ABSTRACT

Unlike many other parts of the world, it is possible to regard most of Europe as an emerging zone in relation to the conditions of entry for migrants who look to exercise family life. The European Union provides a transnational legal framework for the adoption and implementation of legislation concerning policy areas better addressed at Union level. One such area is family reunion and the respect for family life. An important legal basis in this field is the European Convention for the Protection of Human Rights and Fundamental Freedoms, particularly Article 8 on the right to respect for private and family life. The Rights of the Child Convention (CRC) and the International Covenant on Civil and Political rights (ICCPR) also engage international obligations. Thus, the European Union can be seen as an experimental workshop for seeking common solutions in this field, a field fraught with challenges but also with considerable possibilities of confirming the primacy of family life in human society. The Directive on Family Reunification of Third Country Nationals was adopted by the European Council in 2003 and states in its preamble:

“Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental community objective stated in the (EU) Treaty”
INTRODUCTION

The scope of the directive

The notion of family in the directive translates as the nuclear family. However, the minimum norms set by the directive apply without prejudice to any more favorable conditions that may be recognised by national law. The Council Directive 2003/86/EC establishes that the eligible persons for family reunification are:

• The sponsor's spouse
• Children of the couple, including adopted children, who are unmarried minors

The Member States are free to adopt provisions allowing for family reunification of:

• First-degree ascendants in the direct line
• Unmarried children above the age of majority
• Unmarried partners

Polygamy is not recognized and therefore only one wife can benefit from the right to reunification.

The directive provides more favourable rights to the family reunification of refugees compared with persons granted subsidiary protection. The directive does not apply to the UK, Denmark and the Republic of Ireland.

The European Court of Justice has the role of interpreting the terms of the directive and a case brought by the European parliament, as well as in the court, established that member states' policies must respect the right to family life, the right to family reunification, equal treatment, and general principles of EU law. The court confirmed that the directive’s ‘shall’ and ‘may’ clauses must be strictly interpreted based on the individual’s right to family reunion.

THE IMPACT OF THE DIRECTIVE

The European Commission issued a report on the application of the directive in 2008, which concluded that there were varying degrees of conformity to and transposition of the directive throughout the Union. An independent researcher, Thomas Huddlestone, also assessed the impact of the directive in 2011 and concluded that in the majority of the concerned 24 EU Member States, the following applied:

• A residence requirement for sponsors of one year or less
• No age limits over 18 years old for sponsors and spouses
• Some possibility of family reunification for other dependent adult family members
• Basic housing and economic resources requirements
• No language and integration conditions or pre-entry tests
• The level of 'stable and sufficient' income that sponsors must prove was often imprecise and exceeded what nationals need to qualify for social assistance
• The few countries imposing integration conditions increasingly imposed them on spouses abroad
• Significant waiting periods and conditions limited access to autonomous permits in many countries
• ‘Shall’ clauses were incorrectly transposed in areas such as visa facilitation, autonomous permits, best-interest-of-child assessments, legal redress, and favourable provisions for refugees
• ‘May’ clauses were used in some countries in broad or excessive ways for waiting periods, age limits for sponsors, income requirements, and integration measures

Huddlestone analysed the variation in approaches to family reunification within and beyond the EU and categorized them as follows:
1. Countries that facilitate family reunion, often countries trying to attract labour migration (Australia, Canada, Portugal, Spain, Sweden, US)
2. Countries with restrictive family reunion policies, tending to maintain protectionist labour market policies (Austria, Cyprus, France, Greece)
3. Countries like Austria, Denmark, France, the Netherlands, and Switzerland, with more politicized policies, often in response to growing criticism from the far right

**CONSULTATIONS ON POSSIBLE CHANGES TO THE DIRECTIVE**

Currently, the directive is being re-examined and to this end the European Commission presented a Green Paper in November 2011 focusing on areas where reform or clarification might be considered necessary. The issues raised in this Green paper were commented on by member states, international organizations and other stakeholders by March of 2012. The issues raised were based on the scope of the application of the directive; requirements for the exercise of the right to family reunification; entry and residence of family members; asylum related questions, and fraud, abuse and procedural issues. One hundred twenty contributions were received, including 24 from Member States.

