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**The Right to Family Reunification
in Relation to Third Country Nationals within the European Union**

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Abstract: The paper aims to establish the character of the right to family reunification and to bring together all the situations in which a Member State of the European Union is “forced” to assess the application for the family reunification with a third-country national, in accordance with the EU law, both primary and secondary, incident in the case at hand. The family reunification, as the most important form of migration in the European Union, was subject to previous research, research that was conducted only at a sectoral level. Therefore, the “puzzle pieces” must be put together and a “whole picture” conclusion is necessary. It will be submitted that family reunification right, although derives from a fundamental human right – the right for respect of family life, its effects depend majorly on the specific factual and legal situation of the ‘beneficiary’ of such a fundamental right.

Keywords: Directive 2003/86/EC; Directive 2004/38/EC; EU Charter; European Convention on Human Rights

1. Introduction

Family reunification is the most important form of migration as family migration makes up 40-60% of all migrants and because of these numbers, family reunification is a major political issue (Lawson, 2007). It has also become a major legal one when the Council of Ministers (from now on referred as ‘the Council’) adopted Directive 2003/86/EC (‘the Family Reunification Directive’) that partially harmonized this policy field, offering to third country nationals Community residing rights in their own capacity for the first time in history. In addition, as it concerns the rights for family reunification of third country nationals which are also family members of an EU citizen, their situation was covered by the specific provisions of Directive 2004/38/EC (‘the Citizens’ Directive’). Therefore, already two instruments were put in place to tackle the issue of family reunification in cases involving third-country nationals.

In fact, due to the fact that immigration goes to the heart of sovereignty, the rules that govern such a sensible field are split not in two but in three major categories given by the status of the person applying for family reunification with a third-country national (i.e. the sponsor of the third-country national). There are situations when the sponsor is a EU citizen, a national of a country that has concluded an Association or Sectoral Agreement with the European Union – the so-called privileged third-country national (i.e. Turkish or Swiss national) or a legally residing third-country national (i.e. American).

As the purpose of this paper is two faced: on one side, to analyse and underline the right to family reunification of a third-country national sponsor and on the other side, to compare it with the right to family reunification of an EU sponsor, the first step is the analysis in substance of such a reunification right.

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2. The Family Reunification Right

2.1. Proposals and Principles

It all began at the European Council in Vienna in December 1998 where it was established as a priority the need to legislate common provisions on family reunification. A second beginning was on the cards when the Tampere Council was met (on 15 and 16 October 1999). There, it was decided to assimilate the status of third-country nationals as far as possible with those of EU citizens.

This is why, in order to answer to this political will, the Commission has drafted the first proposal of Family Reunification Directive in December 1999 while it has presented its third proposal in May 2002. This three-years time gap was due to, on one hand, the changes proposed by the European Parliament meant at enhancing the Directive's provisions while on the other hand, there were also the proposals of the Council which obliged the Commission to opt for a slower harmonization of this sensitive national immigration topic (Weber & Walter, 2003).

Above all, two principles underpinned its drafting. Firstly, the principle of immigration of Family Members which means that family members have the right to immigrate because of their personal relationship with the migrant worker. This right to immigrate derives from the right to preserve family unit as an answer to the right to protection of family life, a fundamental human right respected also by the Community law (now EU law). Secondly, the integration principle based on the demand of the Tampere Council for "a common approach to ensure the integration into our societies of those third-country nationals who are lawfully residents in the Union" and those should receive "rights and obligations comparable to those of EU citizens" (as also stated at the Tampere European Council, 15-16 October 1999, see conclusion no. 18, Presidency Conclusions). The reference to the rights of EU citizens establishes the upper limit on how family reunification right can be regulated while the minimum list is established by international law standards, namely article 8 ECHR (Weber & Walter, 2003).

Although one might be tempted to affirm that due to the recent transfer of power (since the 1997/1999 Amsterdam amendments to the EC Treaty) to regulate family reunification to the Community we are in the presence of a blank canvas, this was not the case as numerous international obligations of the Member State concerning the respect for family life had to be taken into account (Oosterom-Staple, 2007). The most obvious one is article 8 ECHR in relation to the right to family life and Article 12 ECHR in relation to the right to marry. Both ECHR provisions apply in Member States and have to be respected by the Community (see ex-Article 6(2) EU Treaty). This reflects the Court's previous decisions that the right to respect for family life (within the meaning of Art.8 ECHR) is a general principle of Community law (see Case C-60/00, Carpenter [2002] E.C.R I-6279, paragraph 41). Furthermore, the expression of Article 8 ECHR is to be found in article 7 of the EU Charter, part of the EU primary law. Such rights had therefore to be respected by the Family Reunification Directive, as a secondary EU legislation that must always be in accordance with EU primary law.

