

## THE RIGHT OF FAMILY REUNION UNDER EU LEGISLATION

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### Abstract

Family Reunion is a fundamental right and a social right as well. It is a necessary way of making family life possible. This article examines EU legislation on family reunification. This is an important right in the general context of free movement and migration. Family reunification for EU citizens in the European Union is a right seen as a corollary right of the provision of free movement. Thus, family reunification of EU citizens falls under the general regime of free movement of persons that constitutes one of the fundamental freedoms of the internal market, and comprises an area without internal frontiers in which freedom is ensured in accordance with the provisions of the Treaty. Since 2006 the European Union has regulated family reunification of third-country nationals in the territory of the EU through the directive 2003/86/EC.

The purpose of the paper is to analyze the directive 2003/86/EC according to the family reunification and the family life. The aims of this study are the procedures, the condition and the beneficiaries of family reunification of migrants and refugees in the territory of European Union. It will analyze the definition of the family, the conditions of entry and stay and the rights conferred on family members and all the recent jurisprudence of the ECJ.

**Keywords:** family reunification, EU immigration legislation, Directive 2003/86/EU, family member, Jurisprudence, ECJ.

### 1. INTRODUCTION

Since 2006 the European Union has a regulation on family reunification of third-country nationals in the territory of the EU. The family reunification is the institution that a person can be reached by the members of his family in the territory of a State different from the origin. In its essential core, this right recognizes its holders, after meeting certain requirements, the right to be accompanied or joined by their families. The right to be joined by the families constitutes the basis from which derives the possibility for the holder to exercise their right to family reunification. The legal basics of family reunification in EU is the directive 2003/86/EC. The Directive confines its scope of application to family members of third country nationals who are not Union citizens. The Directive does not contain rules regarding family reunification with third-country nationals who also hold the nationality of one of the Member States. In some countries, third-country nationals who also hold the nationality of those countries are able to rely on the Directive. The same rules for family reunification apply to all persons with residence, regardless of their citizenship. It appears that, in most

Member States, dual nationals are not able to profit from the provisions of the Directive. In most cases, however, there is no such need, since nationals are entitled to more privileged treatment than third-country nationals when it comes to family reunification. The law on family reunification applies to all persons with residence and goes beyond the provisions of the Directive. (Martiniello; 2004 p. 256)

In some countries a more favorable regime applies to nationals seeking family reunification with their third-country national family members. However, the most favorable regime applies to third-country nationals family members seeking reunification with an national who has made use of his/her free movement rights. These family members can benefit from the provisions of Directive 2004/38. In countries where the treatment of family reunification between nationals and their third-country national family members is more favorable than provided for in the Directive, the more favorable treatment mainly involves: The possibility of applying for family reunification in the Member State Exemption from the obligation to hold a work or employment permit; No requirement regarding sickness insurance; No integration requirement; Issue of a residence permit of unlimited duration; Issue of a residence permit of a longer duration; Autonomous right of residence if a baby is born; Possibility of settlement permit after one year; Less problems concerning the acceptance letter of invitation; Notion of family has broader scope; Derived right from national; Protection against expulsion; Residence permit of longer duration; Spouse does not have to prove stable long-term cohabitation Lower visa requirement; Requirement of permanent residence does not apply. (K. Hailbronner; 2000, p. 16)

## 2. DEFINITION OF NUCLEAR FAMILY

The Directive grants a subjective right to family reunification to the spouse and minor children of the sponsor who fulfill the condition set by Directive. Three types of Member State can be discerned: Member States that have codified the right to family reunification of spouses and minor children, Member States that have partially codified this right and Member States that have not codified the right. Seventeen Member States have codified the right to family reunification for family members of the nuclear family. The rules regarding family reunification for members of the nuclear family were liberalized as a result of the Directive. The Directive provides for the possibility of introducing restrictions on family reunification for children aged over 12 and over 15. It appears that special rules concerning the admission of children aged over 15 are envisaged in only two Member States. The other Member States that are bound by the directive are barred from introducing a restriction on the right to family reunification for children over 15 due to the standstill clause. No Member States were making use of the possibility of providing special rules concerning the admission of children aged over 12. (R. Cholewinski, 1997, p. 34).

