

**EUROPEAN MASTERS DEGREE IN HUMAN RIGHTS AND  
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**FAMILY REUNIFICATION FOR MIGRANTS AND REFUGEES:  
A FORGOTTEN HUMAN RIGHT?**

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### **Declaration against Plagiarism**

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## ABSTRACT

During the last thirty years, the right to family reunification has come into conflict with the immigration policies of Western States. The expansion of the divide between rich countries and poor countries and the increase in flight from persecution has affected both the wishes of migrants and refugees and those of States. Migrants and refugees no longer seek to eventually return to their countries of origin. States, on the other hand, attempt to reduce any future immigration. The right to family reunification has therefore become both essential to the well-being of refugees and migrants who will never return to their country of origin and contrary to State policies of zero-immigration and States' sovereign right to control the entry and residence of aliens.

This paper examines how Western European States have jealously guarded their right to determine questions of family reunification in the interests of the State. The paper argues that international conventions, domestic and regional courts and European Community initiatives have, to different degrees, failed to recognise and enforce States' duty to respect the right to a normal family life for resident aliens, a vulnerable and often ignored group in society.

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## **ABBREVIATIONS**

C.E – Conseil d’ Etat

ECJ – European Court of Justice

ECRE – European Council on Refugees and Exiles

EEC – European Economic Community

ENAR – European Network Against Racism

ETS – European Treaty Series

EU – European Union

ExCom – Executive Committee of the UNHCR

ILO – International Labour Organisation

ILPA – Immigration Law Practitioner’s Association

OJ – Official Journal

TEC – Treaty establishing the European Community

TEU – Treaty on the European Union

UN - United Nations

UNHCR – United Nations High Commission for Refugees

UK – United Kingdom

## INTRODUCTION

With the entry into force on 1<sup>st</sup> July 2003 of the 1990 United Nations (UN) International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families<sup>1</sup> and the adoption in the European Union on 27<sup>th</sup> February 2003 of the Council Directive on the Right to Family Reunification<sup>2</sup>, the year 2003 has already witnessed two important events in the recognition of aliens' and their families' rights to fair treatment in receiving States. The UN Convention took thirteen years to acquire the 20 ratifications necessary for it to come into force and has yet to be ratified by a single country of net immigration<sup>3</sup>, while EU States similarly took longer than expected in agreeing upon the harmonisation of family reunification. The content of the two texts have also been criticised for not going far enough in recognising migrants' rights to family reunification<sup>4</sup>. What these similarities highlight is the tension between States' duty to recognise and respect the human rights of aliens and States' interests in curbing such rights and controlling immigration, a tension that is particularly strong in the context of family reunification.

In view of the vulnerable position migrants and refugees find themselves in, the right to family reunification may be viewed in some ways as an even more essential right than the general right to respect for one's family life. The ILO recognized this in its 1973 preliminary report entitled *Migrant Workers*, asserting that: "Uniting migrant workers with their families living in the countries of origin is recognized to be essential for the migrants' well-being and their social adaptation to the receiving country. Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevents them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the receiving community create many well known social and psychological

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<sup>1</sup> Adopted on 18 December 1992, UN GA Res. 45/158, entering into force on 1 July 2003.

<sup>2</sup> Council Doc. 6912/03, as yet unpublished.

<sup>3</sup> For the list of States see <http://www.unhcr.ch/html/menu3/b/migrants.htm> accessed 10 July 2003.

<sup>4</sup> See infra Sections I.2 and IV.2.



problems that, in turn, largely determine community attitudes towards migrant workers<sup>5</sup>. The ILO here rightly observes that a right to family reunification is both essential to the individual's well-being *and* in the interests of the receiving State. According to the United Nations High Commission for Refugees (UNHCR): "The family unit has a better chance of successfully...integrating in a new country rather than individual refugees. In this respect, protection of the family is not only in the best interests of the refugees themselves but is also in the best interests of States"<sup>6</sup>. Mary Haour-Knipe, in studying the successes and failures of families who have moved abroad, lends support to the ILO and UNHCR views by suggesting that those individuals who integrated well and were successful in their living abroad were those who enjoyed close ties with the members of their family<sup>7</sup>.

Nevertheless, whilst international bodies such as the ILO and UNHCR, academics and civil society may concur upon the importance of family reunification, this recognition has not been translated into an effective and enforceable right to family reunification at the international or regional level. When the right to family reunification is compared to the right to non-expulsion for aliens on grounds of family unity, we can see that, in general, a very conservative approach has so far been taken in relation to the right to family reunification, both by States and Courts. The timid jurisprudence of the European Court of Human Rights on the compatibility of Article 8 of the 1950 European Convention on Human Rights<sup>8</sup> with States' refusal to accept such a right to family reunification has been contrasted to its bold stance relating to the compatibility of Article 8 with the expulsion of aliens<sup>9</sup>. In examining States' attitudes, an enlightening

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<sup>5</sup> International Labour Conference, 59th Session, 1974, Report VII(I), *Migrant Workers* (Geneva, International Labour Office, 1973).

<sup>6</sup> <http://www.eure.org/positions/family.shtml#the%20right%20to%20family%20life>, accessed 10 July 2003, para. 8. The importance of family reunification for both States and non-nationals has thus been widely recognised. See, e.g., R. Cholewinski, *Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right*, in the "European Journal of Migration and Law", Vol. 4, 2002, pp. 271-290, pp. 274 – 275.

<sup>7</sup> M. Haour-Knipe, *Moving Families: Expatriation, Stress and Coping*, London, Routledge, 2001.

<sup>8</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms; adopted at Rome on 4 November 1950; entered into force 3 September 1953.

<sup>9</sup> See *infra*. Section II for a review of the jurisprudence of the European Court of Human Rights relating to article 8 and the right to family reunification.

comparison can be made between those international and regional texts expressly relating to the right to family reunification and those relating to the non-expulsion of aliens. Article 1 of Protocol No. 7 to the ECHR and Article 4 of Protocol No. 4 to the ECHR<sup>10</sup> expressly grant aliens procedural rights against expulsion and prohibit the collective expulsion of aliens. In contrast, no express mention is made of family reunification in the ECHR, nor in any additional protocols. Worded more as a principle, an ideal rather than a concrete right, family reunification appears to be also relegated to a lower tier of international and regional texts. A 1999 ILO report in fact affirmed that States: “are not bound by any provision of international law to guarantee family reunification”<sup>11</sup>. The 1951 Refugee Convention<sup>12</sup>, as amended by the 1967 Protocol<sup>13</sup>, provides a succinct example of this difference between the right to non-expulsion and that of family reunification. Under Article 33 of the 1951 Refugee Convention, no refugee can be returned to any country where his or her life or freedom would be threatened for reasons of race, religion, nationality or political opinion<sup>14</sup>. The refugee’s right to family unity or family reunification, on the other hand, is not included in the 1951 Refugee Convention itself. Rather, it is found in Recommendation B of the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons<sup>15</sup>.

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<sup>10</sup> Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and the First Protocol thereto; adopted at Strasbourg on 16 September 1963; entered into force on 2 May 1968; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms; adopted at Strasbourg on 22 November 1984; entered into force on 1 November 1988.

<sup>11</sup> International Labour Conference, 87<sup>th</sup> Session, Migrant Workers, Report III (1B) (Geneva, June 1999), Paragraph 473.

<sup>12</sup> Convention Relating to the Status of Refugees 1951; 189 U.N.T.S. 150; entered into force on 22 April 1954.

<sup>13</sup> Protocol Relating to the Status of Refugees 1967; 606 U.N.T.S 267; entered into force on 4 October 1967.

<sup>14</sup> This is an expression of the principle of *non-refoulement*, see G. S., Goodwin-Gill, *The Refugee in International Law*, Oxford, Clarendon Press, 1996, pp. 117 – 171.

<sup>15</sup> Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons; adopted on 28 July 1951. Recommendation B recommends governments “take the necessary measures for the protection of the refugee's family especially with the view to: 1) ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country; 2) the protection of refugees who are minors, in particular unaccompanied children and girls with special reference to guardianship and adoption”.

This absence of a strong right to family reunification does not fit easily with the importance given to both the notion of the universality of human rights and the right to respect for one's family life<sup>16</sup>. The present thesis therefore seeks to examine why family reunification rights for migrants and refugees have not been recognised or put into practice and how States and Courts have often avoided taking the logical step from recognising a universal right to respect for one's family life to recognising the fundamental right of aliens to family reunification. Chapter I will look at Governments' attitudes to family reunification during different phases of migration in the last half-century and seek to explain why family reunification has not been recognised as a fundamental human right in the international conventions agreed upon by States. Chapter II will look at and question the European Court of Human Rights' application of the right to normal family life in the context of family reunification and compare this case law to certain States' relevant domestic jurisprudence, highlighting the difficulties of an international court in deciding matters that touch upon questions of immigration. Under Chapter III, refugees' particular issues with family reunification will be dealt with, looking at why refugees may be treated differently from other migrants and what present rights to family reunification they enjoy. Chapter IV will analyse the EU's role in strengthening resident aliens' rights, how this has been both feted and undermined by Member States and whether the new EU Council Directive on the Right to Family Reunification represents a progressive step towards the recognition of a right to family reunification or merely an effort to meet Member States' present economic needs. The thesis focuses on European regional and domestic legislation and case-law in part because of the importance of the new Directive, but also because of Europe's humanitarian traditions and past and the continent's recent history as an area of immigration.

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<sup>16</sup> Among the many texts in which the rights to found a family and respect for one's own family life are included see, for example, the 1948 Universal Declaration of Human Rights, Articles 12 and 16 and Article 23 of the 1966 International Convention on Civil and Political Rights.

## **CHAPTER I: FAMILY REUNIFICATION AS A PRINCIPLE AND ECONOMIC TOOL RATHER THAN A HUMAN RIGHT**

### **I.1] Immigration, National Self-Perception and Family Reunification In Post-war Europe**

#### **I.1.1] Western European Countries' Shared Migration Trends**

Until World War II, the majority of European countries were countries of emigration: while some foreigners may have settled within these countries, a far greater number of nationals emigrated so as to escape persecution or find a better life<sup>17</sup>. This trend was inverted for the industrialised countries of Western Europe with the end of the Second World War. Facing a serious shortage in labour force, Governments encouraged the migration of workers from Southern Europe and ex-colonies such as those in the Maghreb, the Caribbean and the Indian subcontinent<sup>18</sup>. This migration greatly contributed to the success in rebuilding war-torn Western Europe<sup>19</sup>. However, the ever-deteriorating economic conditions in the post-colonial countries of emigration, matched with the increasing affluence of Western European countries of immigration, caused the influx of migrants to increase at an exponential rate. By 1972, there were 11 million migrant workers and their families residing in Western Europe<sup>20</sup>. This situation was exacerbated by the 1973-1974 oil crisis, creating in Western Europe recession and high levels of unemployment. It was at this point, therefore, that Western European Governments decided to suspend the recruitment of immigrant labour<sup>21</sup>. This meant that

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<sup>17</sup> The major exception to this assertion is France, which has been a country of immigration since the 19<sup>th</sup> century. See P. Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in T.A. Aleinikoff, D. Klusmeyer (eds.), *Citizenship Today: Global Perspectives and Practices*, Washington D.C., Carnegie EIP, 2001, pp. 17-35, pp. 28-29.

<sup>18</sup> R. Cholewinski, *Migrant Workers in International Human Rights Law*, Oxford Oxford University Press, 1997, p. 16 and F. Jault-Seseke, *Le Regroupement Familial en Droit Comparé Français et Allemand*, Paris, Librairie Générale de Droit et de Jurisprudence, 1996, p. 3.

<sup>19</sup> Ibidem.

<sup>20</sup> ILO, 188th Session of the Governing Body, Nov. 1972, ILO Doc. G.B. 188/5/9, para. 106.

<sup>21</sup> R. Cholewinski, *Migrant Workers...* op. cit., p.17. The decision was taken by, for example, Germany on 23 November 1973 and by France on 3 July 1974, reported in F. Jault-Seseke, op. cit., Paris, Librairie, p. 3.

immigration from then on would only be allowed on grounds of asylum or family reunification<sup>22</sup>.

### I.1.2] Different Attitudes to Long-Term Migration and Family Reunification: France, Germany and Belgium Compared

While these historical features are common to most if not all Western European states, differences may be noted in the manner in which Governments approached the long-term future of their immigrant workers and consequently the issue of family reunification during the initial period of post-war immigration. This is because family reunification confirms the permanent settlement of the migrant<sup>23</sup>, so that Governments seeking to bring in immigrants as settlers embraced the policy more keenly than those Governments that envisaged their immigrants to be temporary “guest-workers”.

#### I.1.2.a] France

As an example of the former, France looked favourably on family reunification as a means of filling the void left by those lost during the war, in other words a solution to the demographic problems the country faced. A Circular from the Ministry of Health and Population in 1947 stressed the importance of family reunification in helping introduce and integrate the immigrant labour force into French society<sup>24</sup>. The position taken by the Government also reflected the traditional view of France as a country of immigration<sup>25</sup>.

#### I.1.2.b] Germany

This may be compared with Germany’s belated approach in handling the question of family reunification. Reflecting the nation’s self-perception as not being a

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<sup>22</sup> Ibidem. See also for Belgium M. Nys, *L’ Immigration Familiale à l’ Épreuve du Droit: Le Droit de l’ Etranger a Méner Une Vie Familiale Normale*, Bruxelles, Bruylant, 2002, p. 28-29.

<sup>23</sup> M. Nys, op. cit., p. 31.

<sup>24</sup> Journal Officiel, 1947, p. 1230 reported in F. Jault-Seseke, op. cit., p. 7.

<sup>25</sup> Ibidem, p. 5.

country of immigration<sup>26</sup>, Germany embarked on bilateral agreements with countries such as Italy<sup>27</sup> that were intended to create a system of rotation, with one generation of temporary “guest-workers” (*Gastarbeiter*) eventually leaving to be replaced by a younger one<sup>28</sup>. Rotation however did not take place: businesses were not keen on losing workers who had learnt to speak German and adapted to German society<sup>29</sup> and the Government did not have the nerve to forcibly deport the workers<sup>30</sup>. The Government’s reluctance to act in any purposeful direction is exemplified by the fact that the Alien Law 1965, which granted no rights to immigrant workers and gave the administrative authorities very wide discretion when deciding on the renewal of residence permits and entry visas, was not reformed until 1990<sup>31</sup>. Whereas France issued a *Decrét* on 29 April 1976 which granted the right of entry and residence to the members of a resident immigrant’s immediately family<sup>32</sup>, the German Alien Law 1965 made no reference to family reunification whatsoever. Yet states such as Germany who considered the migrant workforce to be temporary were not the only ones to fail to legislate on migrants’ right to family reunification.

#### 1.1.2.c] Belgium

However, the absence of national legislation or regulations concerning the right to family reunification cannot always be translated into a Government’s reluctance to accept the long-term settlement of migrant workers and their families. Belgium law remained silent on the question of family reunification until 1980<sup>33</sup>. Yet Belgium perceived itself as a country of immigration, needing families to settle for both

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<sup>26</sup> C. Joppke, *The Evolution of Alien Rights in the United States, Germany and the European Union*, in T.A. Aleinikoff and D. Klusmeyer (eds.), *Citizenship Today...* op. cit., pp. 36-62, p. 37. This apparently false proposition has been defended as articulating “not a social or demographic fact but a political-cultural norm”, R. Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge, Cambridge University Press, 1992, p.174.

<sup>27</sup> Germany’s first labour force agreement was signed with Italy in 1955, F. Jault-Seseke, op. cit., p. 8.

<sup>28</sup> Ibidem.

<sup>29</sup> Ibidem p. 9.

<sup>30</sup> C. Joppke, op. cit., p. 45.

<sup>31</sup> F. Jault-Seseke, op. cit., p. 49.

<sup>32</sup> Subject to certain specific conditions, see F. Jault-Seseke, op. cit., p. 38.

<sup>33</sup> An Arrêté Royal of 21 December 1965 did however apply European Community Law relating to the family reunification rights of E.E.C. migrants. See M. Nys, op. cit, pp. 28-29, 60-61.

economic and demographic reasons<sup>34</sup>. The authorities also made efforts, through campaigns such as its brochures “Vivre et travailler en Belgique” to encourage prospective immigrants to bring their families with them, as this would allow them to lead a normal life and hence overcome any difficulties in settling in<sup>35</sup>. The reason for the absence of any law relating to family reunification for non-E.E.C. migrants is explained by the fact that this right was set out in the bilateral agreements Belgium signed with countries of emigration<sup>36</sup>.