However, the Parliament was of the opinion that this was not the case as the provisions of the Directive were not in accordance with the case law of the ECtHR and other international conventions in relation to the rights of the child (see Case C 540/03 Parliament v Council [2006] ECR I-5769). Basically, three provisions were at stake: a) the possibility open to Member States of imposing integration measures on children over 12 years of age; b) the option of admitting for reunification only children below the age of 15 - as opposed to 21 in the case of EU citizens' children; and c) the power of making immigrants wait for up to three years before being allowed to claim reunification for members of their family. The ECJ's answer came after it examined the scope of the right to family reunification by citing the relevant case-law of the Strasbourg Court (see case C 540/03 Parliament v Council [2006] ECR I-5769 paragraphs 55 et seq).

The *Sen v the Netherlands* and the *Rodrigues da Silva and Hoogkamer v the Netherlands* were the two cases from which the ECJ chose to construct its understanding of the right to family reunification. In *Sen*, the European Court of Human Rights ('ECtHR' or 'Strasbourg Court') recognized for a 9 years

old third-country national, the right to reunify with her family in Netherlands. Nonetheless, by deciding to do so, a major role was played by the specific circumstances of the case (see case *Sen v the Netherlands*, no. 31465/96, paragraph 40). In *Rodrigues da Silva and Hoogkamers*, the Strasbourg Court enumerated the factors that are to be taken into account when the right to family is at stake. Factors such as: the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion or whether the applicant knew that the persistence of that family life within the host State would from the outset be precarious (see ECtHR judgement of 31 January 2006, *Rodrigues da Silva and Hoogkamer v. The Netherlands*, no. 50435/99 and ECtHR judgment of 5 September 2000, *Solomon v. the Netherlands*, no. 44328/98). In both of these cases, one child was left in the State of origin – a third-country, while other children were born in the host Member State, namely Netherlands.

Although all this lengthy reference was made, the European Court of Justice ('ECJ' or 'the Luxembourg Court') concluded by passing the obligation to the national court to ensure the protection of the right to family reunification of legally residing third-country national in accordance with the ECHR ('Convention'). This is precisely why the Luxembourg Court, when the subject of "waiting periods" was brought, established that there was no breach as it was also not held unlawful by the competent courts, including ECtHR, and because it is to be considered a classical element of an immigration policy.

Such a ruling entitled legal scholars to question the added value of a Directive which, while containing ambivalent rules that leave a great amount of discretion to Member States, merely put into black-letter-law obligations which are already binding on Member States by virtue of the ECHR and to also conclude that the protection is not as absolute as it is in the internal market field and is, in a way, more decentralised, as it relies, to a large extent, on Member States' authorities (Hatzopoulos, 2008).

2.2. The Family Reunification as an Autonomous Fundamental EU Right for Third-country Nationals?

Although the Parliament did not win the case in front of the ECJ (after the Treaty of Lisbon, Court of Justice or 'CJ'), the Family Reunification case was important at least for one reason: it offered the European Court in Luxembourg the possibility to clarify some important aspects in relation to the family reunification right contained therein. The Court of Justice confirmed that the Directive grants a subjective right to family reunification to individuals and sets clear limits on the margin of appreciation of the Member States when making individual decisions concerning family reunification (Groenendijk et al., 2007).

The question that arises was if this subjective right to family reunification can it be considered a fundamental right as well? As an answer, under article 8 ECHR, it can be argued that the right to family contained therein does not imply also a right to family reunification. This is so in the light of *Abdulaziz and Others v the United Kingdom* where it was maintained that there is no general imposition on a State to respect the choice of married couples of the country of their matrimonial residence and to authorize family reunion in its territory (see ECtHR, judgment of 28 of May 1985, *Abdulaziz and Others v the United Kingdom*, no. 9214/80; 9473/81 ; 9474/81, paragraph 68). Thus, the right to family does not guarantee a right to choose the most suitable place to develop family life and consequently no right to reunify with the family in the host Member State for third-country nationals.

