

Coordination Européenne pour le Droit des Etrangers à vivre en Famille European Coordination for Foreigners' Right to Family Life

Appeal to annul the directive concerning family reunification

Background

At the European Council of Tampere, 15-16 October 1999, the member states affirmed that the European Union should "ensure fair treatment of third country nationals who reside legally on the territory of its Member States. *A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens.*"¹

Consequently, on 1 December 1999, the Commission proposed to the Council a directive concerning the right of family reunification (COM (1999) 638 final).

As specified in the Treaty on the European Community, this proposal was submitted to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions.

The Economic and Social Committee gave its opinion on 25 May 2000, and the European Parliament adopted its opinion in a 6 September 2000 plenary session, approving the Commission's proposal but suggesting certain amendments.

The Commission subsequently presented, on 10 October 2000, a second, modified proposal concerning family reunification (COM (2000) 624 final).

The European Council of Laeken on 14-15 December 2001 remarked problems involving the adoption of this proposal and reaffirmed that establishing common norms for family reunification was important for a real, common immigration policy. It invited the Commission to present a new modified proposal by 30 April 2002.

The Commission complied, presenting a third proposal on 2 May 2002.

At the 28 February-1 March 2003 meeting of the Justice and Home Affairs Council, member states reached political agreement on terms of this third and final proposal. However, the European Parliament had not examined the proposal again. Indeed, it was not until 9 April 2003 that the Parliament adopted, in plenary assembly, the report of the Freedom and Citizens' Rights Committee, Justice and Home Affairs.

Jurisdiction

The European Parliament can file an appeal in the Court of Justice of the European Communities requesting annulment of an act of the right drifted according to Article 230 of the TCE, which stipulates:

"The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

(...)

The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

Arguments concerning the form

The directive concerning family reunification was adopted with absolutely no regard for the role of the European Parliament.

¹ Point 18 of the Council's conclusions

Article 67 of the TCE states:

"1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

The member states reached a "political" agreement on the last version of the proposed directive at the Council's 27-28 February 2003 Justice and Home Affairs meeting. Although the directive had not been formally adopted, by publishing it in the OJEC, it was nevertheless publicly, officially presented without giving the European Parliament a chance to examine this version or to formulate its observations.

This lapse shows that the European Council had decided to adopt the directive with no consideration for the position of the European Parliament. The Council's contempt towards the Parliament's arguments and proposals — as well as toward the institution itself — is in violation of Article 67 of the Treaty on the European Community.

Arguments on the substance

The directive concerning family reunification does not respect people's right to private family life.

***The principle of Community rights respecting fundamental rights**

Although the Treaty of Rome of 1957 states nothing about the question of fundamental rights, the European Union has, since the Treaty of Maastricht, been committed to respecting them, insofar as they are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and they stem from constitutional traditions common to member states, as general principles of the community law, in accordance with Article 6 of the Treaty of the European Union. These principles were established by the Court of Luxembourg.

Indeed, in the *Stauder* decision² the Court deems that "the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of community law and protected by the court."

The Court subsequently reaffirmed this principle in the *Defrenne* decision³: "fundamental personal human rights form part of the general principles of community law, the observance of which the court has a duty to ensure."

Later, a direct reference to the European Convention of Human Rights is made. Indeed, this convention allows the Court to extract many general legal principles, reinforcing the construction of the Community thus as "a community based on law."

But the European Convention of 1950 is not the only source of these fundamental rights. In the *Nold* decision⁴, the Court held that in its mission to ensure the protection of fundamental rights, "international treaties for the protection of human rights, on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law."

Community law as a whole must therefore respect fundamental rights, as they are defined in particular by the European Convention of Human Rights and the Universal Declaration of Human Rights.

***Inexactness and restrictive definitions of "family" and "family members"**

In Europe today, there are families of very different types, resulting from both endogenous and exogenous social changes. The model that is supposedly "the" European family model, the so-called nuclear family, is undergoing transformation. Similarly, immigrants have "imported" family models from their home countries

² C.J.E.C., 12 November 1969, *Eric Stauder vs City of Ulm*, Rec., 419 and ss. Concl. ROEMER

³ C.J.E.C., 15 June 1978, 149/77, *Gabrielle Defrenne vs SABENA*, Rec. 1365

⁴ C.J.E.C., 14 May 1974, *J. Nold, Kohlen- und Baustoffgroßhandlung vs Commission*, 4-73., Rec. 491

that often are being transformed because of the situation of exile and because of the confrontation between these models and the other models that exist in Europe. However, in the home countries of many immigrants living in Europe, certain customs are quite different from the family as it customarily defined: married parents and their dependant, underage children.

When the rights of foreigners, such as the family reunification, are discussed, even if the families involved come from societies where the domestic systems are socially, culturally, and legally different from our prevailing type, immigrants must conform to the strictly defined model of the nuclear family.

Sometimes foreigners in their home countries are subject to various administrative and legal practices, definitions of personal status, and restrictive rules and codes, and emigration may offer an opportunity for personal freedom.

However, whereas exile sometimes allows them to abandon practices and gain more individual liberty, it may instead reinforce the rigidity of immigrant families who cling to what seems to be "their tradition." The problems of immigration may inspire in them a fundamentalist interpretation of social or legal codes that are changing in their home countries. Those who desire above all integration in Europe are best served by as open an interpretation as possible of what constitutes family ties, allowing them to be part of the changes occurring in our societies.