## **I.2] Family Reunification In International Law: A Principle Rather Than A Right**

### **I.2.1] ILO Conventions and Recommendations**

In this context of different post-war attitudes to migration, the issue of migrants’ rights to family reunification has come up in various international fora. However, in all the international instruments adopted, States have opposed any recognition of a right to family reunification that might be considered to substantially curb States’ sovereign right to control who may enter or settle in its territory. The first example of this is the ILO’s Recommendation No. 86 concerning Migration for Employment (Revised), paragraph 15(1) of which reads: “Provision should be made by agreement for authorization to be granted for a migrant for employment introduced on a permanent basis to be accompanied or joined by the members of his family”<sup>37</sup>. The text is not only narrow in scope, apparently excluding those introduced on a non-permanent basis as in Germany, but also falls well short of recognizing any right to family reunification. Article 13(1) of the Migrant Workers (Supplementary Provisions) Convention 1975 (C143) may have a broader scope yet still leaves States a very wide discretion, stating that: “A Member *may* take all necessary measures which fall within its competence and collaborate with other Member States to facilitate the reunification of the families of all

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<sup>34</sup> See A. Sauvy, *Rapport sur l’ Economie et la Population en Wallonie*, Liège, Conseil Economique Wallon, 1962, p. 54 reported in M. Nys, *op.cit*, p. 70.

<sup>35</sup> *Ibidem*.

<sup>36</sup> *Ibidem*, p. 28.

<sup>37</sup> Adopted on 1 July 1949 in Geneva.

migrant workers legally residing in its territory”<sup>38</sup>. C143 has indeed been described as being “weak on family reunification”<sup>39</sup>. Paragraph 13 (1) of Recommendation No. 151 Migrant Workers Recommendation 1975 (R151) takes a more forceful view on family reunification, stating that “All possible measures *should* be taken both by countries of employment and by countries of origin to facilitate the reunification of families of migrant workers *as rapidly as possible*”. Nevertheless, R151 still falls short of explicitly recognizing that migrant workers have an inalienable right to be reunited with their families in their country of settlement<sup>40</sup>.

### I.2.2] UN Conventions

The International Convention on the protection of the Rights of all Migrant Workers and Members of their Families is the main UN treaty, outside the ILO framework, to deal with the rights of migrant workers. Article 44 of the Convention however, similarly to the ILO texts mentioned above, lays down a duty upon States to “take measures they deem appropriate” and “facilitate” the reunification of workers with their spouses or partners<sup>41</sup>. Moreover, the Convention has yet to receive a single ratification by a country of net immigration. Finally, the right to family reunification is nominally recognised in Article 5(4) of the United Nations Declaration on the Human Rights of Individuals who are Not Nationals of the Country they Live In<sup>42</sup>. In respect of this right however, States retain a very wide, if not unfettered, discretion since the State’s obligation is subject to “national legislation and due authorization”. The 1989 Convention on the Rights of the Child has been considered by some to be the one text

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<sup>38</sup> Adopted on 24 June 1975; entered into force on 9 December 1978. Emphasis added.

<sup>39</sup> F. Russo, *Migrant Workers: Existing and Proposed International Action on Their Rights*, in “The Review of the International Commission of Jurists”, no. 15, 1975, p.57, quoted in R. Cholewinski, *Migrant Workers ...*, op. cit., p. 127.

<sup>40</sup> R. Cholewinski, *Migrant Workers...* op. cit., p. 170 and A. G. Dias Pereira, *A Protecção Juridica da Família Migrante*, in J.J Gomes Canotilho (ed.), *Direitos Humanos, Estrangeiros, Comunidades Migrantes e Minorias*, Oeiras, Celta Editora, 2000, pp. 81-100, p. 90.

<sup>41</sup> Article 44(2).

<sup>42</sup> Adopted on 13 December 1985, UN GA Res. 40/144.



where a fundamental right to family reunification is expressly recognised<sup>43</sup>. Under Article 10(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 in a positive, humane and expeditious manner”<sup>44</sup>. While this may be highly positive, close examination of Article 10(2) suggests it falls short of recognising a right to family reunification as such. Under Article 10(2), “State Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country”. This phrase clearly limits the *right* of entry to one’s own country<sup>45</sup>.

### I.2.3] Council of Europe Conventions

At the regional level, several Conventions concerning the status of migrants and their families have been adopted under the auspices of the Council of Europe. The European Convention on Establishment<sup>46</sup> (ECE) makes no mention of any right to family reunification. Since one of the stated purposes of the Convention is to assist the permanent residence of migrants from one State Party in the territory of another, this omission has been questioned<sup>47</sup>. However, the European Social Charter (Revised) of 1996<sup>48</sup> does contain a provision expressly relating to family reunification. Article 19(6) imposes an obligation on States “to *facilitate as far as possible* the reunion of the family of a foreign worker permitted to establish himself in the territory”. A previous version of the text entailed an obligation on States to grant “the *right* [of migrant workers] to be accompanied or joined by their families”, the tempering of which once again highlights States’ refusal to explicitly recognise such a right. Article 12 of the European

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<sup>43</sup> See, for example, J. Apap, N. Sitaropoulos, *The Right to Family Reunification of Third Country Migrants in Host States: Aspects of International and European Law*, 2001, p. 9, <http://www.december18.net/paper53EurFamilyReunification.pdf>, accessed 10 July 2003.

<sup>44</sup> Article 10(1), 1989 Convention on the Rights of the Child, adopted 20 November 1989, UN Doc. A/44/25.

<sup>45</sup> See also the interpretations by Germany and Japan at the time of deliberation that Article 10 did not infringe upon States’ discretion in matters of family reunification, quoted in L. J. LeBlanc, *The Convention on the Rights of the Child*, Nebraska, University of Nebraska Press, 1995, pp. 115-117.

<sup>46</sup> Adopted and opened for signature on 13 December 1955, ETS No. 109, entered into force on 23 February 1965.

<sup>47</sup> See R. Cholewinski, *Migrant Workers* op. cit., 1997, p. 343.

<sup>48</sup> Adopted and opened for signature on 3 May 1996, ETS No. 163.

Convention on the Legal Status of Migrant Workers<sup>49</sup> also deals with family reunification. However, as one commentator has written, “the principle of family reunification is subject to so many ‘escape clauses’ that the efficacy of Article 12 must be seriously questioned”<sup>50</sup>. These “escape clauses” are the requirements of housing arrangements and steady resources under Article 12(1), as well as the State’s ability to derogate under Article 12(3) from the obligation of family reunification for certain parts of their territories whose housing, education and healthcare services may be under strain from the influx of migrants<sup>51</sup>. Moreover, in assessing these conventions it is also important to keep in mind that they only apply to the migrants who are nationals of States that have signed up, so while Turkish migrants may be covered, migrants originating from the Indian sub-continent or the Maghreb are excluded. Furthermore, none of the aforementioned Conventions, either international or regional, provides a system of enforcement that grants the individual a legal remedy in cases of breach by the State of its obligations<sup>52</sup>.

### **I.3] Family Reunification in the Post-Oil-Crisis No-Immigration State**

In his study on different nationality laws, Patrick Weil identifies the convergence in citizenship policies of industrialized, liberal-democratic states that hold or held different legal traditions and self-perceptions<sup>53</sup>. One of the factors he identifies as explaining such convergence is the shared experience with immigration. In a similar fashion, we may observe, during the shared difficulties of dealing with immigration from the mid-70s onwards, an analogous harmonization, if not convergence, in the field of family reunification in the policies of states with originally different guiding principles such as France and Germany.

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<sup>49</sup> Adopted on 24 November 1977, ETS No. 93.

<sup>50</sup> R. Cholewinski, *Migrant Workers* ... op. cit., p. 346

<sup>51</sup> Ibidem, pp.346 -347. Although state derogation can only be applied temporarily, no specific time-limit is expressly provided.

<sup>52</sup> M. Nys, op. cit., p. 95.

<sup>53</sup> P. Weil, op. cit., pp. 17-35

### I.3.1] France

As noted above, France began its family reunification policy more positively, culminating in the *Decrét* of 29 April 1976 which granted resident migrants the right to reunification with their immediate family members subject to six precisely set conditions<sup>54</sup>. However, Government policy then took a sudden u-turn as the Government issued a decree on 10 November 1977 prohibiting the reunification of resident migrants with any family member who wished to seek employment following arrival in France<sup>55</sup>. Further alterations were made through a decree on 4 December 1984<sup>56</sup>, elaborated by a circular on 4 January 1985<sup>57</sup> and finally incorporated into the *Ordonnance* governing alien rights<sup>58</sup> through the legislative reform of 1993, whose declared objective was to attain as close to zero-immigration as was possible<sup>59</sup>.

### I.3.2]Belgium

Following the oil crisis of 1973-1974 and ensuing recession and high unemployment, Belgium also turned its back on the previous policy of encouraging family migration<sup>60</sup>. As stated above, Belgium first legislated on the question of family reunification in 1980 when it passed the Law on Access to the Territory, Residence, Settlement and Expulsion of Aliens of 15 December 1980. (hereafter the Belgian Alien Law of 1980). Under Article 10(4) of this Belgian Alien Law of 1980, all resident migrants, regardless of nationality or economic status, were granted the right to be joined by their spouse and/or any child considered to be a minor under Belgian law. Although undoubtedly a positive step, the law was not really adopted on the Government's own initiative. The Government acted mainly in response to the student strikes and wide-spread opposition in 1970 to the expulsion of foreign students,

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<sup>54</sup> F. Jault-Seseke, op. cit., p. 38.

<sup>55</sup> This second decree was nevertheless declared to be null and void by the Conseil d'Etat, see below Section II.3.

<sup>56</sup> Journal Officiel, 5 Décembre 1984.

<sup>57</sup> Journal Officiel, 12 Janvier 1984.

<sup>58</sup> *Ordonnance* 45-2658 of 2 November 1945.

<sup>59</sup> F. Jault-Seseke, op. cit., p. 38.

<sup>60</sup> M. Nys, op. cit., pp. 28-29.

followed in 1973 by the general disapproval of the collective expulsion of 200 Moroccan children<sup>61</sup>. Moreover, in the subsequent 18 years since the law was passed, there have been 15 different revisions that have imposed further conditions on the right to family reunification and hence limited its scope. .

### I.3.3] Germany

Germany meanwhile retained its anti-immigration stance. Under Article 83 of the Basic Law, the executive branch of each *Länder* was competent, within the parameters allowed by the Basic Law, to regulate the conditions on which family reunification would be permitted<sup>62</sup>. Although the Federal Government was competent to harmonise the regulations under Article 84 of the Basic Law, it chose not to. Taking the view that the migrant population would only successfully integrate if the number of migrants increased no more, the Government did not discourage the Lender as they made the conditions for family reunification for migrants in Germany the most restrictive in Europe<sup>63</sup>. For many settled migrants, the situation has now changed with the new Alien Law of 1990, in which the Government went beyond granting the constitutional minimum and waived the one-year waiting period previously required for the arrival of settled migrants' spouses<sup>64</sup>. This does not however represent a softening of the Government's view on the right to family reunification. During the 1990s, Germany recruited a further 250 000 or so workers from Central and Eastern Europe in order to fill temporary labour shortages and reduce migration pressure from its Eastern border. The bilateral agreements undertaken by Germany and each sender country precluded all cases of family reunification<sup>65</sup>.

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<sup>61</sup> The children, orphaned and assigned to guardians under Moroccan law, had emigrated to Belgium to join their guardians who now resided in Belgium. Since the bilateral agreements Belgium had signed with Morocco only covered family reunification with their parents, the children were not eligible for family reunion. M. Nys, op. cit., p. 29.

<sup>62</sup> Ibidem, p. 10.

<sup>63</sup> Ibidem, p. 10-11.

<sup>64</sup> C. Joppke, op. cit., p. 48.

<sup>65</sup> Ibidem, p. 47.

#### I.3.4] Conclusion

We might therefore conclude that, although France and Belgium's measures allowing family reunification may not be as stringent as Germany's, the trends followed by the three states reviewed have been parallel. This allows us to understand why Governments have opposed the recognition of a concrete right to family reunification in internal human rights instruments. No Government wished to find itself shackled to a precise and enforceable standard of family reunification rights that would impede on the State's sovereign right to control who entered and settled on its territory. While France and Belgium may have encouraged family reunification during the early post-war period, this was grounded in a temporary demographic and economic need<sup>66</sup> rather than a fundamental belief in the need for all states to respect migrants' right to lead a normal family life through family reunification. Therefore, at the international level, different countries of immigration such as France and Belgium on the one hand and Germany on the other, found themselves taking similar positions in opposition to the formulation of a binding obligation to respect the right to family reunification, both before and after the end of immigration for employment.

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<sup>66</sup> See F. Jault-Seseke, *op. cit.*, p. 70.

## **CHAPTER II: FAMILY REUNIFICATION AND THE EUROPEAN COURT OF HUMAN RIGHTS**

### **II.1] Abdulaziz v UK: The European Court's Negative Beginning**

The international instrument that was most likely to curb many European States' increasingly restrictive measures on family reunification was the European Convention on Human Rights. Although the Convention does not include an express right to family reunification, its article 8 does create an obligation for states to respect the family life of all individuals present in its territory, be they nationals or aliens<sup>67</sup>. Moreover, under Article 25 of the Convention all individuals may bring individual claims to the European Court of Human Rights, whose decisions are binding on the contracting states<sup>68</sup>. The European Court's jurisprudence on Article 8's implications on a right to family reunification has however turned out to be extremely limited in its protection of aliens, drawing criticism from judges within the Court as well as observers of its jurisprudence.

The first case of family reunification to come before the Court was that of *Abdulaziz, Cabales and Balkandali v UK*<sup>69</sup>, brought by three female alien migrants permanently and lawfully settled in the UK whose husbands were refused permission to remain with them or join them in the UK. The UK Home Office's 1980 Immigration Rules had introduced stricter conditions for the entry and residence of a husband or male fiancé for the purposes of joining or remaining with his UK-resident wife or fiancé. Previously, any such husband or fiancé would normally have been allowed to settle after a qualifying period. Subsequent to the 1980 Rules however, leave to enter or remain would only normally be granted to spouses of UK nationals and the wives of

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<sup>67</sup> See supra, foot note 8.

<sup>68</sup> Both these features distinguish the Convention from other Council of Europe Conventions such as the European Social Charter which only grant rights to citizens of the signatory States and does not allow for individual petitions.

<sup>69</sup> *Abdulaziz, Cabales and Balkandali v UK*, judgement of 24.04.1985, Case No. 15/1983/71/107-109.

male alien migrants permanently settled in the UK<sup>70</sup>. The UK Government's central argument before the Court was that, since all three applicants could resettle with their husbands in Portugal, the Philippines and Turkey respectively, the three applicants were in effect claiming a right to choose their country of residence<sup>71</sup>. The applicants however contended that, the application being brought by the wives and not the husbands, respect for family life encompassed the right to establish one's home in the State of one's nationality or lawful residence, subject to the provisions of paragraph 2 of Article 8<sup>72</sup>. Although the Court did find the UK Government's practice a violation of article 8 taken with article 14 due to the discrimination between male and female spouses<sup>73</sup>, the Court did not consider the rules or practice a breach of the State's obligations under article 8 alone<sup>74</sup>.

The decision taken by the Court in *Abdulaziz* is open to criticism on more than one front. As with other articles in the convention<sup>75</sup>, Article 8 contains a first paragraph placing certain negative and positive obligations upon the contracting States, followed by a second paragraph allowing the State to limit its obligations under the preceding paragraph as far as any such limitation is prescribed by law, pursuant of a legitimate aim and proportionate. Article 8(2) therefore states that "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". The natural reading of Articles 8(1) and 8(2) taken together would therefore indicate that State interests and needs should be taken into consideration under Article 8(2). Nevertheless, in *Abdulaziz*, the Court dealt with the case merely within the framework of Article 8(1). In the reasoning of the Court, for there to have been an interference with the applicants' right to respect for their family life, the specific right

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<sup>70</sup> Ibidem, paras. 10 to 24.

<sup>71</sup> Ibidem, para. 61.

<sup>72</sup> Ibidem, para. 66.

<sup>73</sup> Ibidem, para. 83.

<sup>74</sup> Ibidem, para. 69.