On the other hand, whenever there is a rule, there is also an exception. In this case, the exception is to be found in *Gül v Switzerland* (judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I], p. 174) and *Sen v the Netherlands* (ECtHR, judgement of 21 December 2001, no. 31465/96)

where there is a strong autonomous right of the child that is also involved in the residence rights equation. In such cases, the Strasbourg Court took a more balanced decision by taking into account the position of the family members who had already settled in the host country. Usually, in this exceptional cases, there was the danger of expulsion of one of the family members at the detriment of the family members that were still children. Another situation is the one existing in *Tuquabo –Tekle v the Netherlands* case (ECrHR, judgement of 1 December 2005, no. 60665/00). It seems that an important factor in persuading the Strasbourg Court to give a ruling in favour of Mrs Tuquabo-Tekle was the fact that the family members, those living in a Member State, had already other children who were born in that Member State and thus, the return to the country of origin would have meant the need of their other children to adapt and integrate in a different cultural and linguistic environment. Thus, the ECrHR concluded that there was a major impediment against them returning back to their country of origin and the only way to enjoy family life would have been for the other children to be allowed to reunite with their family.

One difference between the *Sen v the Netherlands* and the *Tuquabo-Tekle v the Netherlands* case is that the child that needed to be reunited was, in the first case, 9 years old while in the latter case, 15. This is highly relevant when we are to look at the provision of the Family Reunification Directive which stipulates that a Member State may derogate from the general principles set out in the Directive where the child is 15 or older (see Article 4(6) of Directive 2003/86/EC, OJ 2003 L 251, p. 12).

It must also be underlined that even if such right was to have an autonomous existence, an individual right cannot exist if there is to be a case-by-case approach when assessing the core characteristics of such a right. This seems to be also the problem when looking at the Strasbourg Court's case law. There, the ECrHR uses the case-by-case approach in order to ensure that a national authority has ensured a fair balance between the interest of the family reunification applicants and the need to control immigration (see *Tuquabo-Tekle v the Netherlands*, no. 60665/00, paragraph 44). This is the consequence of Article 8(2) and of the fact that this right is not to be absolute. In many of the cases 'this proves to be a lottery for national authorities and a source of embarrassment for the Court.' (see ECrHR, judgment of 24 April 1996 *Boughnemi v France*, no 22070/93).

This case-by-case approach cannot be transferred also at the EU level, as the Court of Justice in Luxembourg still does not have the competence to directly apply Article 8 ECHR. However, the Court of Justice (referred further on as 'CJ') has the competence to interpret article 7 of the EU Charter, which is a reflection of Article 8 ECHR. This would allow the CJ to construct its own meaning of family reunification while taking inspiration from the common traditions existing in the Member States and basing its judgment on the provisions contained in the EU Charter. It can have the power to transform the exception in the rule and vice-versa. On the other hand, the CJ is not competent to rule on the basis of detailed facts. Thus, it would not have the possibility, like the ECrHR to always make sure that there is a fair balance between the interests at stake. This would be the duty of the national courts. Nevertheless, what the CJ can do is to ensure a broad interpretation of the Article 7 of the Charter and then request the national courts to respect that broad interpretation which favors the right to family reunification. The power of interpretation hold by the CJ is the subject of our next section. We plan to have a look at the case law on matters concerning the rights to family reunification which affects the same third country national but when having as a sponsor a different category of lawfully residing citizens within a EU Member State.

3. Same Third-country National – Different Sponsor – Different Outcome

3.1. Third-country National ('TCN') with a EU Sponsor that has Exercised its Right to Free Movement within the EU - the Metock and Others Case

When the sponsor is an EU citizen living in a host EU Member State, the need to protect the family life on such a sponsor seems to be higher than the need to protect the family life of a third country national's sponsor as it can be concluded from the CJ ruling in *Metock and Others v Minister for Justice, Equality and Law Reform* case (Cambien, 2011). Here, the Luxembourg court also overruled

the Akrich legal precedent by creating a right to family reunification argued to be absolute. This is mainly for two reasons. Firstly, the fact that a TCN was unlawful resident before applying for a residence is of no importance, leaving a Member State without any possibility to deny their entrance on its territory. Secondly, the date of the marriage is of no importance as well. The ruling in *Metock and Others* was underpinned by the need to ensure that no obstacle is to be created to the exercise of the free movement rights because of a potential disruption to family life of the European Union sponsor.