The Directive provides for the right to family reunification for third country national unmarried partners, who are in a duly attested stable long-term relationship with the sponsor, or to whom the sponsor is bound by registered partnership. The Article is not of a mandatory nature. A minority of the Member States provide the right to family reunification for third-country national unmarried partners. Unmarried partners are not included in the definition of family members who qualify for family reunification, although registered partnership does exist in Hungary. In practice, however, a letter of invitation and settlement permit can be issued to unmarried person. In order to ensure better integration and to prevent forced marriages Member States may require the spouse and his/her sponsor to be of a minimum age, and at maximum 21 years before the spouse is able to join him/her. Of the 25 Member States covered by this research, only six Member States actually require the spouse to be over 18. (G. Fourlanos; 1986 p.76)

## 3. FORMAL CONDITION

Formal Condition for residence is laid down in Article 3 and Article 8 of the Directive. According to Article 3 the Directive shall apply when a third-country national who is residing lawfully in a Member State and applying for family reunification or whose family members apply for family reunification, hold a residence permit issued by a Member State for a period of at least one year and has reasonable prospect of obtaining a permanent right of residence, if the members of applicant's family are third-country nationals of any status. It appears that only Cyprus has a provision explicitly referring to the clause, reasonable prospect of obtaining the right of permanent residence. Cyprus literally copied the clause in the pending bill without defining which categories have reasonable prospects of obtaining the right to permanent residence. Based on existing practice and the provisions of the Bill regarding long-term residence status will be entitled to family reunification rights. Other categories would be persons employed in international companies and third-country nationals who benefit from the exception to the 4 year maximum residence rule. According to the reporter, in the least one case of a third-country national within the last category, a residence permit for 11 months was issued, instead of 12 months that had been the practice so far. This means that it was immediately excluded from the scope of the Directive. It appears that, in most of the other Member States,

the sponsor is deemed to have reasonable prospects if he or she has been granted a settlement permit or a residence permit. (*Angelini, F;2011,p.166*).In most Member States a temporary residence permit is sufficient. According to the Article 8 of the Directive, Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members joining him/her. In some countries no formal waiting period applies before an application can be field although, in Austria. If the maximum has been reached the authority has to suspend the proceedings. In reply to a Judgement of the Constitutional Court in 2003 and the Directive, since January 2006 the legislative has provided for a maximum period in which a settlement permit has to be granted. A settlement permit for the purpose of family reunification has to be granted after three years, regardless of the quota. According to the Dutch reporter, the requirements of the integration exam abroad and the age and income requirements for family formation in practice serve as an informal waiting period.

#### **4. MATERIAL CONDITIONS FOR RESIDENCE**

Member States may require the applicant to prove evidence that he/she has accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the member state concerned.

Most of the Member States have set forth housing requirements for the right to family reunification the exact rules vary between Member States. In the United Kingdom, for example, the housing requirement is based on the number of rooms, in Estonia and Hungary on the number of square meters. Most of the prevalent national rules do not specify the housing requirement. The Member States may require the applicant to provide evidence that he/she has stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members. With the exception of two Member States, all Member States require that the applicant and his family are able to maintain and accommodate themselves without recourse to public funds. Five Member States do not specify in their legislation what level of income is required. Other Member States require a specific minimum level of income. In this respect, there are two groups. The first group has set the minimum standard at a level comparable to the minimum wage. The other group consists of the Member States that require a minimum level comparable to social security benefits. Article 7 stipulates that Member States may require family members to comply with integration measures, in accordance with national law. The second sentence of this Article states that the family members of refugees may only be required to comply with such measures once family reunion has been granted. Article 6 of the Directive States it is said that Member States may reject an application for family reunification, or withdraw or refuse to renew the residence permit of family members on the ground of public policy or public security. When taking the decision, the Member State is obliged to consider the severity or type of offence against public policy or public security committed by the family member, or the dangers that are presented by such person. The practice of Member States is hard to establish on the basis of laws and regulations, as their formulations as rather vague and open. In some Member States however, transposition of the Directive has also led to more safeguards for third-country nationals and their family members with regard to the public policy and public security exceptions. According to the new rules, the de decisions have to be better motivated, and personal circumstances have to be taken into account more explicitly than before. (*Apap J;2006 p.235*)In all Member States, EU citizens still occupy a stronger position than third-country nationals in this regard. Different rules apply to refusal grounds relating to public policy or public security for EU citizens and for third-country nationals. In most Member States, the rules are stricter on decisions regarding EU citizens when it comes to the obligation to take personal circumstances into account, with regard to required seriousness of the crime, the stricter relationship between personal behave regard to the period for which they can be expelled. Article 16(1) (a) states that Member States may reject an application for family reunification, or withdraw or refuse to renew a family member's residence permit, if the conditions laid down by this Directive are not or are no longer satisfied. When deciding on renewal, Member States shall take into account the contributions of the family members to the household income, if the sponsor does not have sufficient resources. All Member States that require a certain level of income, take the income of all family members in account when calculating sufficient resources at all the time of renewal of the permit. According to Article 16 (1) (b), Member States may reject an application for family reunification, or withdraw or refuse to renew a family member's residence permit, if the sponsor and his/her family members(s) do not live or no longer live in a real marital or family relationship. All Member States require a real marital or family relationship with spouses or partners who apply for reunification. Member States react differently to the termination of a real marital or family relationship after a person's admission. In all Member States, an important criterion for a real martial