A number of these responses stress that the best course of action is to fully implement the current directive in all countries. There is a fear that opening up the directive for re-negotiation would lead to more restrictive rules. To this end, the Churches’ Commission for Migrants in Europe (CCME) and others propose that the European Commission should provide more detailed and binding guidelines on how to apply the legal basis for the current directive.

Experiences so far show that, for third country nationals seeking family reunification, the challenges can be greater in some EU countries than others since the directive allows certain optional clauses and lacks a fully harmonised approach. Challenges in some countries are based on income requirements, conditional integration programmes, providing valid identity documents that prove family ties, and obtaining access to work and education. A risk some families run is prolonged separation because of the slow processing of applications. This has considerable consequences for the integration of the family member first present in the host country. Common obstacles faced are access to basic benefits and fulfilling specific ID requirements in the processing of applications. Women are also in a vulnerable situation when a permit-granting relationship breaks up. Furthermore, there is a growing fear of fraud, fuelled by the popular press in some countries, which has affected some administrations and resulted in a reversal of the burden of proof regarding whether a relationship is genuine or not. People in traditional, arranged marriages are more likely to be thoroughly scrutinized in certain countries. Application fees can also be a hurdle in some countries. The European Court of Justice, which is the normative body regarding the interpretation of the directive, recently handed down a judgment stating that a prohibitive level of fees for applying for family reunification is a breach of the terms of the directive.

**STATISTICAL BACKGROUND**

To provide a statistical perspective on the level of migration within and from outside the EU, the following figures from Eurostat are informative.

In 2010, 32.5 million foreigners resided in the EU—27 of a total population of 501 million. They made up 6.5% of the total population. The majority of them, 20.2 million, were third-country nationals, while 12.3 million were citizens of another Member State.

There were 47.3 million foreign-born residents in the EU in 2010 making up 9.4% of the total population. Of these, 31.4 million were born outside the EU and 16.0 million were born in another EU Member State.
The share of permits issued to third-country nationals (TCNs) joining non-EU citizens in relation to total first permits issued to TCNs was 17.9% in 2008, 18.1% in 2009 and 20.6% in 2010. In actual numbers, they represented 508,325 of a total of 2,466,347 TNC permits in 2010. The variations within member states can be seen from the tables below.

Table 1: Permits for family reasons as % of all legal immigration in 2010

Table 2: Permits for non-EU families reasons as % of all legal immigration in 2010

Table 3: Composition of reuniting non-EU families in 2010

Source: Huddleston T. 2001. Right to family reunion: The dynamics between EU law and national policy change. MPG briefings for Green Paper on Family Reunion #2
THE RESULT OF THE GREEN PAPER CONSULTATIONS

Member states responses
Most Member States did not support reopening the directive for negotiation. Many Member States expressed that there were no major problems with current provisions, and some were concerned that any modifications might limit the competence of Member States. The Netherlands was the only country that explicitly called for a reopening of the directive. It proposed a number of amendments introducing additional restrictions on family migrants.

The key concerns in the responses of Member States were:
- The discretion of Member States on family reunification given in the directive should not be reduced
- Integration was a matter of national competence and most Member States were against introducing rules on integration at EU level

Regarding fraud and marriages of convenience, most Member States could not provide systematic information. Germany and the UK were the only countries to provide statistics that attempt to quantify the problem at the population level. A few countries also gave data on the number of cases identified by the authorities, which tended to be relatively small.

A number of Member States were content for beneficiaries of subsidiary protection to be included in the directive, while others opposed the extension of the scope of the directive to beneficiaries of subsidiary protection, arguing that that status is intended to be temporary only.

Most Member States opposed more detailed procedural rules in the directive.

International organizations, social partners and NGOs
International organisations, social partners and NGOs on the other hand took a pro-family reunification position and proposed less restrictive rules. Suggestions for amendments and improvements where the directive could be strengthened to ensure rights to family life were put forward. Many submissions highlighted international human rights obligations and identified areas where current practice denied some third-country nationals the right to family reunification.