Regulation n°343/2003 of the Council of Europe, also called "Dublin 2," provides (Chapter 1, Article 2, paragraphs (i), (ii), and (iii), in determining the member state that shall examine an asylum request, a list of persons who must be considered members of the same family and thus eligible to join a resident within EU territory. This list includes: *(i) the spouse of the asylumseeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;* *(ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;* *(iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried.*

The directive on family reunification should take these categories as minima, but it could go further, for the reasons mentioned above, including, for example, children who live with the family even if not officially adopted.

In any case, in the harmonisation of the European law on family reunification, there must be a clear definition of the family members who may join a foreigner residing in Europe, and this definition must respect the right to maintain relations based on assistance, affection, and education, which has been established as the right to family life.

* Violation of the right to private family life by the directive on family reunification

Among the fundamental rights is the right to a normal, private, family life that is guaranteed by Article 8 of the European Convention of Human Rights, as well as by Articles 12 and 16 §3 of the Universal Declaration of Human Rights.

The right of family reunification is an integral part of this right.

Moreover, two other European documents specifically address family reunification. The **European Social Charter**, in order to safeguard the rights of immigrant workers and their families to protection and aid, calls for the facilitation of reuniting families of immigrant workers who have obtained authorization to settle within the territory. The **European Convention of 1977** concerning the status of immigrant workers allows the spouse and the unmarried children to be united with the worker who is already in the country. Although this Convention applies only to the present immigrant workers living in one of the signatory states, the principles that it includes have a universal range of application.

In this international legal setting, there are also the **International Pacts of 1966**, concerning civil and political rights as well as economic, social, and cultural rights. They regard the family as the natural basic unit of society, which society and states should protect. **Convention n°143 of the International Labour**

Organisation calls for states to facilitate family reunification for all immigrant workers residing legally within their territory.

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**, adopted by the General Assembly of United Nations in December 1990 to take effect on 1 July 2003, appealed to states to take "measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children."

Otherwise, although the 1951 **Convention relating to the Status of Refugees** does not address the right to family reunification, the **Final Act** of the conference that adopted this convention expressly does so. The **Executive Committee of the High Commissioner of Refugees** also recalls repeatedly that the principle of family unity is announced in international documents and that states should ensure that this unity is preserved. It endorses a pragmatic, flexible approach that considers financial, physical, and psychological dependence.

It is also indispensable to mention the **Convention on the Rights of the Child**, which tries to ensure that children are not separated from their parents (see below).

According to the jurisprudence of the European Court of Human Rights, it is possible for states to specify under what conditions the right to a normal, private family life within the limits of Article 8 shall be exercised. However, placing conditions on such a right should not mean "emptying" it of its meaning. Yet this is what the directive does. In several points, in a more or less explicit goal of "controlling migratory flows" rather than promoting integration, the Council sets conditions that will not at all allow for the full exercise of this right to family reunification:

- Only the spouse and minor children may benefit from family reunification; for other partners, there is merely a "possibility" of benefiting from this right. Nothing is said about other types of family structure.
- A waiting period of two or even three years is set if provided for in the laws of the member state;
- The right to family reunification is subordinated to the condition of the "reception capacity" of the member state.
- The family reunification may be denied on motives of public order and internal security, while moving away from the notion of public order (individual, real, present threat, etc) established in EU jurisprudence.
- The directive accords this right to family reunification to persons who can demonstrate that they can benefit from "long-lasting" residence. Persons under subsidiary protection are thus excluded.

The member states, through the Council, do not simply restrict the right to family reunification; they also limit residency permits for family members who benefit from family reunification. Thus, family members only receive a temporary permit, for "at least one year"; they may be denied the right to professional activity for a period of up to one year; the right to residency may be withdrawn if the original applicant maintains a steady relation with another person or if the marriage is found not to be legitimate.

Furthermore, by adding restrictions concerning age or "integration" for a child who applies for family reunification, this directive goes against Articles 3 and 9 of the International Convention on the Rights of the Child, which was signed and ratified by the members of the EU. The directive, which claims to foster integration, is quite illogical, putting respect for children's family life comes after their degree of "integration." How can children attain integration if they are deprived of the family setting that makes it possible?

Overall, this directive, in addition to making reunification more difficult, places family members in an extremely tenuous situation concerning residence:

Family members benefiting from family reunification may be denied employment for one year, endangering the family's financial situation. There is real indirect discrimination against women: more than 90% of the spouses who join applicants are women, who thus cannot attain financial autonomy. They must be supported by their husbands. This subordination is further reinforced by the possibility that they may lose

their residency permit if their spouse engages in a steady relationship with another person. A veritable right of repudiation is established in that by losing their residence permit, these women lose all the rights that are supposed to protect them in the case of separation and divorce.

Overall, economic criteria prevail over protection and the rights of individuals. The provision that family reunification may be cancelled if housing or salary change during the first year means concretely that a person who loses a job will also lose the right to family life.

There are many more examples, because the general philosophy of this text conflicts with principles and fundamental rights. Although there is a proposal to include Charter of Fundamental Rights in the new European Constitution, adopting texts that contradict the very principles of the charter is worrying for those who wish the Union to respect its own ideals. Respect for private family life and opposition to age discrimination will be meaningless in this text if the directive on family reunification is adopted. It would be a great disappointment to all who worked for months to ensure that Europe has a constitution that affirms the values and founding principles of an expanding European Union.

To ensure that the European Parliament fulfils its role in enacting Union resolutions and in guaranteeing fundamental rights, we urge you to appeal to the Court of Justice of the European Communities.

"This text was prepared jointly by a group of legal experts of the European Coordination for Foreigners' Right to Family Life (Bruxelles) and the Group for Information and Support of Immigrant Workers (GISTI) – Paris."

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