<sup>75</sup> Notably Articles 9, 10 and 11 of the Convention.

had first to be identified. For the Court this meant assessing whether the State had an obligation to allow the entry and residence of the applicants' spouses. In assessing whether such an obligation might exist, the Court would therefore examine and give due weighting to the interests and needs of the individual and, on the other hand, those of the State<sup>76</sup>. While such an approach may appear at first to be wholly rational, its effect was to collapse the distinction between the interference with an individual's right and a State's violation of a Convention Article. This point was in fact raised by the two concurring judgments written by Judges Thór Vilhjálmsson and Bernhardt. Judge Bernhardt, who wrote a little more on the point than Judge Thór Vilhjálmsson, criticised the approach for placing inherent limitations upon the rights guaranteed in Article 8(1). Yet Judge Bernhardt did not expand on what the dangers of such an approach were. As stated above, article 8(2) sets three conditions on State justifications for interference with Article 8(1): prescription by law, pursuance of a legitimate aim and proportionality. In *Abdulaziz*, the Court can be said to have examined to a certain extent the legitimacy of the State's aims and the proportionality of the measures taken<sup>77</sup>. However, the Court did not examine whether the State's policy was "in accordance with the law". Therefore, the Court not only obfuscated the separation between Articles 8(1) and 8(2) in theory, it also cut out in practice a key requirement of article 8(2). This omission is particularly relevant in the case of *Abdulaziz* since the norms concerned, the 1980 Immigration Rules, were not an Act of Parliament (i.e. primary legislation) nor were they delegated legislation, as determined by the UK Courts<sup>78</sup>. The Rules were issued by the Home Office as guidance to immigration officers in the application of their discretionary powers. In view of the more recent jurisprudence of the Court relating to what requirements must be fulfilled for a norm to be "in accordance with the law", it is at least questionable whether the 1980 Immigration Rules would have been held as a valid legislative measure<sup>79</sup>.

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<sup>76</sup> *Abdulaziz v UK*, op. cit., para. 67.

<sup>77</sup> Ibidem, paras. 67, 68.

<sup>78</sup> Ibidem, paras.16 – 19.

<sup>79</sup> For recent cases regarding requirements that restrictions be "in accordance with the law", see *Halford v UK*, judgement of 25.6.1997, Case no. 20605/92; *Khan v UK*, judgement of 12/05/2000, Case no. 35394/97. The rules were later incorporated into the 1982 and 1983 Immigration Rules that were approved by Parliament. Nevertheless, the point should still stand as the authorities' original decisions



To understand why the Court took the approach it did in its evaluation of the applicants' case, attention must be drawn to the Court's consideration of the possible obligation on the State to allow the applicants' husbands' entry and residence. The Court began its assessment by considering any such obligation as a *positive* obligation, that is to say one requiring the State to act, rather than a negative obligation requiring the State to refrain from acting<sup>80</sup>. The first case in which the Court recognised the existence of positive obligations under Article 8 and the Convention in general was *Marckx v Belgium*, a case concerning Belgian procedures for the legal recognition of motherhood to mothers of illegitimate children as well as certain related inheritance laws<sup>81</sup>. In the words of the Court, Article 8 "does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life"<sup>82</sup>. In *Marckx* the Court went on to say that when the State failed in its positive obligation, in other words failing to legislate in a manner which allowed the child to integrate into his family from the moment of birth, the State violated "Article 8(1) without there being any call to examine it under Article 8(2)"<sup>83</sup>. The Court did not however explain why it is that negative obligations should be assessed under Article 8(1) and Article 8(2) while positive obligations need only be evaluated under Article 8(1) alone. There is some evident common sense to the Court's approach. An example of this is the case of *X and Y v the Netherlands* which concerned a legal loop-hole in Dutch criminal law the effect of which was that a young mentally retarded girl who had been sexually assaulted could not prosecute the culprit and nor could her father on her behalf<sup>84</sup>. Since what the State was accused of was its failure in granting the applicants an adequate redress through the penal system, any violation of the girl's right to respect for her private life under Article 8 would be for the breach of a positive obligation rather than for State interference in

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rejecting family reunification for all three applicants pre-date the adoption of the 1982 and 1983 Immigration Rules.

<sup>80</sup> *Abdulaziz*, op. cit., para. 67.

<sup>81</sup> *Marckx v Belgium*, judgement of 13.06.1979, Case no 6833/74, Series A no. 31.

<sup>82</sup> *Ibidem*, para. 31.

<sup>83</sup> *Ibidem*, para. 47.

<sup>84</sup> *X and Y v the Netherlands*, judgement of 26.3.1985, Case no. 8978/80, Series A, no. 91.

the more orthodox sense of a negative obligation not to act. In assessing whether a duty existed under article 8(1) for the State to legislate appropriately in order to give the applicants the redress they demanded, the Court took the approach set in *Marckx* of assessing all the arguments within the framework of Article 8(1). Having assessed all the arguments, the Court held that the State was under such a duty and proceeded to declare a violation of Article 8, refraining from rehearsing the Government's possible justifications once more under Article 8(2). It is in fact difficult to see how the Court could have interpreted the State's action as "interference", as stated under Article 8(2), with X and Y's right to respect for private life. Moreover, while the Court might and did assess the reasons for the authorities' failure to act and the proportionality of the State's interests and needs weighed against those of the individual, it is difficult to contemplate how States might be required to fulfil the remaining requirement of Article 8(2) and prescribe in law all those omissions that may infringe on individuals' enjoyment of their Convention rights.

While cases such as *Marckx v Belgium* and *X and Y v the Netherlands* may have highlighted the positive development of the notion of positive obligations in protecting the rights of individuals under the Convention, *Abdulaziz* does not shine as positive a light on the Court's use of positive obligations, or rather its interpretation of what constitutes a positive obligation. While *Marckx* concerned out-dated legislation and *X and Y* a legal loop-hole occurring through plain oversight of the Government, *Abdulaziz* related to decisions taken by the immigration authorities pursuant to an active, retrogressive Government policy of restricting the right to family unity of resident aliens that was previously enjoyed. To put it more simply, the right to family unity that the applicants might previously have enjoyed was taken away by the Home Secretary through the changes initiated by the 1980 Immigration Rules. This would appear to be rather more active interference than passive omission. When one considers the established principle in public law that any necessary retrogressive measure in the field of civil liberties should be enacted through primary legislation<sup>85</sup>, it becomes even more

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<sup>85</sup> See the application of this principle in, for example, the French *Conseil d'Etat* decision in the *GISTI Case* (1978), *infra*. Section II.3

difficult to understand how the Court could consider the Government's actions as inactions and the applicants' case to be one based on positive obligations, thereby bypassing an important and in this case highly relevant assessment of whether the State's actions were "in accordance with the law".

A further criticism that may be aimed at the Court's interpretation of the case as one of positive obligations is the mere arbitrariness of the perspective taken. This was in fact one of the criticisms made later on by Judge Martens in his dissenting opinion in *Gül v Switzerland*<sup>86</sup>. To say that the case concerns the possibility of an obligation "to allow" the entry of the husbands of the applicants is simply another way of saying that the case concerns the possibility of an obligation *not to stop* their entry. The assessment of whether the obligation is negative or positive therefore becomes a matter of word games.

A more fundamental criticism of the decision in *Abdulaziz* relates to the Court's failure to expound from Articles 8 and 1 a concrete right to family reunification for a clear and definite group of migrants such as those holding indefinite leave to reside in the State concerned. Such a finding would have been consistent with the Court's philosophy that the Convention was to be interpreted so as to be truly effective in the protection of the rights it contained<sup>87</sup>. The Court appeared to refrain from taking such a step in view of three factors which it viewed as entitling the State to a wide margin of appreciation in the matter<sup>88</sup>. One of these three factors was the classification of such a right as one imposing positive obligations. Secondly, as customary in the Court's adjudication of a case, the Court examined whether any such right was generally recognised by the majority of Contracting States and found State practice in the matter

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<sup>86</sup> *Gül v Switzerland*, judgement of 19.02.1996, Case no. 559645/93. Dissenting Opinion of Judge Martens, para. 7.

<sup>87</sup> Examples of the Court's dynamic interpretation of the Convention articles are *Golder v UK*, judgement of 25.02.1975, Case no. 4451/70, Series A no. 18, and *Airey v Ireland*, judgement of 09.10.1979, Case no. 6289/73, Series A no. 41, the latter case being particularly notable since it involved the imposition of a positive obligation on the State to provide legal aid to the applicant in a civil suit.

<sup>88</sup> *Abdulaziz*, op. cit., para. 67.

to be varied<sup>89</sup>. While the norm of observing the general uniformity of a practice may have been appropriate in most cases coming before the Court, in the case of migrants' rights this approach fails to reflect the reality of migrants' situation in the Contracting States as a weak group lacking a voice as voters and subject to measures initiated by Governments under pressure from reactionary elements within society and the media<sup>90</sup>. A more appropriate approach in a case such as *Abdulaziz* might therefore have been to examine State practice with reference to the admission of spouses of Contracting States' own nationals. The Court would have found a more uniform practice, even in times of high unemployment, of granting family reunification, revealing the Contracting States' recognition of the importance of family reunification.

It is also therefore ironic that the third factor that influenced the Court in its holding back from recognising a concrete right to family reunification for migrants was the Court's impression that, since the matter concerned questions not only of family life but also immigration, a wide margin of appreciation should be afforded to the State. In the words of the Court, "as a matter of well-established international law and *subject to its treaty obligations*, a State has the right to control the entry of non-nationals into its territory"<sup>91</sup>. Since the European Convention on Human Rights was one such treaty obligation, the right of States to control the entry of non-nationals by no means forbade the Court from recognising the migrants' right to family reunification. Furthermore, while this principle may have justified granting States a certain margin of a appreciation, the fact that the case concerned not simply questions of immigration law but also those of lawfully resident migrants would have justified the Court in taking a particularly watchful oversight of the case.

While the Court held back from setting out such a right, it did not completely rule out that article 8 may, on a case by case basis, impose an obligation upon the State

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<sup>89</sup> Ibidem.

<sup>90</sup> See J. A. Bustamante, *Immigrants' Vulnerability as Subjects of Human Rights*, in "International Migration Review", vol. 36, no. 138, 2002, pp. 333-354.

<sup>91</sup> Ibidem, emphasis added.

to allow the entry of a non-national for the purposes of family reunification<sup>92</sup>. In the view of the Court, whether Article 8 enabled an applicant to claim a right to family reunification would therefore depend on the particular circumstances of the case and more precisely the difficulties the individual would face in establishing their family life outside the Contracting State. While such an approach might have in practice amounted to a right to family reunification for permanently settled migrants had the Court set a sufficiently low threshold for the difficulties a migrant must face, the Court's treatment of the matter as one in which the State enjoyed a wide margin of appreciation also meant that the Court took a heavily skewed approach in balancing the difficulties faced by the applicant with the interests of the State<sup>93</sup>. Although Mrs Abdulaziz, Cabales and Balkandali all found themselves in different situations, all three cases presented strong reasons for why their right to respect for their family life should entitle them to be granted the right to reside with their husbands in the UK.

Mrs. Abdulaziz had been lawfully residing in the UK since 1977. She had subsequently been granted indefinite leave to remain in the UK due to her close links with her parents, who were lawfully settled in the UK. Moreover, although born in Malawi, she had subsequently been denied Malawian citizenship owing to her Indian ethnicity. She was therefore stateless. Furthermore, while many migrants having to resettle in the country of their spouses would be in effect returning to their country of birth, Mrs Abdulaziz's husband was Portuguese. Her situation was made yet more difficult by the fact that she gave birth to a child in 1982. For her to move to Portugal would therefore mean that Mrs Abdulaziz would leave her family, whose importance in her life had been previously recognised by the UK authorities; leave her country of residence against her wishes for the second time in her life; and move to a country whose language she did not speak and where she had no family<sup>94</sup>. Not moving to Portugal on the other hand would not only deny her the opportunity to live with her

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<sup>92</sup> Ibidem, para. 67.

<sup>93</sup> Ibidem, para. 68.

<sup>94</sup> Ibidem, paras. 39 – 43.

husband, it would also deny her child the chance to grow up in the company of his father as well as denying the father the prospect of being by his child.

Mrs Cabales also presented strong yet different reasons for why the State should allow her husband to reside with her in the UK. Born in the Philippines in 1939, she had arrived in the UK in 1967 to work legally as a nursing assistant. Since then, she had been granted indefinite leave to reside in the UK. In 1980 she married Mr Cabales in the Philippines, having first met him while on holiday there in 1977. The Government nevertheless, in a decision taken on 23 February 1981, refused to grant Mr Cabales a visa allowing him to come to reside in the UK with his wife on the grounds that she was not a citizen of the UK who, or one of whose parents, had been born in the United Kingdom<sup>95</sup>. Therefore, Mrs Cabales, who had lived in the UK for over 13 years and who had served the State as a nurse when the State was most in need of her work was now being asked to leave the country as the Government did not wish her husband to reside in the UK, this not being in the State's economic interests.

Mrs Sohair Balkandali had legally resided in the UK since 1973, obtaining indefinite leave to reside in 1978. Having married a British national in the same year, she obtained British citizenship in 1979 even though the couple were by then separated and divorced in 1980. Mr Balkandali, a Turkish national with leave to remain in the UK as a student, moved in with Mrs Balkandali in 1979. In 1980 the couple had a son and became engaged, marrying in January 1981. In a decision taken on 14 May 1981, the UK Home Office nevertheless refused to grant Mr Balkandali leave to remain in the UK as the husband of a UK citizen on the grounds that Mrs Balkandali was not a UK citizen who, or one of whose parents, had been born in the United Kingdom and there were no reasons why the couple could not live together in Turkey. Yet Mrs Balkandali, as well as having strong ties to the UK having lived there since 1973, was both a highly educated woman and the mother of an illegitimate child. In moving to Turkey she

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<sup>95</sup> Ibidem, paras. 44 – 49.

would therefore face being treated as a social outcast as well as having to sever her ties with the United Kingdom<sup>96</sup>.

The Government's justification for refusing to allow for the residence of the spouses of female migrants settled in the UK was justified on the grounds of protecting the domestic labour market in times of high unemployment<sup>97</sup>. In the transcript of the Court's judgement, the legitimacy and proportionality of this measure was only specifically examined when the Court judged the compatibility of the 1980 Rules with Articles 8 and 14 taken together<sup>98</sup>. While the aim of the Government was rightly deemed legitimate<sup>99</sup>, the Court did not believe that any reduction in the number of males seeking to enter the labour market justified the discrimination between men and women. The Court noted that the Government acknowledged that the alleged reduction of 5,700 husbands entering the UK was not only due to the 1980 Rules, but also a result of other economic factors such as the continued rise in unemployment. The Court also noted that "economically active" migrants would not necessarily be seeking to be employed by others, as they would in many cases be starting up their own businesses and thereby actually create employment for others<sup>100</sup>. The Court therefore concluded that the applicants had after all been victims of discrimination on the ground of sex, in violation of Article 14 taken together with Article 8<sup>101</sup>. By contrast, when reviewing the alleged violation under Article 8 alone, the Court made very little attempt to examine how effective or sensible the Government policy was in attaining its legitimate aim. Moreover, the Court's assessment of the particular circumstances of the applicants' predicament was to briefly note that the applicants had not shown sufficient obstacles for not being able to live with their husbands elsewhere, regardless of the difficulties and injustices of having to relocate highlighted above, and that all three knew or should

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<sup>96</sup> Ibidem, paras. 50 – 54.

<sup>97</sup> Ibidem, para. 39.

<sup>98</sup> Ibidem, paras. 70 – 83.

<sup>99</sup> Ibidem, para. 78.

<sup>100</sup> Ibidem, para. 79. This was in fact the situation Mr Cabales found himself in as he sought to open his own restaurant.

<sup>101</sup> Ibidem, para. 83.

have known that their spouses would not be entitled to reside in the UK<sup>102</sup>. The second remark of the Court is a rather unorthodox factor for the Court to take into consideration since the Convention's purpose is certainly not limited to protecting the individual's Convention rights from State interference that the individual could not have predicted. One can therefore make a striking comparison between the importance the Court gave to the equal treatment of the sexes in assessing the proportionality of the government's policies and the meek scrutiny the Court applied when, under Article 8 taken alone, the Court was reviewing a policy that effectively discriminated between female migrants and female nationals born in the UK. This is yet more galling when one considers the following: since the Court had ruled that there had been no violation of Article 8 taken alone but found a violation of Article 8 taken with Article 14, it must have realised that its judgement would merely encourage the UK Government to change its Immigration Rules so as to deny the right of entry and residence to the spouses of *all* migrants whether male or female.