or family relationship is the fact that the family members live together. In the other Member States, it is clear that if the authorities notice that the family members no longer live in a real marital or family relationship, their residence permit will be withdrawn will take place only occasionally. In the other Member States, it is clear that if the authorities notice that the family members no longer live a real marital or family relationship; their residence permit will be withdrawn. According to Article 16 (4): Member States may conduct specific checks and inspections where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience as defined by paragraph 2. Specific checks' may also be undertaken on the occasion of the renewal of family members residence permit. In all Member States, the residence permit is refused or withdrawn if the marriage was concluded for the sole purpose of obtaining a residence permit. According to the national legislation of the Member States, the authorities are competent to assess whether the marriage for which a residence permit is requested or issued is a marriage of convenience. How and on which criteria this assessment is carried out or what powers the authorities have is usually not specified. In some Member States, the authorities have broader powers to check when the marriage was concluded after the sponsor was admitted to the Member States. In some other Member States, the situation where a divorced third-country national marries again within a short period of divorce is grounds for a thorough assessment.

## 5. LEGAL POSITION OF FAMILY MEMBERS

Under Article 14 of the Directive, the admitted family members of the sponsor are entitled 'in the same way as the sponsor to access to education, to employment and self-employment activity and to vocational training are not covered. Article 14 provides for two exceptions to this equal treatment. Firstly, Article 14 (2) allows Member States to decide:

The conditions under which family members will exercise an employed or self-employed activity. These conditions set a time limit which shall in no case exceed 12 months during which Member States may examine the situation of their labor market before authorizing family members to exercise an employed or self-employed activity. Secondly, Article 14 (3) allows Member States to restrict access to (self-) employment by ascendants or unmarried older children admitted under Article 4 (2) of the Directive. (*Bariatti S.2007 p.377*)

The rule on equal access to employment in Article 14 has been transposed into the legislation of the majority (14 of the 22) of Member States bound by the Directive. The exception to Article 14 (2) that grants access to employment to family members conditional upon a labor market test during the first 12 months has been used by six Member States, the use of the exception exceeds what is permitted by the Directive, since national law allows the complete exclusion of certain categories of family members from employment during the first year after admission, the Directive only allows exclusion on the basis of a labor market test. It appears that there are no national rules restricting access by admitted family members to self – employment, the national's rules retracting access by admitted members to self-employment, the national rules explicitly provide for the same access to self-employment as nationals or the national's rules on access to self-employment are similar to those regarding access to employment. Family members, irrespective of their nationality, have the right to accompany or Join you in an EU country other than that of your nationality. This right applies regardless of whether they have previously been residing in another EU country or with which visa the family member entered the host EU country. Spouses, (registered) partners, descendants and ascendants are family members. The family members referred to above enjoy the rights granted by the Directive when they join or accompany you and the EU countries are obliged to recognise their rights. Other family members such as siblings, cousins, aunts and uncles and other relatives have the right to have their entry and residence Facilitated by the host EU country if: they are dependent on you; or they are members of your household; or where serious health grounds strictly require your personal care.