Some of the key issues for NGOs were:
- Removal of restrictions on the ability to be a sponsor, as well as standstill clauses and waiting period
- Organisations were critical of provisions for a minimum age for spouses, questioning the link between age and forced marriage
- Views on the definition of family were mixed, but the majority of organisations felt that a wider range of family members, including same sex partners, parents and de facto children, should be eligible, a wider definition was sought particularly for refugees
- There was strong opposition to pre-entry integration measures from organisations—most respondents were supportive of post-arrival measures, but there were some concerns about their accessibility
- It was felt that beneficiaries of subsidiary protection should be covered by the directive and should be subject to the same favourable rules as refugees. Restrictions on the application of favourable rules were generally opposed
- NGOs were concerned about there being a presumption of guilt in terms of fraud and marriages of convenience in some Member States. Organisations called on investigations and DNA testing in particular to only be undertaken if there were doubts and not routinely. There was no consensus as to whether the directive should be amended to ensure these principles are applied
The lack of consideration around gender aspects in the current directive was criticized by migrant women’s associations who pointed out for example that women are more often temporarily employed at a lower wage than men and have difficulties meeting up with income requirements, which are based on full-time employment.

**CCME’s response**

The CCME made the following observations and proposals in its submission to the commission:

- Early family reunification should take place with as complete a family as possible
- Dependent family members should be included regardless of age, and children should be allowed to join their parents up to the age of 21
- The CCME believes that forced marriages are not affected by an age requirement
- A maximum waiting period for family reunification of 2 years should include all procedural time
- An autonomous permit for a spouse should be granted earlier than 5 years
- Post-arrival integration measures must be accessible and affordable
- There must be wider access to the labour market, education and training
- There should be no mandatory income requirement beyond the standard level for families of nationals
- Authorities should bear the burden of proof in proving fraudulent relationship
- CCME proposed the adoption of binding guidance from the Commission on the provisions of the current directive
- Migration management discourses are often a short-term response to populist discourse on the perceived extent and patterns of migration

**CONCLUSION**

It remains to be seen how the commission will act on the basis of this consultation, which has shown that the tension between the right to family life enshrined in basic human rights conventions and an increased focus on migration management is becoming more apparent. How the challenge of balancing human rights—as expressed in the Rights of the Child Convention and in other international instruments with the terms of the current or revised directive—is met, will be crucial to the future ability of migrant families in European countries to persist as families.

**Endnotes:**

1. The European Convention of Human Rights 1950
   Article 8: Right to respect for private and family life
   a) Everyone has the right to respect for his private and family life, his home and his correspondence.
   b) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

   Article 10:
   In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
   Article 16.
No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

3. Article 23 ICCPR (International Convention on Civil and Political Rights)
   a) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
   b) The right of men and women of marriageable age to marry and to found a family shall be recognized.
   c) No marriage shall be entered into without the free and full consent of the intending spouses.

4. COUNCIL DIRECTIVE 2003/86/EC of 22 September 2003 on the right to family reunification


6. GREEN PAPER on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)


8. Eurostat. Statistics in focus Author: Katya VASILEVA 34/2011


10. The Dutch government response to the Green paper on family reunification 2012-02-29
   a) Integration prospects should be assessed; level of education important
   b) Consideration given to global economic crisis and international security threats
   c) More requirements at the admission stage: tests to prove whether family ties stronger with country of origin
   d) 24 years age limit for marriage – to limit chain migration
   e) Directive to apply to all non-EU family members
   f) Income requirement 120% of minimum wage
   g) Sponsors pay a deposit of a bond Deny right to reunite with new partner (1 partner every 10 years)
   h) Exclude sponsors convicted of certain violent crimes

11. UNHCR response to the Green Paper
   a) Beneficiaries of subsidiary protection should have access to family reunification.
   b) Not to apply time limits to the use of the more favourable conditions granted to refugees (currently 3 months)
   c) The adoption of guidelines defining clearly what is understood as dependency in relation to a sponsor for the purpose of family reunification
   d) To facilitate refugees’ access to family reunification by providing for the possibility for the sponsor to apply in his/her country of asylum
   e) Family reunification requests for beneficiaries of international protection are not rejected based solely on the lack of documentary evidence (Article 11(2))
   f) To put in place in law and in practice alternative regimes when national travel documents
      g) Are not accepted or not available, including the use of emergency ICRC travel documents to issue one-way laissez-passer to family members who do not have the possibility to obtain national travel documents.
   h) In order to avoid dependency between family members, in particular for victims of domestic violence, the residence of the family member should be independent of those of the sponsor.

12. Submission of the European Women’s Lobby (EWL) and the European Network of Migrant Women (ENoMW) in Response of the Green Paper on the Right to Family Reunification of third country nationals living in the European Union