It is generally accepted that a Government may often make up for the denial of certain rights to legally settled migrants by making citizenship easily acceptable, as is for example the case in the US<sup>103</sup>. So that while a migrant may not at first be allowed to have his family come and live with him in the country in which he lawfully resides, this can subsequently become possible as he becomes entitled to citizenship following continued residence in the receiving country. In *Abdulaziz* however, the 1980 Rules cunningly avoided granting female migrants who had attained citizenship status a right to family reunification, while maintaining such a right for non-migrant (i.e. native) UK citizens: family reunification for female citizens of the UK would only be granted if the citizen was born in the UK or to parents one or both of whom had been born in the UK<sup>104</sup>. Mrs Balkandali, having obtained UK citizenship in 1979, rightly argued before the Court that such a policy amounted to an unreasonable discrimination on the ground of birth and hence a violation of Article 14 taken together with Article 8. The

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<sup>102</sup> *Ibidem*, para. 68.

<sup>103</sup> See C. Joppke, *op. cit.*, p. 59.

<sup>104</sup> *Abdulaziz*, *op. cit.*, para. 23.



Commission in fact held that such a difference of treatment based on the mere accident of birth, used as a blanket policy without regard to the individual's personal circumstances or merits, amounted to a violation of Article 14 taken with Article 8<sup>105</sup>. The Court nonetheless took a different view. In strikingly dismissive and parochial manner, it declared "it is true that a person who, like Mrs Balkandali, has been settled in a country for several years may also have formed close ties with it, even if he or she was not born there. Nevertheless, there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it" so that the Government policy was for the Court both legitimate and proportionate<sup>106</sup>. The Court's opinion here simply reflected an out-dated perception of migrants as individuals who migrated for economic reasons, never truly integrated into the society of the receiving State and planned to eventually return to their country of birth either to retire or apply and invest the money and skills they had acquired through emigration. While there may have been in the past some truth to such views, this was certainly not the situation for the great majority of migrants in 1985, especially for those who had requested and attained the status of citizenship<sup>107</sup>.

In conclusion therefore, strong objections to the Court's decision in *Abdulaziz* are based on the arbitrary manner in which the Court categorised the case as one relating to positive obligations; the Court's failure to apply Article 8(2) in its totality; the Court's excessive deference to State practice in matters touching on positive obligations, immigration law and varying practice among Contracting States, a deference which failed to give due regard to the particularly vulnerable position of migrants within Contracting States; the dismissive manner with which the Court treated the difficulties faced by the applicants in pursuing their family life abroad when weighed against the overall effects of the Government policy on the community; and finally, the excessively conservative view of the Court in relation to the discrimination between native citizens and immigrant citizens.

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<sup>105</sup> *Ibidem*, para. 87.

<sup>106</sup> *Ibidem*, para. 88.

<sup>107</sup> See T.A. Aleinikoff and D. Klusmeyer, *Citizenship Policies for an Age of Migration*, Washington D.C., Carnegie EIP, 2002, pp. 7-22.

One should nevertheless attempt also to draw from the case any relatively positive factors which, although obiter, might have led, or will lead, to the recognition of a right to family reunification for different applicants in subsequent cases. After all, as well as recognising that immigration matters could impinge on rights contained in Article 8, the Court declared that the notion of family life did include cohabitation in the same way that a right to found a family must include the right to cohabit<sup>108</sup>. Therefore, the claimants *would* be entitled under Article 8 to be joined by their spouses were it proven that they could not be expected to follow them abroad, even though a considerably high threshold appeared to be set by the Court for this test<sup>109</sup>. Moreover, the Court made it clear that its decision in the present case did not relate to the rights of immigrants who had a family which they left behind in another country until they had achieved settled status in the country of immigration, leaving the door open for the Court, in future cases relating to such a scenario, to take a more open approach<sup>110</sup>. It is in view of these openings left by the Court that the subsequent cases may be assessed.

## **II.2] Gül and Ahmut: A further Narrowing of the Right to Family Reunification**

### **II.2.1] Gül v Switzerland**

The next case concerning family reunification to come before the Court was that of *Gül v Switzerland*<sup>111</sup>. The case related to a decision taken by the Swiss authorities not to allow the entry into Switzerland of a 6-year-old boy whose father and mother had lawfully resided in Switzerland for seven years and four years respectively. The facts of the case, in a nutshell, were the following. The applicant, Mr Gül, the boy's father, had arrived in the country seeking asylum as he feared political persecution in Turkey due to his membership of a party opposed to the Government's actions in South-East Turkey. However, once granted a humanitarian permit, he dropped his claim for asylum status. His wife, who suffered from severe epilepsy, had also been allowed by the authorities to

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<sup>108</sup> Ibidem, para. 62.

<sup>109</sup> Ibidem, para. 67.

<sup>110</sup> Ibidem, para. 68.

<sup>111</sup> *Gül*, op. cit., n. 85

join him three years later for humanitarian reasons. The applicants therefore sought to be reunited with their son in Switzerland on the grounds that it was not possible for them to return to live in Turkey<sup>112</sup>. The Government, on the other hand, argued that a return to Turkey was possible, that Mr Gül did not hold a residence permit entitling permanent settlement, that he and his wife did not have the funds, adequate housing and physical conditions required to support their son, that Mr Gül was in any case able to visit his son in Turkey and hence that no obligation to allow the son's entry and residence in Switzerland arose under Article 8 of the Convention<sup>113</sup>. The Court, accepting the Government's arguments, held by seven votes to two that the refusal to allow the boy's reunion to take place in Switzerland did not constitute a violation of Mr Gül's right to respect for family life under Article 8<sup>114</sup>.

In view of the openings that had been left by the decision in *Abdulaziz* and the general developments of the Court's jurisprudence over the preceding eleven years, *Gül* presented the Court with the perfect opportunity to show a more receptive approach to family reunification cases. Yet perversely, both the conclusion that the Court reached and the manner by which the Court came to such a conclusion signified instead a further narrowing of the right to family reunification.

More than one feature of the *Gül* case would have justified distinguishing it from *Abdulaziz* and hence not granting the State as wide a margin of appreciation. The Court's categorisation of the State's possible obligation as a positive one was one such feature, commented on in fact by Judge Martens's dissenting opinion with which Judge Russo concurred<sup>115</sup>. As well as highlighting the arbitrariness of such a categorisation, Judge Martens highlighted the evolution of the Court's approach to positive obligations, so that while in *Abdulaziz* the identification of the obligation as a positive one entitled the State to a wider margin of appreciation, subsequent decisions of the Court had dwindled away any such difference in treatment between negative and positive

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<sup>112</sup> Ibidem, paras. 6 – 15.

<sup>113</sup> Ibidem, para. 30.

<sup>114</sup> Ibidem, paras. 40 – 43.

<sup>115</sup> Ibidem, Dissenting Opinion of Judge Martens, para. 7.

obligations<sup>116</sup>. Judge Martens also highlighted another even more important difference between *Abdulaziz* and *Gül*. Whilst *Abdulaziz* concerned the reunification of recently formed families, the present case was one in which the applicant claimed a right to reunification with a member of his family that he had had to leave when emigrating. Furthermore, as noted above, the importance of this distinction was actually recognised by the Court in *Abdulaziz*. The Court's express limitation in 1985 of its approach in *Abdulaziz* to cases of newly founded families clearly implied that a different set of norms should apply to cases such as *Gül*. Unfortunately, the Court in *Abdulaziz* did not indicate whether such norms should be more or less favourable to the applicant than those applied in *Abdulaziz*. Since it would appear implausible for the Court to have meant that in cases such as *Gül* an even stricter approach than that taken in *Abdulaziz* would be applied towards the individuals' rights, the most likely intention of the Court was to imply that in *Gül*-type situations there would be a greater onus upon States to accept the family reunification requested by settled migrants<sup>117</sup>. A third, stark difference between the two cases was that *Abdulaziz* concerned the reunification of spouses. *Gül*, on the other hand, concerned the reunification of a young child with his two parents. Since the separation from one's own child is generally considered as even more painful than the separation from one's spouse, this is therefore another important difference between the two cases that the Court might have recognised.

The Court nevertheless appeared to disregard all three distinctions. With regard to the notion of positive obligations and subsequent State discretion, the Court began positively, "the boundaries between the State's positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both cases regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the

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<sup>116</sup> *Ibidem*, Dissenting Opinion of Judge Martens, paras. 8 – 9. Judge Martens appears to argue that cases such as *Keegan v Ireland* (1994) and *Stjerna v Finland* (1994) have altered both the manner in which the Court assesses breaches of a positive obligation, in other words now assessing any justifications under article 8(2), and in granting the same margin of appreciation in the balancing of interests as it would for negative obligations. While cases such as *Goodwin v UK* (2002) show that cases of positive obligations may still be examined entirely within the framework of Article 8(1), the latter point relating to the balancing of interests still stands.

<sup>117</sup> *Gül*, *op. cit.*, Dissenting Opinion of Judge Martens, paras. 13 – 14.

community as a whole; and in both contexts the State enjoys a certain margin of appreciation”<sup>118</sup>. Yet in the next paragraph, the Court drew the exact same conclusion drawn in *Abdulaziz*: Mr Gül had to prove that his son’s move to Switzerland would be the only way for father and son to live as a normal family<sup>119</sup>. Therefore, although the Court paid lip service to the recent rapprochement between positive and negative obligations, it in effect applied the doctrine current at the time of the *Abdulaziz* case by which the State would be afforded a wider margin of appreciation in view of the positive nature of the obligation involved.

The Court also made no reference to the proviso in *Abdulaziz* that the norms being applied concerned the family reunification of newly founded families and not pre-existing families. In setting out the principles involved, the Court in *Gül* merely parroted the *Abdulaziz* judgement without explaining in any way why it felt the same norms should apply when the Court in *Abdulaziz* implied they should not<sup>120</sup>. If anything, the Court actually made family reunification even more difficult for pre-existing families since, when weighing the strengths and weaknesses of the applicant’s particular claim, the Court implied that the applicant’s decision to leave Turkey and hence his son in 1983 weakened his claim<sup>121</sup>. Even the rules set in *Abdulaziz* referred to by the Court in *Gül* were extended so as to apply to the case in hand with no acknowledgement or justification for such an extension. The Court stated, “where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence *and to authorise family reunion in this territory*” referring to *Abdulaziz* as authority for such a claim<sup>122</sup>. Yet the relevant text in *Abdulaziz* clearly referred only to the reunification of spouses rather than family reunion in general (i.e. including children): “The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of

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<sup>118</sup> Ibidem, para. 38.

<sup>119</sup> Ibidem, para. 39.

<sup>120</sup> Ibidem, para. 38.

<sup>121</sup> Ibidem, para. 41.

<sup>122</sup> Ibidem, para. 38, emphasis added.

their matrimonial residence *and to accept the non-national spouses for settlement in that country*”<sup>123</sup>.

The judgement in *Gül* is also open to criticism for the Court’s finding that family reunification *could* take place in Turkey in spite of the serious difficulties the applicant had shown. One of the reasons that the applicant claimed he could not return to Turkey concerned his wife’s health. Mrs Gül had suffered from epilepsy since 1982. While still in Turkey in 1987, she suffered serious burns while having an epileptic fit and was admitted to Switzerland to receive treatment as the appropriate treatment was not available in the area of Turkey in which she lived. Her illness was so severe that she could not take care of her daughter who was born in 1988. Moreover, a specialist in internal medicine issued a written declaration in 1989 stating that Mrs Gül could not return to Turkey given her serious medical condition and that to do so would put her life at risk<sup>124</sup>. It was in fact in view of Mrs Gül’s state of health that the authorities granted the couple a residence permit on humanitarian grounds<sup>125</sup>. While the Court noted the seriousness of Mrs Gül’s health when she arrived in Switzerland in 1987, it held that the applicant had not sufficiently proven that she could not later receive appropriate treatment in medical hospitals in Turkey and that she had after all been able to travel to Turkey in July 1995<sup>126</sup>. However, the decision of the Court should not have been based on the state of affairs existing on the day of the Court’s judgement. As affirmed by Judge Martens, the Court’s duty was to determine whether the Swiss authorities had committed a breach of the Convention when refusing to grant Mr Gül’s son the right to reside with his parents in Switzerland. The relevant circumstances were therefore those of 19 September 1990<sup>127</sup>. In view of the specialist’s opinion given only a year earlier, Mrs Gül clearly could not have been required to return to Turkey in 1990, a situation the authorities had recognised in granting the couple a residence permit. Moreover, it would surely be unreasonable for the Court to accept the argument that Mrs Gül had not

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<sup>123</sup> *Abdulaziz*, op. cit., para. 68.

<sup>124</sup> *Gül*, op. cit., paras. 8 – 9.

<sup>125</sup> *Ibidem*, para. 11.

<sup>126</sup> *Ibidem*, para. 41.

<sup>127</sup> *Ibidem*, Dissenting Opinion of Judge Martens, para. 2.

disproved beyond doubt in 1990 that one day her condition might improve sufficiently for her to return to Turkey and hence family reunification should not be granted. Furthermore, regarding her visit to Turkey in 1995, there is clearly a substantial difference between permanently resettling in Turkey and going there for a brief visit.

As stated above, central to the Swiss Government's opposition to granting family reunification in Switzerland was the indefinite nature of Mr Gül's residence permit<sup>128</sup>. The Court appears to have given considerable importance to this factor<sup>129</sup>. Yet in practice the withdrawal of Mr Gül's residence permit was not likely to occur. One reason for granting the residence permit was the dangers Mrs. Gül faced in returning to Turkey due to her condition. As stated above, it would not be reasonable to require the applicants to disprove beyond doubt a future improvement in Mrs Gül's condition. The residence permit was also granted in recognition of Mr Gül's seven years of legal employment and residence in Switzerland<sup>130</sup>. Therefore, while Mrs Gül's condition might have improved at some point in the future, the more time the couple spent in Switzerland the less likely it was that their residence permit would be withdrawn. It was of course hypothetically possible that the permit could be withdrawn on other grounds such as the couple committing a criminal offence yet there was nothing to suggest that such a scenario would occur. Moreover, as Judge Martens pointed out, the temporary nature of the residence permit should not have been considered more important than the fact that the applicants, having lived for several years in Switzerland, were assumed to have become integrated into the country by forming social ties there and adapting to the new culture<sup>131</sup>.

The Court also conspicuously failed to explain how Mr and Mrs Gül could enjoy family life with both their son and daughter if the son was not allowed to reside with them in Switzerland. As mentioned above, Mr and Mrs Gül gave birth to a girl in 1988 who had to be taken into a home. In this context, a previous decision of the Court is

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<sup>128</sup> Ibidem, paras. 16 and 18.

<sup>129</sup> Ibidem, para. 41

<sup>130</sup> Ibidem, para. 11.

<sup>131</sup> Ibidem, Dissenting Opinion of Judge Martens, para. 15.

highly relevant. In *Berrehab v the Netherlands*, the Court held that the Netherlands had violated Article 8 of the Convention by attempting to expel Mr Berrehab, a Moroccan national, once he had divorced his Dutch wife<sup>132</sup>. The Court held that, given that Mr Berrehab's daughter could not be expected to leave her mother and resettle in a country with a different culture and language to that in which she had previously lived, to expel Mr Berrehab would deny him of the contact he had with his daughter and hence violate his rights under Article 8. Ironically, the Court in *Gül* distinguished its decision in *Berrehab* with the present case because Mr Gül's son was born and grew up in Turkey, so that, unlike Mr Berrehab's daughter, Mr Gül's son faced no cultural or linguistic problems by remaining in Turkey<sup>133</sup>. However, the *Berrehab* case was far more relevant to Mr Gül's relationship with his daughter than it was to Mr Gül's relationship with his son. Firstly, the Court established in *Berrehab* that, since a child born of a marital union was ipso jure part of that relationship, cohabitation between parent and child was not required for there to be a bond amounting to family life and that only exceptional circumstances could break that bond<sup>134</sup>. In Mr Gül's case one must therefore assume that such a bond existed with his daughter since nothing in the facts of the case and the Court's judgement suggest that Mr and Mrs Gül had cut off all contacts with their daughter<sup>135</sup>. Secondly, analogies can be made between the difficulties for both girls to follow the applicants abroad. Mr Gül's daughter was only two when his request for family reunification was rejected. Therefore, unlike Mr Berrehab's daughter, she would not necessarily have faced serious linguistic and cultural problems in moving to Turkey with her parents. Also, in Mr Berrehab's case, his former wife could also not be expected to move to Morocco. His return to Morocco obligatorily meant one of the two parents' contact with their daughter would be severed, which was not the case in Gül since both parents remained together. These differences aside, there was an underlying principle in *Berrehab* that should have been applied equally to the *Gül* case: when avoidable, an individual should not be required to act against their child's best interests in order to exercise their right to respect for their family life. It should have been clear

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<sup>132</sup> *Berrehab v the Netherlands*, judgement of 21.06.1988, case no. 10730/84, Series A no. 138.