## 6. THE JURISPRUDENCE OF ECJ ON FAMILY REUNIFICATION

Shortly after the Directive had been adopted by the Council, the European Parliament made use of its new competence for the first time to start legal action for annulment of a measure of secondary Community law. This new competence had been inserted by the Treaty of Nice into Article 230 EC Treaty. The Parliament asked the Court to annul three provisions of the Directive: the last sentence of Article 4 (1) on the admission of children over 12 years of age, Article 4 (5) on the admission of children over 15 years of age and Article 8 on the waiting period. The Parliament deemed those three provisions to be in violation of Articles 8 and 14 ECHR - *European Parliament vs. Council* (Case C-540/03)<sup>1</sup>. The Court has dismissed the action of the

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<sup>1</sup> The judgment illustrates the importance of the power granted to the Parliament by Article 230 EC Treaty as

European Parliament seeking the annulment of the final subparagraph of Article 4(1), Article 4(6) and Article 8 of Council Directive 2003/86/EC. It is important here to see the recent jurisprudence of the ECJ on family reunification. In its judgment of June 2006, the Court dismissed the action by the Parliament but used the opportunity to clarify several important issues regarding the meaning of key provisions of the Directive. In so doing, the Court has laid down principles that will probably be of great importance for the interpretation and application of other directives on migration and asylum issues also adopted by the Council on the basis of Articles 62 and 63 EC Treaty. The Court affirms 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.

In *Chakroun* (Case C-578/08) the Court ruled that the phrase 'recourse to the social assistance system' in Article 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies ('*minimabeleid*'). In addition the Directive 2003/86, in particular Article 2(d) thereof, must be interpreted as precluding national legislation which, in applying the income requirement set out in Article 7(1)(c) of Directive 2003/86, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.

In another case *O et S* (Joined Cases C-356/11 and C-357/11) the Court stressed that Article 20 TFEU must be interpreted as not precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third country national, provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, that being for the referring court to ascertain. Applications for residence permits on the basis of family reunification such as those at issue in the main proceedings are covered by Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Article 7(1)(c) of that directive must be interpreted as meaning that, while Member States have the faculty of requiring proof that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family, that faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter of Fundamental Rights of the European Union, which require the Member States to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of that directive. It is for the referring court to ascertain whether the decisions refusing residence permits at issue in the main proceedings were taken in compliance with those requirements.

## 7. CONCLUSION

Family Reunification is a fundamental right for third country citizens in EU. European Union guarantees family reunification of third-country nationals in the territory of the EU through the directive 2003/86/EC. The procedures, the condition and the beneficiaries of family reunification of migrants and refugees in the territory of European Union are laid down by this directive. According to the Directive, for the purposes of family reunification, individuals are required to provide evidence concerning accommodation, sickness insurance or stable and regular resources. Member States apply a waiting period for the family reunification. According to Article 5 (2), the application for family reunification should be accompanied by documentary evidence of the

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a means of supporting the rights granted by Community law to individuals, of clarifying the obligations of Member States and of enhancing respect for human rights and Community law by the Council and by the authorities of the Member States. With this action before the Court, Parliament has to a certain extent compensated for the minimal influence on the content of the Directive which the Parliament was permitted by the Council during the negotiations on the proposal for this Directive. The Court affirms that Article 4 (1) of the Directive: 'imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to Authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation'. (Paragraph 60).

family relationship and evidence of compliance with the conditions laid down in Articles 4, 6, 7 and 8<sup>2</sup>. Almost all Member States require these documents.

Generally, it appears that the Directive had the effect of producing more harmonized union immigration rules. It reduced the differences between the national rules in at least four ways. Firstly, by introducing minimum standards on a wide range of issues. Secondly, the standstill clauses in certain provisions of the Directive further reduced the divergence. Several Member States, for the first time, have a clear and detailed set of rules on the right to family reunification in their union legislation. The minimum standards of the Directive also act as a barrier or an argument against more extreme policy measures. Very important seems to be the interpretation of the ECJ in two cases analyzed in the paper: *Chakroun* and *O et S* where the Court stressed that Article 7(1) (c) must be interpreted as precluding a Member State from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies. Article 2(d) thereof, must be interpreted as precluding national legislation which, in applying the income requirement set out in Article 7(1) (c) of Directive 2003/86, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State. In addition Article 7(1) (c) of that directive must be interpreted as meaning that, while Member States have the faculty of requiring proof that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family, that faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter of Fundamental Rights of the European Union, which require the Member States to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life, and avoiding any undermining of the objective and the effectiveness of that directive.

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<sup>2</sup> Generally, the following documents are required: a copy of a valid passport, a document proving the family ties, a document proving (legal title to) accommodation, a certificate of current health insurance and evidence of stable and regular resources.

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