The CJ, using the prohibition of reverse discrimination of an EU citizen compared to a legally residing third-country national, decided that any other conclusion than the one reached would amount to third-country nationals being better treated in EU more favourably than EU citizens as far as the right to family reunification is concerned. Family members of TCNs residing lawfully in a Member State could gain entry on the basis of the Family Reunification Directive but TCN spouses of Union citizens might still be refused entry based on the Citizens' Directive (see C-127/08, *Metock and Others* [2008] ECR I 6241, paragraph 69).

Of most interest in this regard is the Court's confirmation that the proposition of disruption to family life applies, in the first instance, just as strongly, even if the family was not in existence at the time of the Union citizen's move to the Member State (the consequence of Case C 291/05 *Eind* [2007] ECR I 0000) and, secondly, regardless of how the TCN entered the Member State, namely lawfully or unlawfully.

This can be compared with the situation of a third-country national which has as sponsor a lawfully residing third-country national. In this situation, the Family Reunification Directive precisely allows for family reunification irrespective of the time in which the family was formed. Such a view was also supported in *Chakroun v Minister van Buitenlandse Zaken* where it was established that a Member State cannot impose further legislation which draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State (See Case C-578/08 *Chakroun* [2010] ECR I-1839 paragraph 64).

3.2. EU sponsor and Purely Internal Situation Case – Ruiz Zambrano v. McCarthy case – the Side-effect of Children

The limit to the *Metock* ruling was that it did not apply to purely internal situations, namely when the EU citizen sponsor did not exercise his right to free movement (see *Metock and Others*, paras. 77-9). This limit was nuanced in the *Ruiz Zambrano v Office national de l'emploi (ONEM)* case. Here, the children – but not the parents – are the EU sponsor, a sponsor that did not exercise his free movement right but nevertheless, the third country nationals, parents of an EU citizen-child enjoy a right for residence in order to render the children's citizenship status effective on the basis of primary EU law and not secondary legislation such as the Citizens Directive (Hailbronner&Thym, 2011). In addition, in the case of an EU child, the right to family enshrined in Article 7 of the Charter must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in Article 24(2) of that Charter, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3) of the Charter (see, to that effect, Case C 540/03 *Parliament v Council* [2006] ECR I 5769, paragraph 58).

The reverse can be found in *McCarthy v Secretary of State for the Home Department* judgement (see case C 434/09 *McCarthy* [2011] ECR I 0000), where the Luxembourg Court's third chamber denied the right to residence of family members applying for family reunification in which the sponsor was an EU citizen-adult without having any intra-EU movement. The situation was purely internal and therefore had to be regulated by the national immigration rules of that Member State.

3.3.A Third-country National Sponsor

Based on the Family Reunification Directive, third-country nationals, who are family members of another but lawfully residing TCN, can enter the European Union territory and reside together with him/her. Nevertheless, this right is not absolute (as in the case of third-country nationals, family members of an EU citizen sponsor) and certain conditions, sometimes not so clear spelled out, have to be satisfied before being capable to actually enjoy the exercise of a residence right. This was because, Member States have been very determined to negotiate a Family Reunification Directive where the personal scope was limited only to those who have a “reasonable prospect” of obtaining a permanent right of residence (Baldaccini & Toner, 2007).

In relation to this, two categories of requirements have to be fulfilled: personal and economic requirements.

Firstly, the sponsor is the applicant for family reunification who has to satisfy certain conditions such as the need to hold a residence permit which is to be valid for at least one year and also to have reasonable prospects of obtaining a permanent right of residence. Concepts like “reasonable prospect” and “permanent residence” are not further on explained and thus, their meaning is vague. Nevertheless, Member States should not define such concepts unilaterally. There should be a uniform Community interpretation in order to resist to the “willingness” of the Member State to amend their national legislation on the right to permanent residence and thus restricting the personal scope of the Directive.