<sup>133</sup> *Gül*, op. cit., para. 42.

<sup>134</sup> *Berrehab*, op. cit., para. 21.

<sup>135</sup> This assumption is reinforced by Judge Martens' raising of the point in his dissenting opinion.



to the Court that the Swiss authorities' decision constituted a violation of this principle. To exercise their right to live with their two children, Mr and Mrs Gül would have had to bring their daughter with them to Turkey, which was clearly not in her best interests in view of the care she was receiving in Switzerland. While in *Berrehab* the only just solution was to allow Mr Berrehab to reside in the Netherlands, the only just solution in *Gül* was to allow their son to join them in Switzerland.

The Court's reference to *Berrehab* mentioned above suggests that the Court was implying that it was in Mr Gül's son's best interests to remain in Turkey. Yet to make such a judgement and be influenced by it flies in the face of the fundamental principle that, in all but the most drastic cases, the most appropriate judges of a child's interests are its parents. One also suspects that what the Court had in mind was the boy's circumstances in 1996 rather than those prevailing at the time of the authorities' original decision. Mr Gül's son was only seven at the time of the authorities' original decision, an age at which linguistic and cultural change is not an insurmountable challenge. Moreover, to consider against the application the amount of time the child has lived separately from his parents and in his own country creates a catch 22 situation. If the parents have resided abroad for many years, the Court will consider the applicants' link with their child weaker and the child's level of independence and attachment to his birth country stronger. Yet if the applicants have resided abroad for less time, then the Court will also deem it easier for them to return to the country from which they emigrated<sup>136</sup>.

The Court, revealingly, did not refer to the Government's claims that Mr and Mrs Gül did not have the sufficient housing, income or health to care for the boy, which suggests that such claims were not sufficiently substantiated. Nor did the Court question how Mr and Mrs Gül could expect to care for their son when their daughter had to be placed in a home. The most likely explanation for this is that, since the boy was already

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<sup>136</sup> On this contradiction, see J. Andriantsimbazovina, *Le Maintien du Lien Familial des Etrangers*, in F. Sudre (ed.), *Le Droit au Respect de la Vie Familiale au sens de la Convention Européenne des Droits de l'Homme*, Brussels, Bruylant, 2002, pp. 211 – 240, pp. 226 – 233.

seven and had grown up for the last four years under the limited care of various family relations, the level of care he required would be considerably less than that required by his younger sister.

### II.2.2] Ahmut v the Netherlands

A further family reunification case was decided by the Court later on in the same year. *Ahmut v the Netherlands* concerned an alien migrant in the Netherlands whose nine-year-old son had been refused entry from Morocco to join his father after his mother died in a car accident and his grandmother became too ill to care for him<sup>137</sup>. The applicant claimed that, apart from the boy's sick grandmother, none of the boy's relatives in Morocco had expressed a willingness to care for him<sup>138</sup>. Moreover, the applicant, while living in the Netherlands, had acquired Dutch nationality through marriage to a Dutch citizen and now had a business of his own<sup>139</sup>. He therefore sought to convince the Court that it would be unreasonable to expect him to return to Morocco to continue his family life with his son who had also stayed with him in the Netherlands in 1990 for nine months before returning to Morocco<sup>140</sup>. The Government, on the other hand, argued that since Mr Ahmut had retained Moroccan nationality as well acquiring Dutch nationality, there was no real obstacle to family reunification taking place in Morocco<sup>141</sup>.

As with *Gül*, the Court once again applied the same rules and standards for determining the case as it had previously done in *Abdulaziz*<sup>142</sup>. In examining the particular circumstances of the case, the Court took into consideration the presence of the boy's cultural and linguistic links with Morocco, the presence in Morocco of his older siblings and the care provided by the boarding school the boy was attending in

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<sup>137</sup> *Ahmut v the Netherlands*, judgement of 26.10.1996, Case no. 21702/93, paras. 8 – 23.

<sup>138</sup> *Ibidem*, para. 64.

<sup>139</sup> *Ibidem*, para. 10.

<sup>140</sup> *Ibidem*, paras 19, 20, 64.

<sup>141</sup> *Ibidem*, para. 66.

<sup>142</sup> *Ibidem*, paras. 67 – 68.

Morocco<sup>143</sup>. The Court also deemed relevant Mr Ahmut's conscious decision to leave his son when migrating to the Netherlands and his retention of Moroccan nationality after he had acquired Dutch nationality<sup>144</sup>. In view of such considerations, the Court held by a narrow majority of five votes to four that the State had not failed to strike a fair balance between the interests of Mr Ahmut and those of the State<sup>145</sup>.

Although the difficulties faced by Mr Ahmut in returning to Morocco were not as great as those faced by the applicant and his family in *Gül*, in at least one aspect *Ahmut* is an even more unsatisfactory decision than that taken by the Court in *Gül*. Had the Court wished to, it could have distinguished *Ahmut* from *Abdulaziz* and *Gül* and accordingly imposed a narrower margin of appreciation upon the State. As previously observed, the ratio decidendi set by the Court in *Abdulaziz* had been expressly limited to cases of newly formed families. The Court in *Gül* admittedly extended this ratio decidendi to a case concerning family reunification with family members left behind at the time of migration. However, in *Ahmut*, the extension of *Abdulaziz*'s norms in *Gül* could have been explained away as being due to Mr Gül's theoretically temporary and indefinite right of residence in the receiving country. Mr Ahmut, on the other hand, had acquired Dutch nationality and therefore held the most secure right of residence possible. Instead, by applying in *Ahmut* the wide margin of appreciation set in *Abdulaziz*, the Court decisively emptied of all meaning the proviso laid down by the Court in *Abdulaziz* that the approach taken was being set for cases of family reunification that covered newly formed families only<sup>146</sup>.

As with *Gül* and *Abdulaziz*, the Court's balancing of the interests and needs of the individual against those of the State can be criticised on analytical and humanitarian grounds. While in *Gül* the Court implied that the applicants' decision to leave his son behind and emigrate might count against his application for family reunification, in

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<sup>143</sup> Ibidem, paras. 69, 72.

<sup>144</sup> Ibidem, para. 70.

<sup>145</sup> Ibidem, para. 73.

<sup>146</sup> Judge Martens in fact expresses his disapproval of this move by the majority of the Court in his dissenting opinion and also claims that, had the Court wished to, it could have distinguished *Gül* from the present case. See *Ahmut*, op. cit., Dissenting Opinion of Judge Martens, paras. 2, 6.

*Ahmut* the Court was very explicit on this point. In the view of the Court, “living apart is the result of [Mr] Ahmut’s conscious decision to settle in the Netherlands” and since he could go to Morocco as often as he wished, “It therefore appears that [Mr] Ahmut is not prevented from maintaining the degree of family life which he himself opted for when moving to the Netherlands in the first place”<sup>147</sup>. What the Court appeared to be saying therefore was that those who chose to migrate and leave their families behind were abdicating their right to family reunification. Yet migrants from countries such as Morocco and Turkey often decided to leave their children behind with relatives so that the children could join them at a later date once they had achieved settled status and created the appropriate conditions for their children to join them<sup>148</sup>. The Court, ignoring this reality, was effectively punishing migrants such as Mr Ahmut for trying to do what was in the best interests of their children.

The Court also failed to judge the matter on the basis of the circumstances prevailing at the time of the applicant’s original request in 1991, considering in its assessment other factors and events which only came about after the authorities’ initial refusal to allow family reunification. The Court, for example, claimed that it need not concern itself with the applicants’ claims that none of the family in Morocco were able or willing to care for his son since the applicant had arranged a boarding school for him there<sup>149</sup>. Mr Ahmut however only arranged for his son to return to Morocco and attend the boarding school after the Dutch authorities rejected his claim for his son to reside with him in the Netherlands. If the boarding school was to be considered by the Court, then it should have been as an indication that the claims made by Mr Ahmut before the Dutch authorities that no family members in Morocco were willing or able to look after his son were well founded.

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<sup>147</sup> *Ahmut*, op. cit., para. 71.

<sup>148</sup> See S. Van Walsum, *Comment on the Sen Case. How Wide is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification?*, in “European Journal of Migration and Law”, vol. 5, 2003, pp. 313 – 322, p. 315.

<sup>149</sup> *Ahmut*, op. cit., para. 72.

In view of all these remarks, it is easy to understand why the Commission, unlike the Court, held the decisions taken by national authorities in both *Gül* and *Ahmut* to be a breach of Article 8 of the Convention<sup>150</sup>. The Court's judgements are reproachable in their application of the wide margin of appreciation set in *Abdulaziz*, disregarding the differences in subject matter and the evolution of the notion of positive obligations in cases that had been decided after *Abdulaziz*. The judgements are also subject to criticism for the lack of reasonable compassion and fairness shown to the applicants in determining that the State was justified in requiring that any family reunification was only to take place in the childrens' countries of birth. Furthermore, the Court has both failed to consider important issues such as parents' wishes to act in the best interests of their children and yet considered issues which were not related to the decisions of the national authorities upon which the Court should have been adjudicating.

### **II.3] The Protection by National Courts of the Right to Family Reunification: A Comparison with the European Court of Human Rights**

#### **II.3.1] Jurisprudence of the French *Conseil d'Etat* and Constitutional Court**

The extent to which the European Court of Human Rights has taken a negative approach in protecting the right to family reunification becomes even more evident when compared to the role national courts have played in protecting such a right in response to governments' increasingly restrictive anti-immigration policies. Perhaps the best example of this is the role of the French *Conseil d'Etat* and Constitutional Court in protecting the right to family reunification. As stated above, the French Government, in 1977, sought to reverse the effects of the 1976 *décret* on family reunification by issuing a further *décret* prohibiting entry and residence to all family members who wished to accede to the labour market<sup>151</sup>. The legality of the 1977 *décret* being challenged in the administrative courts, the *Conseil d'Etat* delivered its judgement on the matter in the

<sup>150</sup> See *Gül*, op. cit., para. 25 and *Ahmut*, op. cit., para. 57.

<sup>151</sup> *Décret* 10.11.1977, see F. Jault-Seseke, op. cit., p. 38.

*GISTI Case*<sup>152</sup>. The *Conseil d'Etat* first noted that in section 10 of the Preamble to the 1946 Constitution, the State guaranteed the family the necessary conditions for its development. A general principle of law deduced from this was therefore the right to lead a normal family life<sup>153</sup>. In the *Conseil's* opinion, for an individual to develop, he or she must be able to found a family that may itself develop. Therefore, such a family should not be separated. Considering also the numerous references to such a right in international conventions and the general make-up of France's family law, the *Conseil d'Etat* therefore linked the right to normal family life with that of family unity. Since this principle applied to lawfully resident aliens as well as French nationals, the principle included a right for such aliens to have their spouses and minor children join them. While the Government was entitled to set the conditions for such family reunification to take place, the Government could only act within the constraints set by its international engagements and general principles of law. The right to family reunification could only therefore be restricted in pursuance of a legitimate aim and subject to requirements of proportionality. The Government could not therefore prohibit the legal employment of family members of lawfully settled aliens as a response to the country's high unemployment rate. The 1977 *décret* was therefore declared by the *Conseil d'Etat* to be illegal and hence null and void<sup>154</sup>. On the other hand, the *Conseil d'Etat* did allow for the possibility of conditions being set relating to the resident alien's resources and housing for reasons of public policy (*ordre public*) and the social protection of aliens and their families<sup>155</sup>.

While the *Conseil d'Etat's* recognition of a general principle of law containing aliens' rights to family reunification signified a very positive step forward in the

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<sup>152</sup> *Arrêt GISTI* (C.E.) 8.12.1978

<sup>153</sup> General principles of law (*Principes Généraux du Droit*, PGD) are principles which may not be expressly stated in any applicable text but which the administrative courts may deduce from related provisions in such texts as the constitutional preambles or international treaties and which, once deduced, are to be respected by the administrative authorities. See F. Jault-Seseke, *op. cit.*, p 40.

<sup>154</sup> *Ibidem*, pp. 39 – 43.

<sup>155</sup> This was confirmed by the *Conseil d'Etat* in the *GISTI (II) Case* in which the *Conseil* reviewed the legality of the Government's 1984 *décret* limiting family reunification to those aliens who could prove they had sufficient resources and housing, had been lawfully residing in France for over a year, and whose family members were not carrying serious infectious diseases. See *GISTI, D.* (C.E.) 26.9.1986 in Jault-Seseke, F., *op. cit.*, p. 45.

protection of settled migrants, only the Constitutional Court could recognise such a right as one holding constitutional value. Until the Constitutional Court did so, the legislature could pass legislation overstepping the boundaries set by the *Conseil d'Etat*. It was in this setting that the Constitutional Court reviewed the constitutionality of law 24/8/1993 that incorporated the 1976 *décret* (as modified by the *décret* of 4/12/1984) into a legislative text, the *ordonnance* 2/11/1945<sup>156</sup>. The Constitutional Court's decision is important for two reasons. Firstly, while the *Conseil d'Etat* allowed in principle for the Government to set certain restrictions on the right to family reunification through its executive powers, the incorporation of the right to family reunification into a legislative text meant for the Constitutional Court that, from then on, all restrictions on the right to family reunification had to be approved by the legislature. Secondly, the Court recognised the right to lead a normal family life of both nationals and aliens derived from the Preamble of the 1946 Constitution, and hence the right to family reunification, to be one of constitutional value. The legislature could therefore place limits upon the right to family reunification but only in so far as this was necessary for the protection of objectives holding constitutional value and subject to a strict review of proportionality by the Court. In reviewing the 1993 legislation therefore, the Constitutional Court annulled provisions prohibiting non-national students from exercising their right to family reunification. Moreover, it qualified a provision requiring two years' lawful residence before family reunification could take place as valid only if the process of application by the settled alien could be begun before the two-year term expired<sup>157</sup>.

The French Courts have therefore ensured that lawfully resident aliens enjoyed a right to family reunification the limits of which have been carefully monitored, controlled and mitigated by the Courts. Moreover, by recognising the constitutional value of such a right, the Constitutional Court has protected the right to family reunification from the vagaries of anti-immigration legislatures and governments.

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<sup>156</sup> *Conseil Constitutionnel*, judgement of 13.8.1993, Case no. 93-325.

<sup>157</sup> Jault-Seseke, F., op. cit., pp. 43 – 44; B. Genevois, *Un Statut Constitutionnel pour les Etrangers*, in "Revue Française de Droit Administratif", vol. 9, no. 5, 1993, pp. 871-890; H. Labayle, *Le Droit de l' Etranger à Mener une Vie Familiale Normale, Lecture Nationale et Exigences Européennes*, in "Revue Française de Droit Administratif", 1993, pp 534 - 535.

### II.3.2] Jurisprudence of the German Constitutional Court and Federal Administrative Court

However, not all national courts have protected the right to family reunification to the same extent. Article 6 of Germany's Basic Law contains various provisions established in order to protect the individual's right to family life. Article 6(1) prohibits the separation by the State of married couples and places an obligation on the State to act in order to protect the family. Under Article 6(2) parents have the right to care for and educate their children while Article 6(3) states that children may only be separated from their parents in exceptional circumstances. The Federal Administrative Court (*Bundersverwaltungsgericht*) originally claimed in 1984 that Article 6(1) would not be breached by a refusal to grant family reunification as long as the family could be reunited in the family's country of origin<sup>158</sup>. Even though the text of Article 6(1) is more clearly linked to the principle of family unity than the relevant provision in the Preamble to the 1946 French Constitution, the German Constitutional Court three years later also did not interpret Article 6(1) as containing a concrete right to family reunification. This meant that the State was under no obligation to recognise a right to family reunification. The Court did however impose on the State an obligation to balance the interests of the State with those of the family when passing provisions concerning family reunification<sup>159</sup>. The conditions or restraints on family reunification could admittedly be justified in pursuance of a wide range of objectives such as the economic interests of the country and the fight against unemployment. Also, the proportionality test itself was relatively weak so that the denial of family reunification for those who had not been lawfully residing in Germany for eight years was deemed permissible<sup>160</sup>. Nevertheless the Court did enforce the interests of the individual in its

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<sup>158</sup> BVerwG., 18.9.1984, Deutsches Verwaltungsblatt, 1984, p. 1020, reported in Jault-Seske, F., op. cit., p. 60.

