migration will have the choice to further restrict their economic migration policies, resulting also in less admissions on the basis of family reunification. This choice however can result in structural labour shortages in certain sectors. The other option is to work on the public perception of migration in parallel with stepping up efforts for better integration of migrants living in the Member States.

12 E.g.: the memorandum of information to the Dutch national bill on integration measures explains the exemption of nationals from Western countries as follows: 'because they come from countries which are comparable with European countries, do not result in unwanted and unlimited immigration flows to the Netherlands and significant problems with integration in Dutch society.'