Secondly, although you might think that the Family Reunification Directive should apply to all third-country nationals, you should think again. There is an explicit exclusion of the third-country nationals who are applicants for refugee, also of the ones who are residing on a temporary basis (i.e. the TCN-student) and also of those who are to enjoy subsidiary protection. In relation to this, we share the opinion of H. Oosterom-Staple that the above-mentioned class of third-country nationals was to be already excluded “by virtue of the fact that they cannot provide evidence that they have reasonable prospects of a permanent residence status” (Oosterom-Staple, 2007). Secondly, the economic resources of the sponsor must be “stable and regular” in order to ensure that there will be no recourse to the social assistance system of the host Member State. This can be contrasted with the requirement for EU citizens, namely “sufficient resources”. It seems that the level asked for the resources is higher than the one that must be satisfied by a EU sponsor. This can suggest that in such a situation, the resources must be generated by a stable economic activity (i.e. an employment contract) while in the case of a EU sponsor, the person can satisfy the condition of having resources without having to prove that those are regular.

4. Future Approaches

In a post-national polity which views its citizens as “citizens” and no longer merely as factors of production, divisions as to the protection of human rights should no longer be maintained, since all human beings, regardless of status, are entitled to the respect of their human rights and in the case at hand, of their family life. The CJ has made one step towards this direction by extending the availability of family reunification rights to almost all categories of Union citizens. It remains to be seen whether the Court will follow further down this road in the future by abolishing other unjustifiable distinctions that remain in the grant of family reunifications rights (Tryfonidou, 2007).

As it concerns the equality principle, this appears to be applied only in cases involving Community nationals (since Treaty of Lisbon, EU nationals). In the end, the Community plays “the identity politics game” as regards third country nationals and their family life, by requiring integration tests and permitting derogations from the two-year waiting period before family reunification is requested on the basis of “a country's receptive capacity”. Consequently, the family reunification of third country nationals is still subject to the Member States' discretionary control. Despite official assurances that the aim of the Directive was to ensure that third country nationals were being treated in the same way

as Community nationals, the definition of family members is fraught with limitations and must be substantiated with many official documents; the conditions for enjoying family reunification are riddled with discretionary elements to be assessed by Member States' authorities and in principle permit high financial barriers to family reunification to be created or maintained; and the rights granted to family members are restricted (Guild, 2007).

Unfortunately, it also looks that even for the future and as a last resort, the only way in which third-country nationals can become equal with EU citizens as the right to family reunification is concerned would be for them to become full-EU citizens.

5. Conclusions

Starting with the Family Reunification Directive case it looks that the European immigration law has moved from the stage of abstract legislation into the stage of practical interpretation and application.

The Directive on the right to family reunification and the Directive on the status of long-term resident third-country nationals are both examples of the long tradition of Community law furthering the integration of migrants and they are to form the centerpieces of any EU integration policy (Groenendijk, 2004). However, the way in which they are going to be implemented by the Member States in their national law provides, at the end of the day, a good indication of the extent to which Member States seriously want to increase integration of immigrations into their society. In fact, the Family Reunification Directive, adopted at a 3rd try, is in fact a selection, a "best of" all limitations and restrictive practices in force (or even forthcoming) in the Member States. It is a typical case in which the requirement of unanimity in the Council has led to the adoption of the lowest common denominator as the common rule (Hatzopoulos, 2008).

Because of the many qualifications that the Family Reunification Directive contains, it is even questionable if the family reunification is a "right" in the proper sense of the word. The Commissioner of Human Rights of the Council of Europe in his 4th Report: 'Age requirements for the reunion of spouses and children, strict economic conditions concerning employment, accommodation, the absence of security claims, all touch the very limits and often infringe the rights to family life and the principle of equality before the law. All of these measures greatly undermine the integration of immigrants' (Alvaro, 2004). While the free movement of EU citizens and their family members is an important rationale of the EU project and is promoted and celebrated, the movement of third-country nationals is often viewed in a considerably more negative light, whether it is in the context of their admission or non-admission to the EU, their presence on the territory of EU Member States, including their capacity to integrate, and their return or expulsion (Cholewinski, 2007).

Lastly, although it is trite law that the ECHR applies to everyone within the jurisdiction of states parties (Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov 1950, ETS No.5, Article 1), the ECJ does not have the mechanism to ensure the minimum level of protection for the family reunification, which remains in the end the prerogative of the national courts.

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