<sup>159</sup> BVerfG., judgement of 12.5.1987, Entscheidungen des Bundesverfassungsgerichts, (vol?) 76, 1, reported in Jault-Seske, F., op. cit., p. 54 - 55.

<sup>160</sup> Confirming its previous decision, BVerfG, judgement of 4.11.1983, Neue Zeitschrift für Verwaltungsrecht, 1984, 66.



1987 decision by holding a provision requiring spouses to have been married for at least three years to be in breach of Article 6(1) of the Basic Law.

### II.3.3] Domestic Courts and European Court Compared

We therefore may conclude that not only in France, but also in Germany, where the Court's limited protection of migrants' rights to family reunification has been widely criticised<sup>161</sup>, the national courts have taken a more positive approach than that taken by the European Court of Human Rights. There is a particularly stark contrast between the approach taken by the French courts and that of the European Court of Human Rights. The difference can perhaps be summed up thus: while the former took as its starting point the fundamental or constitutional importance of the right to family reunification, the latter has taken as its starting point States' right to control the entry and stay of aliens. Sadly, the negative influence of the European Court's jurisprudence has also affected the position taken by some national courts and tribunals, such as those in the United Kingdom where recent decisions relied heavily on the reasoning used in the *Abdulaziz* judgement. As the Master of the Rolls wrote in a decision by the Court of Appeal, "the State owes no duty generally to give effect to couple's choice of place and residence, and it will be very much up to the State to strike the balance between requirements of immigration control and the immigrant's freedom to choose when and where he will enjoy his Art. 8 rights"<sup>162</sup>. In his dissenting opinion in the *Ahmut* case, Judge Valticos wrote that "the arguments in support of the Netherlands authorities' decision to separate the son from his father ... do not weigh very heavily and even reflect a restrictive spirit incompatible with the very meaning of the Convention and the concept of human rights"<sup>163</sup>. One would suspect therefore that Judge Valticos felt the same way about the European Court's case law on the matter.

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<sup>161</sup> See Jault-Seseke, F., op. cit., pp 56 –57.

<sup>162</sup> *R v Secretary of State for the Home Department, ex parte Mahmood* (CA), judgement of 8.12.2000. See also the decision by the Immigration Appeal Tribunal in *Nhundu and Chiwera v. Secretary of State for the Home Department*, judgement of 1.6.2001, Appeal No. CC/21729/2000.

<sup>163</sup> *Ahmut*, op. cit., dissenting opinion of Judge Valticos.

#### **II.4] Sen v Turkey: The Beginning of a New Phase for the European Court's Relationship with Family Reunification?**

There may however be grounds for optimism following a more recent decision taken by the European Court of Human Rights, *Sen v the Netherlands*, in which the denial of a right to family reunification was held to violate Article 8 of the convention<sup>164</sup>. Mr Sen, a Turkish national, had been lawfully living in the Netherlands since 1977 and held a settlement permit granting him indefinite leave to reside there. In 1982 he married Mrs Sen in Turkey and in 1983, still in Turkey, the couple gave birth to a child. In 1986, leaving her child in the care of her sister and brother-in-law, Mrs Sen joined her husband in the Netherlands and obtained a residence permit from the authorities<sup>165</sup>. In 1990 and 1994 their second and third children were born in the Netherlands. In 1992, Mr Sen applied to the authorities for their first child to be allowed to join them. One month later, this application was rejected by the Ministry of Foreign Affairs on the grounds that allowing the child's entry and stay did not serve the national interests and that the family bond between the parents and the child had been broken following the mother's departure for the Netherlands<sup>166</sup>. None of Mr Sen's subsequent appeals to have the decision overturned were successful<sup>167</sup>. The European Court however, decided unanimously that Article 8 of the European Convention had been violated<sup>168</sup>.

In itself this does not mean that the Court departed from the preceding case law as the Court had always stated that the denial of family reunification could, in certain circumstances, constitute a violation of Article 8 of the Convention<sup>169</sup>. However, many features of the Court's decision suggest both a change in the margin of appreciation granted to the State and in the weighting given to factors common to cases of family

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<sup>164</sup> *Sen v the Netherlands*, judgement of 21.12.2001, Case no. 3145/96.

<sup>165</sup> *Ibidem*, paras. 9 – 11.

<sup>166</sup> *Ibidem*, paras. 12 – 16, 20.

<sup>167</sup> *Ibidem*, paras. 17 – 19, 21.

<sup>168</sup> *Ibidem*, para. 42.

<sup>169</sup> *Abdulaziz*, op. cit., para. 67; *Gül*, op. cit., para. 38; *Ahmut*, op. cit., para. 68.

reunification<sup>170</sup>. For the first time, the Court distinguished the case from that of *Abdulaziz* in noting that the present case did not apply to family links established after the applicants had migrated. For the Court therefore, this meant that the case would not be examined solely from the immigration law viewpoint, hence implying a narrower margin of appreciation than that granted to the State in *Abdulaziz*<sup>171</sup>. In acknowledging that Mr and Mrs Sen had left their child in Turkey of their own free will and even waited two years after their marital problems were resolved before applying for family reunification, the Court held that these facts should not be held against them and that any decision to live separately should not be an irrevocable one<sup>172</sup>. The Court also deemed it irrelevant to consider whether relatives of the child could care for him appropriately in Turkey<sup>173</sup>. What *was* given importance by the Court was the status the applicants had acquired in the Netherlands. By forcing the applicants to choose between abandoning life in the Netherlands and not living with their first child, the State had not achieved a sufficiently fair balancing of interests according to the Court<sup>174</sup>. Moreover, the Court took into consideration the young age of the applicant at the time of the original application and hence the urgent need for her to be integrated into the applicants' family<sup>175</sup>. The approach taken by the Court in all these features is clearly therefore far closer to that of the dissenting judges in *Gül* and *Ahmut* than to that of the majority of the Court in those two cases.

The Court however did not even implicitly acknowledge a break from the past jurisprudence. In stating the applicable principles relevant to the assessment of the case, the Court expressly referred to *Gül* and *Ahmut*<sup>176</sup>. The Court, acknowledging the many common features the case shares with *Ahmut*<sup>177</sup>, sought to justify the different conclusions by stressing that in the present case two further children were born to the applicants in the Netherlands who had grown up there and had no ties with Turkey other

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<sup>170</sup> This opinion and many of the following points are made in S. Van Walsum, op. cit, pp. 317-322.

<sup>171</sup> *Sen*, op. cit., para. 37.

<sup>172</sup> *Ibidem*, para. 40.

<sup>173</sup> *Ibidem*, para. 41.

<sup>174</sup> *Ibidem*, para. 41.

<sup>175</sup> *Ibidem*, para. 40.

<sup>176</sup> *Ibidem*, para. 36.

<sup>177</sup> *Ibidem*, para. 38.

than their official nationality. In the court's view, it would not therefore be reasonable for them to resettle in Turkey<sup>178</sup>. This denial of a break with the Court's jurisprudence is further reinforced by Judge Türmen's concurring opinion in which he expresses regret that the Court did not take a stronger position which would have found a violation of Article 8 even in the case where the two youngest children had not been born<sup>179</sup>.

It is nevertheless questionable whether *Sen* merely represents a case in which the exceptional circumstances of the applicants meant that the high thresholds set in *Abdulaziz, Gül and Ahmut* were passed due to the existence of the two younger children. When the authorities took their initial decision in 1992, only one child had been born. Aged only two years and two months, his move to Turkey and change of language and culture would certainly not have been for him an insurmountable challenge. By the time the decision came before the European Court, the two children living in the Netherlands were admittedly eleven and seven years old and hence resettlement in Turkey would have been far harder. However, by that stage, the applicants' first child had turned eighteen and was no longer a minor, let alone a young child with an urgent need to be integrated into the family unit of her parents and siblings.

The ambiguous and apparently incongruous decision of the Court is perhaps partly due to the fact that the decision was taken unanimously. It is difficult therefore to predict what *Sen* signifies for future cases of family reunification that, in view of the present uncertainty, are certain to arise. It is however hoped that Judge Türmen is wrong in his assessment of the decision. Perhaps more indicative than any individual feature of the case mentioned above is the Court's repeated focus on the need for the State to respect family life not only through not interfering with it but also in allowing it to develop. This reflects a recent show of strength in the Court's jurisprudence regarding positive obligations under Article 8 in immigration cases concerning the expulsion of resident aliens<sup>180</sup>. To understand the importance of this focus on the positive obligation

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<sup>178</sup> *Ibidem*, para. 39.

<sup>179</sup> *Ibidem*, Concurring Opinion of Judge Türmen.

<sup>180</sup> This is highlighted in N. Rogers, *Immigration and the European Court of Human Rights: Are new principles emerging?*, in "European Human Rights Law Review", vol. 1, 2003, pp. 53 – 64. See *Boultif v*

of the State, one need only think of the difference between the protection offered by the French and German Courts in cases of family reunification. The 1946 Preamble was written in terms of the State's obligation to support the family, in other words a positive obligation. Article 6 of the Basic law on the other hand, included the express prohibition on the State of separating children from their parents and spouses from each other. While Article 6 may have appeared more closely related to cases of family reunification, it is from the French Preamble that the greater protection of family reunification was achieved. While *Sen* may not lead to the level of protection achieved through the French *Conseil d'Etat* and Constitutional Court, it could nevertheless redress the balance between the State's interests and those of the individual in cases of family reunification.

## **CHAPTER III: FAMILY REUNIFICATION FOR REFUGEES**

### **III.1]The Right to Family Unity for Convention Refugees and the Presumption of Family Persecution: Two Different Coins**

Although a case of a recognised refugee has not yet come before the European Court of Human Rights, the Court's focus on the family's possibilities of enjoying their family life elsewhere highlights the special plight of refugees who, by definition, do not have the option of return to their country of origin. As noted above, the 1951 Geneva Convention on the Status of Refugees does not grant refugees a specific right to family reunification<sup>181</sup>. However, family reunification has been the focus of several recommendations of the UNHCR's Executive Committee (ExCom)<sup>182</sup>. While ExCom's Conclusions are not binding upon states, they do carry considerable normative weight in view of ExCom's composition. Members of ExCom meet annually in their capacity as sovereign states and, as well as approving the UNHCR budget and programme, advise on protection measures<sup>183</sup>. In 1999 ExCom's Standing Committee, upon request of the Executive Committee, issued a Conference Paper laying out in greater detail various aspects of family reunification for refugees<sup>184</sup>. As well as referring to general principles and specific rights of family unity, the Standing Committee emphasises particular aspects of refugees' situations that make family reunification even more important than it already is in normal cases of migration. Individual members of the family may become very vulnerable during periods of persecution or forced migration. Children separated from their parents can suffer neglect or military recruitment while women are more likely to be exploited or sexually assaulted. Since migration for a refugee may be considered to generally be more traumatic than for a voluntary migrant, the psychological support and sense of continuity provided by the family also becomes

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<sup>181</sup> See supra p. 5.

<sup>182</sup> Executive Committee Conclusions on family reunification (A/AC.96/549, para. 53, (7) and A/AC.96/601, para. 57, (4)); refugee children and adolescents (A/AC.96/702, para. 205, A/AC.96/737, para. 26 and A/AC.96/895, para.21) and refugee women (A/AC.96/673, para. 115, (4), A/AC.96/721, para. 26, A/AC.96/737, para. 27 and A/AC.96/760, para. 23).

<sup>183</sup> <http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=exec> accessed 27 June 2003.

<sup>184</sup> ExCom Standing Committee, *Family Protection Issues*, EC/49/SC/CRP.14, 4 June 1999.

even more important<sup>185</sup>. Another important aspect stressed by the Standing Committee is the need for family members to be granted the same status as that of the original refugee, while being able to apply for asylum in their own right as well<sup>186</sup>.

At the European level, Article 8 of the European Convention on Human Rights, according to the above jurisprudence, should nevertheless ensure family reunification for the nuclear family of all those who could not be expected to reside in their, or their family member's, country of original residence, which would generally be the same country which they had left to seek refuge<sup>187</sup>. The fact that no case has come before the European Court is possibly indicative of the general application by European States of family reunification rights for Convention refugees<sup>188</sup>.

However, this should not lead one to presume that faults do not exist in the conditions States have imposed on Convention refugees' right to family reunification. One of the most common causes for rejection of family reunification relates to strict requirements of valid documentation proving a family link such as marriage. In the situations family members of Convention refugees often find themselves, official documents cannot be provided to prove such links and a more flexible approach is required by States<sup>189</sup>. In other cases a refugee may be denied family reunification on the grounds that the refugee's family is residing in a third state where family reunification may take place. To be reunited with his or her family, the refugee must therefore forfeit

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<sup>185</sup> Ibidem., paras.14 - 15.

<sup>186</sup> Ibidem. Paras.9 – 10.

<sup>187</sup> There does not however appear to a precedent of this either in the European Court's case law. See European Council on Refugees and Exiles (ECRE), *Position on Refugee Family Reunification*, July 2000, [www.ecre.org/positions/family.shtml](http://www.ecre.org/positions/family.shtml) accessed 15 June 2003. One should also consider that Article 8 might only apply to residence and not socio-economic rights granted to refugees through national legislation.

<sup>188</sup> See J. Carlier, *Qu'est-ce qu'un réfugié?*, Brussels, Bruylant, 1998, pp. 72, 129-130, 185-187, 250, 317-318, 363, 400, 485-486, 511, 560. By the term "Convention refugees" I intend those who have been granted official refugee status in accordance with the 1951 Refugee Convention.

<sup>189</sup> See ExCom Conclusion no. 24, para. 6 on the duty not to presume non-existence of family links for inability to provide official documentation and European Council on Refugees and Exiles (ECRE), *Position on Family Reunification*, July 2000, for importance of fair interviewing procedures during establishment of existence of family links. <http://www.ecre.org/positions/family.doc>, paras. 39-48 accessed 27 June 2003.

his or her right to asylum and resettle in a country that may, according to the declared findings of the UNHCR, not provide the refugee with durable protection<sup>190</sup>.

One may cite other imperfections in the system of family reunification for Convention refugees. In the Netherlands, changes brought through the Aliens Law 2000 made family reunification for Convention refugees conditional upon a certain level of income if family reunification was not requested within the first three months of asylum<sup>191</sup>. In France, Article 15-10<sup>o</sup> of the 1945 *Ordonnance* entitles the dependent and direct ascendants, spouse and minor children of a recognised refugee to a residence permit<sup>192</sup>. However, this does not exempt the refugee's family from the requirement that their entry into French territory be legal. A refugee's family would therefore be required to obtain a visa before entering French territory, something that the family of an exiled refugee would not find easy<sup>193</sup>.

A more fundamental question relating to Convention refugees' rights to family reunification is whether refugee status is granted to the family members of a recognised refugee in accordance with the refugee's right to family unity or rather on the presumption of persecution of family members of the refugee, recognising in the latter case each individual of the family as coming within the definition of refugee set in Article 1A(2) of the 1951 Refugee Convention<sup>194</sup>. Different countries provide different

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<sup>190</sup> This is notably the case of Iraqi refugees in Germany whose family are residing in Syria or Jordan. ECRE, *Survey of Provisions for Refugee Family Reunion in the European Union*, November 1999, <http://www.ecre.org/research/family.pdf> accessed 10 July 2003.

<sup>191</sup> See ECRE, *ECRE Country Report for the Netherlands 2001*, <http://www.ecre.org/country01/SYNTHESIS%20Part%202> accessed 10 July 2003. ExCom Conclusions also recommend exempting Convention refugees from such requirements of income or housing. See ExCom Conclusion no. 9, 1977. For a review of the policy of assessing funds and housing before allowing family reunification see *infra*. Section IV.2.2.b.

<sup>192</sup> Family members may also be granted refugee status, see *infra*. p. 51. Note also the deficiencies of a mere right of residence for Convention refugees' family members *infra*. p. ....

<sup>193</sup> The *Ordonnance* does not specifically state such a requirement for the families of Convention refugees but rather implies so. This is because Article 15-10<sup>o</sup> applies to refugees the same family reunification rules as are applicable to French nationals. The requirement is also implied in the 8 February 1994 Government Circulaire on the matter. See Jault-Seske, F., *op. cit.*, p. 228.

<sup>194</sup> According to Article 1A(2) of the 1951 Refugee Convention, the term "refugee" applies to any person who: "Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country....".



answers to the question and even within countries themselves the separation of the two theoretical groundings may not be clear-cut.

### III.1.1] Greece

Greece provides a positive example of the respect for the principle of family unity. Under Article 1(4) of the 1993 Presidential Decree, the spouse, minor and unborn children and dependent parents who live with a refugee are all entitled to asylum<sup>195</sup>. The parents also need not be dependent if the refugee himself is under eighteen. Furthermore, the Convention refugees' right to family unity is ensured by the Courts on the basis of the Final Act of the Plenipotentiaries Conference and hence protected from future anti-asylum State policy<sup>196</sup>.

### III.1.2] Belgium

In Belgium, on the other, the situation is different. The Immigration Appeals Commission (*Commission Permanente de Recours des Réfugiés*, C.P.R.) distinguished the two different claims of family unity and presumption of persecution in a case concerning the application for refugee status of the wife of a recognised Congolese refugee. While the applicant claimed entitlement to refugee status in view of the principle of family unity, the Commission clearly stated that the procedure for the recognition of refugee status did not serve the purpose of ensuring family unity and hence family ties would only be relevant for assessing the possibility of persecution were the applicant to be returned to the Democratic Republic of Congo<sup>197</sup>.

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Although one should beware generalising upon the interpretation of the Convention in view of there being no international system of enforcement or monitoring, most if not all signatory countries' interpretation of the term "membership of a particular social group" includes membership of a specific family. See the US case *Sanchez- Trujillo v. INS*, 801 F.2d 1571 (9<sup>th</sup> Cir. 1986); Goodwin-Gill, G. S., op. cit., pp. 358-359 and J. Carlier (ed.), op. cit., p. 761.

<sup>195</sup> Presidential Decree no. 83/1993, reported in J.Carlier (ed.), op. cit., p. 485 – 486.

<sup>196</sup> Mytilini Tribunal of First Instance, 4.5.1993, no. 585, report in Ibidem, p. 486.

<sup>197</sup> Then Zaire. C.P.R. (1<sup>er</sup> ch.), 9 June 1994, F268 quoted in J. Carlier (ed.), op. cit., p. 129.

### III.1.3] Germany

In Germany, both principles have been applied at different times. Up until the mid-eighties, the administrative courts would grant asylum not only to the refugee, but also to his or her family members in view of the country of asylum's duty to not only protect the refugee from persecution but also allow him or her to carry out a normal life in both professional and private spheres<sup>198</sup>. In 1982 however, the Federal Administrative Court stated that Article 6 of the Basic Law did not guarantee a right to asylum to members of a refugee's family. Only those family members who could prove persecution would therefore be entitled to asylum<sup>199</sup>. Following much criticism of the Court's position, the Court decided in 1985 that the spouse and minor children of a refugee would however benefit from a presumption of persecution<sup>200</sup>. Federal legislation nevertheless brought the position back from one of presumption of persecution to a right of the refugee to family unity. Under Article 17(3) of the 1990 Alien Law, Convention refugees requesting a residence permit for their minor children and spouse need not fulfil the requirements listed in Article 17(2) such as sufficient income and housing. Moreover, Article 26 of the 1990 Asylum Law<sup>201</sup>, has been interpreted by the Federal Administrative Court as granting refugee status to the family members of a recognised refugee by extension of Article 6 of the Basic Law, thereby requiring neither proof nor presumption of persecution<sup>202</sup>.

### III.1.4] France

Similarly, in France too the State only passed legislation granting the right of residence to families of Convention refugees in 1989<sup>203</sup>. Nevertheless, the Refugee Appeals Commission (*Commission des Recours des Réfugiés*) had previously made up

<sup>198</sup> BverwG, DVBl., 1963, 146; BverwG, 29.4.1971, BverwGE. 38, 87; D.O.V. 1972, 113; VG Karlsruhe, 21.5.1981, InfAuslR. 1981, 284 quoted in Jault-Seseke, F, op. cit., p. 230.

<sup>199</sup> BverwG, 27.4.1982, BverwGE. 65, 244, quoted in Jault-Seseke, op. cit., p. 230.

<sup>200</sup> BverwG., 2.7.1985., InfAuslR, 1985, 274.

<sup>201</sup> This was previously Article 7(a)(3), becoming Article 26 by amendments made through the asylum amendments law 26.7.1992.

<sup>202</sup> BverwG., 21.1.1992 (2<sup>nd</sup> decision), ZAR. 1992, p. 86, DVBl. 1992, 841.

<sup>203</sup> Law no. 89-548 dated 2.8.1989, Article 6(V) of which modified Article 15 of the 1945 *Ordonnance*.

for the legislation's omission. In 1957, the Commission granted refugee status to an applicant on the sole basis of her marriage to a recognised refugee<sup>204</sup>, extending this to a refugee's minor children in 1958<sup>205</sup> and dependent parents in 1959<sup>206</sup>. While this policy carried on for many years, later decisions put into doubt the basis upon which refugee status was granted to members of a recognised refugee's family<sup>207</sup>. This jurisprudence of the Commission was reviewed by the *Conseil d'Etat* in its *Agyepong* decision in 1994<sup>208</sup>. Here again one finds the two grounds of presumption of persecution and right to family unity in the arguments exposed before the Court by the *amicus curiae*, the *Commissaire du Gouvernement*. While the *Commissaire* refers to the importance of the aliens' right to lead a normal family life following the Constitutional Court's ruling of 13 august 1993<sup>209</sup>, the *Commissaire* concludes with the re-affirmation that family reunification should be granted in view of the community of risks, that is to say a presumption of persecution. Even the *Conseil d'Etat*'s decision on the matter is ambiguous as the Court speaks of (my translation) "fully ensuring the refugee enjoys the protection found in the [Refugee Convention 1951]" ("*assurer pleinement au réfugié la protection prévue par ladite Convention*"). "Fully ensuring" could, in this phrase, refer to ensuring, as well as other rights, the right to family unity of the original refugee or could equally mean ensuring also the right to refugee status on the grounds of persecution for membership of a specific family. While the Commission's jurisprudence as a whole would hint more at the first hypothesis, the restrictions set by the Court for the granting of asylum to family members give more weight to the second hypothesis,

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<sup>204</sup> *Baselga*, 1474, 12.3.1957, quoted in Tiberghien, *Protection des Réfugiés en France*, Paris, Economica, 2<sup>nd</sup> ed., 1988, p. 222.

<sup>205</sup> *Atanasio Meijas*, 1778, 27.3.1958, quoted in Tiberghien, *op. cit.*, p. 223.

<sup>206</sup> *Rubio*, 3584, 3.12.1959, quoted in Tiberghien, *op. cit.*, p. 223.

<sup>207</sup> *Aldana Barrera*, C.E (Séction) 8.12.1982; *Ungudi Lundundu*, C.R.R., S.R., 12.3.1993, 233917, C.I.C., p.39, quoted in F. Bonnot, *Les Principes Généraux du Droit Applicables aux Réfugiés et le Principe de l'Unité de Famille*, in "Revue du Droit Public et de la Science Politique en France et à l'Étranger", vol. 112, no. 5, 1996, pp. 1379-1404, p. 1382. These decisions did not directly question the founding of the preceding case law but gave prominence to the fear of persecution of a recognised refugee's family members.

<sup>208</sup> *Mme Agyepong*, C.E., Haute Assemblée, 2.12.1994, req. 112842, quoted in F. Bonnot, *op. cit.*, p. 1385.

<sup>209</sup> See *supra* Section II.3.1

with spouses having to be of the same nationality and married before the original recognition of refugee status<sup>210</sup>.

### III.1.5] Where Presumption of Persecution and Family Reunification Do Not Overlap

Although the question might appear at first highly theoretical and of little practical importance, there are cases where a distinction between the two approaches becomes very important. Very often, the presumption of persecution of the spouse, direct ascendant or descendant of a refugee will not be rebuttable<sup>211</sup>. Nevertheless, there may be cases where the asylum authorities may be able to prove that fear of persecution of the refugee's family is not well-founded. One example could be the case of women living in territories under Sharia law who are sentenced to death by stoning for having allegedly committed adultery<sup>212</sup>. If the convicted woman is pregnant, she is allowed to give birth to the child and is only executed after the breastfeeding stage comes to an end. Were the mother to escape with her child and any other family members to a country in which asylum is only granted to them on the presumption of persecution, asylum might not be granted to the whole family. The immigration authorities could plausibly rebut the presumption of persecution for members of the woman's family in view of the care shown towards the child by the original country of domicile and the specific targeting of the woman because of the "crime" committed. While it is difficult to imagine the authorities seeking to deny asylum to her new-born baby, it would be more plausible for them to do so for a sixteen-year-old son or daughter who had come to seek asylum with them. The presumption of persecution serves therefore a purpose

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<sup>210</sup> BONNOT interprets this as granting the right to family unity to the original refugee, focusing on how the Court stresses the totality of protection of the refugee's rights. JAULT-SESEKE, on the other hand, gives consideration to the limits imposed and concludes that the decision is based on the presumption of persecution. F. Bonnot, op. cit., p. 1389; F. Jault-Seseke, op.cit., p. 227.

<sup>211</sup> In fact, in cases such as the Belgian C.P.R.'s and *Agyepong* where the Courts did or may have decided that recognition of asylum was not based on the presumption of persecution, such rulings were obiter dictum as they did not affect the outcome of the cases. See supra pp, 49-51.

<sup>212</sup> For an actual case of Muslim women accused of committing adultery and subject to Sharia law claiming refugee status see *Islam and Shah v Secretary of State for the Home Department* (HL), judgement on 25.3.1999, reproduced in "International Journal of Refugee Law", vol. 11, no. 3, 1999, pp. 496-527, discussed in A.L. Riquito, *The Public/Private Dichotomy in International Refugee Law*, in "Boletim da Faculdade de Direito", Coimbra, vol. 76, 2000, pp. 375-412.

when it is applied to those family members, such as non-dependent siblings or parents, who would not normally come within the group of family members entitled to refugee status on the grounds of family unity<sup>213</sup>. The members of a refugee's nuclear family and dependents, on the other hand, need to be granted asylum on the basis of the Convention refugee's right to family unity.

### **III.2] Complementary Protection of Refugees and Family Reunification**

The example of the persecuted Muslim woman also highlights a more pressing deficiency in the protection of refugees' rights to family unity, namely the opportunities provided for the family reunification of individuals benefiting from complementary refugee status. While the persecuted Muslim mother may have been able to argue persecution in reason of a "particular social group" as required by Article 1A (2) of the 1951 Refugee Convention in the UK courts<sup>214</sup>, this might not be accepted by other courts<sup>215</sup>. Although the right of *non-refoulement* may not therefore be granted on the basis of Article 33 of the 1951 Refugee Convention<sup>216</sup>, other Conventions may grant the individual who fails to claim refugee status a complementary right of non-expulsion. The two most relevant Conventions for European States are the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984 Torture Convention) and the 1950 European Convention on Human Rights. Article 3 of the 1984 Torture Convention states that: "No State Party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger if being subjected to torture"<sup>217</sup>. Article 3 of the ECHR, which imposes on

<sup>213</sup> *Aghel*, judgement of 22.6.1982, quoted in Tiberghien, op. cit., pp. 338 – 470.

<sup>214</sup> *Islam and Shah*, op. cit., see infra. p. 53. See also ExCom Conclusion no. 39 (1985) that considers that States may include women who have transgressed social mores in their interpretation of the notion of "particular social group", UN doc. A/AC.96/673, para. 115(4).

<sup>215</sup> See for example *Shanchez-Trujillo v INS* 801F.2d1571 (9<sup>th</sup> Cir. 1986) in which "a voluntary associational relationship" was required for there to be a "particular social group", reviewed in Goodwin-Gill, G.S., op. cit., pp.358-359.

<sup>216</sup> The principle of non-refoulement as encapsulated in Article 33(1) of the Refugee Convention is the right not to be expelled or returned to territories where one's "life or freedom would be threatened on account of [one's] race, religion, nationality, membership of a particular social group or political opinion".

<sup>217</sup> For the effects of Article 3 of the Convention see M. Nowak, *Committee Against Torture and Prohibition of Refoulement*, in "Netherlands Quarterly on Human Rights", vol. 14, no. 4, 1996, p. 435.

Contracting States a prohibition on all torture or inhuman or degrading treatment or punishment, has been interpreted by the European Court of Human Rights as applying to extraditions<sup>218</sup> and expulsions<sup>219</sup> where such acts might lead to the individual being submitted to torture or inhuman or degrading treatment or punishment. Those committing the torture or inhuman or degrading treatment or punishment in the State of return needn't be State agents<sup>220</sup>, a feature that may be very relevant for those seeking refuge in countries where the courts do not recognise the 1951 Refugee Convention as covering persecution by non-state actors. Article 3 may even prohibit an expulsion where the severe illness of the individual and the lack of adequate medical care in the State of return would cause the individual's suffering to become inhuman and degrading treatment<sup>221</sup> although only exceptional circumstances will justify the application of Article 3 in such a context<sup>222</sup>. In view of these restraints on the State's right to expel individuals deemed not to be refugees within the meaning of the 1951 Refugee Convention, States have established complementary forms of protection through either precise legislative measures<sup>223</sup> or the discretionary use of executive powers<sup>224</sup>.

However, as regards the right to family reunification for those availing themselves of such complementary protection, one finds great disparity of practice between States. While some grant family reunification rights equal to those held by a Convention refugee<sup>225</sup>, other States either impose conditions equal to or similar to those

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<sup>218</sup> *Soering v UK*, judgement of 07.07.1989, Case no.14038/88, Series A no.161.

<sup>219</sup> *Chahal, Vilvarajah*, judgement of 15.11.96, Case no. 2241/93.

<sup>220</sup> *Ahmed v Austria*, judgement of 17.12.1996, Case no.25964/94.

<sup>221</sup> *D v UK*, judgement of 02.05.1997, Case no. 22954/93.

<sup>222</sup> *Tatete v Switzerland and S.C.C v Sweden*. For a review of this case law see, among many others, P. Lorenzen, *Rifugiati, richiedenti asilo e profughi*, in "Rivista Internazionale dei Diritti dell' Uomo", vol. 13, no. 3, 2000, pp. 643-654.

<sup>223</sup> e.g. Denmark, Aliens Law Article 7(2); Finland, Alien Law s. 31, see ECRE, *Complimentary/Subsidiary Forms of Protection in the EU States: An Overview*, April 1999, pp. 10-11, 16-17 <http://www.ecre.org/research/compliment.pdf> accessed 10 July 2003.

<sup>224</sup> e.g. Luxembourg, *Ibidem*, pp. 31-33 and the United Kingdom's Exceptional Leave to Remain (ELR), see L. Morris, *Britain's asylum and immigration regime: the shifting contours of rights*, in "Journal of Ethnic and Migration Studies", vol. 28, no. 3, pp. 409-425, pp. 414-415.

<sup>225</sup> Denmark, *supra* footnote 224; Finland, *supra* footnote 224 and Sweden, 1989 Aliens Law Section III Ch. 3. See ECRE, *Complimentary/Subsidiary...*, *op. cit.*, pp 10-11, 16-17, 48-49.

applied to ordinary legal migrants<sup>226</sup> with a third group of States not providing for any right to family reunification whatsoever<sup>227</sup>. This “stratification” of different types of refugees’ entitlement to family reunification is not rationally justifiable<sup>228</sup>. Firstly, one should keep in mind that many genuine asylum seekers that might qualify as Convention refugees accept the authorities’ offer of status as complimentary refugees in view of the uncertainty that surrounds the interpretation of the 1951 Refugee Convention. More fundamentally, there is no moral case for why someone who has proven the threat of torture or inhuman or degrading treatment should be denied the rights enjoyed by those entitled to status as Convention refugees. There is no reason why family reunification should be denied or made more difficult for an individual on the basis that the persecution or mistreatment he or she had reason to fear was not based on membership of a “particular social group” as understood by the local courts<sup>229</sup>. What should matter is the simple consideration that the refugee, be he or she a Convention refugee or complimentary refugee receiving subsidiary protection, is not able to return to his or her country because of a well-founded fear of persecution, torture or inhuman or degrading treatment or punishment. To deny family reunification is therefore to deny the individual his fundamental right to respect for his family life as it would be for a Convention refugee.

On a separate note, complementary protection and protection as a Convention refugee should be distinguished here from temporary protection in times of emergency and large-scale influx. Although asylum is meant to be temporary, with a view to an eventual return by the refugee to the original country of domicile once the threat of persecution has passed, there is a difference between the temporary nature of

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<sup>226</sup> Belgium, Aliens Law s. 9(3); France, *Loi Chévennement* Art. 16; Netherlands Aliens Law Art. 9; UK (ELR). While Belgium only imposes a waiting period, the Netherlands, France and the UK also require the sponsor to have the sufficient funds and housing. See *Ibidem*, pp. 8, 19, 35, 48.

<sup>227</sup> Austria, 1997 Asylum Law Art. 15; Germany, Aliens Law s.53; Luxembourg; Spain, Asylum Law s.17(3). *Ibidem*, pp. 6, 23, 33, 45.

<sup>228</sup> The term “stratification” is used by L. Morris in her analysis of boundaries and processes of exclusion and inclusion in the construction of migrant rights. See L. Morris, *op. cit.*, p. 414.

<sup>229</sup> Membership of a “particular social group” is but one example of many aspects of the 1951 Refugee Convention that may be interpreted differently by different national courts. Another might be whether persecution must be carried out by state agents or if not whether at least the State’s culpable failure to protect the individual are required. See G. S. Goodwin-Gill, *op. cit.*, pp 77-79.

refugee status which may in practice be long-lasting and the cases of civilians fleeing short-term conflicts such as the recent war in Kosovo. To put it another way, an Iraqi refugee fleeing persecution from Saddam Hussein's regime might have spent over 25 years in exile while a civilian fleeing Iraq during the war should be able to return within the year. For those fleeing such conflicts, family reunification may be examined in a different light<sup>230</sup>. In view of the short-term exile and non-settlement of such families, the question of family reunification concerns more questions of humanitarian aid, inter-State cooperation in times of crisis and humanitarian law<sup>231</sup> rather than the general dynamic of human rights and long-term migration. For this reason, analysis of family reunification in this context is not included in the present study<sup>232</sup>.

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<sup>230</sup> I of course do not wish to imply that all conflicts are of a short duration. Such long-term conflicts as the Somali and Sudanese civil wars create long-term refugees that do therefore fit with the present study and come under either the protection provided for Convention refugees or complimentary protection.

<sup>231</sup> Notably Arts. 74 and 75(5) of Protocol I of the 1949 Geneva Conventions and Art. 4(3)(b) of Protocol 2.

<sup>232</sup> This is not however intended to exclude those refugees fleeing long-term civil wars such as in Sudan or Somalia, for example, nor is it claimed that the



## **CHAPTER IV: FAMILY REUNIFICATION IN A EUROPEAN UNION OF FREEDOM, SECURITY AND JUSTICE**

### **IV.1] The Slow Evolution From European Migrants' Right to Family Renification to Harmonisation of Family Reunification for Third-Country Nationals**

#### **IV.1.1] Freedom of Movement for EEC Migrants and Their Families Followed by the Creation and Communitarisation of the Justice and Home Affairs Pillar**

An effective and enforceable right to family reunification for nationals of the then EEC Member States was essential in ensuring freedom of movement of workers within the EEC. This right was therefore duly granted through Regulation 1612/68<sup>233</sup>. Since freedom of movement for workers did not cover resident third-country nationals<sup>234</sup> and non-EEC immigration matters lay outside the scope of the Community institutions, family reunification rights of non-EEC migrants and refugees remained a question for each Member State to deal with individually. The creation of the EU and a “Justice and Home Affairs” pillar did create a framework for cooperation between Member States on matters of asylum and immigration<sup>235</sup>, even expressly referring to family reunification for third-country nationals as one such matter<sup>236</sup>. Cooperation between Member States under Article K of the 1992 Treaty of the European Union (TEU) appeared however to be more focused on limiting immigration from outside the EU rather than harmonising and increasing the rights of those third-country national residing and working within the EU. Indicative of this state of affairs was the reunion of Member States’ Home Affairs Ministers in London on the 30th of November and 1st December 1992 in which no mention of family reunification was made. At the 1993 Copenhagen meeting of Home

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<sup>233</sup> Regulation 1612/68, OJ 19.10.1968, L257. This regulation covered family members of EC Member State nationality *and* third-country nationals. See Articles 10-12.

<sup>234</sup> See ECJ, judgment of 9.8.1994, Case C-43/93, *Vander Elst v Office des Migrations Internationales*, [1994] ECR I-3803, discussed in K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union*, The Hague, Kluwer Law International, 1999, pp. 252-260.

<sup>235</sup> Treaty of the European Union 1992, Article K.

<sup>236</sup> Article K.1(3)(b).

Affairs Ministers, Member States did issue a Resolution on family reunification for third-country nationals<sup>237</sup>. This resolution was however non-binding and laid out a mere minimum of rights. The resolution did not cover those migrants admitted for a fixed term, asylum applicants or recognised refugees. Family members who should “normally” be admitted were limited to the spouse and dependent, single children under the ages 16, 17 or 18<sup>238</sup> while other family members would only be admitted for “compelling reasons”<sup>239</sup>. Moreover, the possibility for family members of obtaining the right to employment or independent residence permit remained under Member States’ discretion<sup>240</sup>. It was not until 1997 that the Commission proposed a Convention on Migration containing family reunification rules in Chapter VII<sup>241</sup>, a proposal reformulated into the Commission’s Proposal for a Council Directive on the Right to Family Reunification<sup>242</sup> once the 1997 Amsterdam Treaty brought family reunification within the competence of the European Community legal order under Title IV of the amended European Community Treaties (ECT)<sup>243</sup>.

#### IV.1.2] The Need to Raise and Harmonise Migrant and Refugee Rights

There are several good reasons why family reunification for both migrants and refugees required enhancement and harmonisation at the European level. With 12 million third-country nationals residing in the EU by 1996<sup>244</sup>, no longer could the ideal of the European Union as “a single space” be achieved while maintaining freedom of movement exclusively for Member States’ nationals<sup>245</sup>. Differences in rules relating to family reunification would clearly hinder any such freedom of movement for third-

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<sup>237</sup> Harmonisation of National Policies on Family Reunification, Copenhagen, 1 June 1993, SN 2828/1/93 WGI 1497

<sup>238</sup> points 2, 8.

<sup>239</sup> point 10.

<sup>240</sup> Point 12. See also the 1994 EU Council Resolution on Admission of Workers, notably points A(v), C(9), C(5), OJ 1996 C274, reviewed in J. Apap, N. Sitaropoulos, *op. cit.*, p. 19.

<sup>241</sup> COM (97) 387, 30 July 1997, Articles 24-31.

<sup>242</sup> COM (99) 638, OJ 2000 C116.

<sup>243</sup> EC Treaties Article 63(3)(a), OJ 2002, C325.

<sup>244</sup> Eurostat, news release 31/96 of 22 May 1996.

<sup>245</sup> R. Lewis, Abbing F R, *An Asylum and Immigration Policy for the European Union*, in “Law and European Affairs”, vol. 5, 2001-2002, pp. 501-512, p. 503.

country nationals, as well as impeding their successful integration into society. Ensuring the right to family reunification at Community level would also avoid a case of Member States taking part in a regulatory race to the bottom as immigrants and asylum seekers “window-shopped” the Member States that offered the most favourable immigrant rights. Furthermore, while the market may punish States practising excessive anti-immigration measures<sup>246</sup>, purely market-oriented immigration policies would not necessarily favour the entry and residence of family members over other migrants that might be preferred on the basis of their skills and training<sup>247</sup>. More generally, a consensus appeared to be reached that new measure had to be adopted to bring the rights and obligations of third-country nationals in line with those of the EU citizen. Since the EU took great interest in the treatment of national minority groups in the acceding countries, it could not ignore the inequalities in the Union itself<sup>248</sup>. While the late 70s and early 80s had been in many countries a period of strong judicial intervention in the politics of migration, the Courts had proved over the last twenty years highly reluctant to step in and intervene to defend alien rights in a climate where migration issues had become a more controversial and newsworthy subject<sup>249</sup>. Harmonised legislative action was therefore required to ensure migrants and refugees would enjoy the right to family reunification across Europe<sup>250</sup>.

#### IV.1.3] The 1999 Tampere Summit: Reasons for Optimism and Reasons for Pessimism

At the Tampere European Council in October 1999, Member States agreed that a vigorous integration policy for legally resident third-country nationals was vital. The goal was therefore to grant them rights and obligations comparable to those of EU

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<sup>246</sup> Ibidem, p. 511.

<sup>247</sup> See C, Worswick, *The Economics of the Immigration Debate*, in “Econochat”, Melbourne Univ., no. 7, February 1997, pp. 2-4.

<http://www.economics.unimelb.edu.au/TLdevelopment/econochat/Econochat7.pdf> accessed 5 July 2003.

<sup>248</sup> For a review of the relationship between the EU’s external and internal human rights policies see P, Alston, J, Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, in Alston, P (ed), *The EU and Human Rights*, Oxford, OUP, 1999, pp. 3-68.

<sup>249</sup> See V., Guiraudon, *Citizenship Rights for Non-Citizens*, in C. Joppke, *Challenge to the Nation-State: Immigration in Western Europe and the United States*, Oxford, Oxford University Press, 1998.

<sup>250</sup> This raising of legal migrants’ and refugees’ rights would also help deter illegal immigration, see R. Lewis, F. R. Abbing, op. cit., p.511.

citizens<sup>251</sup>. While this political declaration may have been a source for some optimism, different institutional and “behind-the-scenes” factors gave cause for some scepticism. One of the most obvious impediments to the development of harmonised measures that would raise the level of third-country nationals’ rights was the requirement of unanimous voting in the Council of Ministers<sup>252</sup>. Presciently, this was demanded by Germany, the Member State with the most restrictive family reunification policies<sup>253</sup> and a view on the relationship between family reunification and integration at odds with most States, international organisations and civil society<sup>254</sup>. The UK, Ireland and Denmark meanwhile, having opted out of “Justice and Home Affairs” measures, would not necessarily be bound by any Directive eventually adopted by the Council of Ministers<sup>255</sup>. The European Parliament (EP) on the other hand, who had taken a progressive position on family reunification since 1989, did not hold any power of co-decision under Title IV. The EP’s influence on the outcome of relevant measures would therefore be limited to the recommendations it made to the Council and Commission.

Also influencing the outcome of measures elaborated and negotiated under Title IV of the ECT was the trend set by the pre-Amsterdam Justice and Home Affairs intergovernmental cooperation under the Third Pillar. While the Commission lacked the power of initiative during this period, the task force established by the Commission to liaise with the Justice and Home Affairs Council was set up within the General Secretariat and did not come from the Employment and Social Affairs and Internal Market Directorate-Generals that had traditionally championed the rights of third-country nationals<sup>256</sup>. Meanwhile, those acting on behalf of the Member States during this period of cooperation were the Governmental agencies in charge of migration control who sought to act at the trans-national level in order to avoid clashes with both

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<sup>251</sup> Tampere European Council, 15 and 16 October 1999, Presidency Conclusions [http://europa.eu.int/council/off/conclu/oct99/oct99\\_en.htm#asylum](http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm#asylum) accessed 10 July 2003.

<sup>252</sup> See Article 67(1) ECT.

<sup>253</sup> see above section I.1.2.b].

<sup>254</sup> See infra section IV.2.3.a].

<sup>255</sup> See Protocol on the Positions of the UK and Ireland and Protocol on the Position of Denmark, annexed to the Amsterdam Treaty, OJ 1997 C340.

<sup>256</sup> See V. Guiraudon, *The Constitution of a European Immigration Policy Domain: a Political Sociology Approach*, in “Journal of European Public Policy”, vol. 10, no. 2, April 2003, pp. 263-282, p. 269.

the domestic courts and other governmental agencies, such as those responsible for the integration of resident aliens, who might be pursuing conflicting policies<sup>257</sup>. In these settings, migration came to be equated exclusively with transnational security threats and best dealt with through intergovernmental secret forums<sup>258</sup>. While the personnel may have changed following Amsterdam, the influence of the “fore-fathers” of the area of freedom, security and justice naturally remains<sup>259</sup>. Also, the chances of civil society positively and effectively influencing Council deliberations appeared to be slim. A call by businesses for more workers, not chosen on the basis of skills or training in the case of family reunification, was not likely to come at a time of relatively high unemployment<sup>260</sup>. NGOs meanwhile faced their own problems. Since voting in the Council had to be unanimous, domestic NGOs were needed to target individual Governments. Yet these NGOs lacked appropriate consultation by Governments as well as having to receive adequate briefing by NGOs working at the Community level before they could act<sup>261</sup>.

#### **IV.2] The Council Directive on the Right to Family Reunification**

On 27 February 2003, the Justice and Home Affairs Council agreed on the Directive on the Right to Family Reunification (henceforth the 2003 Directive)<sup>262</sup> for third-country nationals originally proposed by the Commission in 1999<sup>263</sup> and frequently negotiated and redrafted since then<sup>264</sup>. This Chapter does not seek to discuss all the possible issues and provisions contained in the Directive, but merely look at the most important ones.

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<sup>257</sup> Ibidem, p. 268.

<sup>258</sup> Ibidem, p. 273.

<sup>259</sup> Ibidem, p. 270.

<sup>260</sup> Average unemployment across the EU in May 2003, for example, was at 8.1% according to Eurostat data. <http://europa.eu.int/comm/eurostat/Public/dashop/print-product/EN?catalogue=Eurostat&product=3-01072003-EN-AP-EN&mode=download> accessed 10 July 2003.

<sup>261</sup> See J. Niessen, Y. Schibel, Promoting Debates on European Migration Policies, in “European Journal of Migration and Law”, vol. 4, no. 4, 2002, pp. 469-475.

<sup>262</sup> See p. 1.

<sup>263</sup> COM(1999) 638, OJ 26.4.2000 C116.

<sup>264</sup> See Amended Commission Proposals COM (2000) 624, OJ 27.2.2001 C62; COM (2002) 225, OJ 27.8.2002 C203.

#### IV.2.1] Persons Eligible for Family Reunification

The Directive applies where the sponsor<sup>265</sup> holds a residence permit “for a period of validity of one year or more [and] has reasonable prospects of obtaining the right of permanent residence”<sup>266</sup>. The scope of the Directive here raises both a fundamental flaw with the Directive’s approach and doubts over whether many legally resident third-country nationals would be excluded from its application. The fundamental flaw in the Directive’s approach is its failure to differentiate between long-term residents who may even have been born in the Member State and other third-country nationals who have only been living in a Member State for a relatively short period of time<sup>267</sup>. The equating of long-term resident third-country nationals’ rights with those of EU citizens, the goal set by the European Council at the Tampere Summit, would clearly be hampered by grouping together long-term residents with other third-country nationals, as the eventual outcome of the Directive illustrates. Moreover, there is nothing in the Directive to stop Governments side-stepping its effects by issuing residence permits on a nine-month basis rather than a one-year basis. That is why the Immigration Law Practitioners’ Association (ILPA) proposed that Article 3(1) be amended so as to include those holding a residence permit “for a period of one year *or for successive periods of less than one year that amount to more than one year in total*”<sup>268</sup>.

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<sup>265</sup> Under article 2(c) of the Directive, “‘sponsor’ means a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her”.

<sup>266</sup> Article 3(1).

<sup>267</sup> See R. Cholewinski, *Family Reunification...* op. cit., p. 278; Immigration Law Practitioners’ Association (ILPA), *Response to the European Commission’s Proposal for a Directive on the Right to Family Reunification*, pp. 3-4. <http://www.ilpa.org.uk/submissions/FamilyReunion.html> accessed 10 July 2003

<sup>268</sup> ILPA, op. cit, p. 7.

## IV.2.2] Family Members Covered

### IV.2.2.a] The Children

Under Article 4(1) of the 2003 Directive, among those entitled to family reunification are the children of the sponsor<sup>269</sup>, spouse<sup>270</sup> or both<sup>271</sup>. The children entitled to reunification must be below the age of majority set by the law of the Member State<sup>272</sup> which may be as low as 16. This differs from the 1968 Regulation that applies to EU citizens exercising their freedom of movement, the age requirement for children under this Regulation being 21<sup>273</sup>. Similarly, according to the European Committee of Social Rights, the notion of family covered by Article 19(6) of the European Social Charter is held to cover at least the spouse and dependent children under 21, dependency covering not only reasons of health but also economic reasons such as when children are undertaking further studies<sup>274</sup>. The Directive not only falls short of meeting these standards, it also allows for further restrictions if present in Member States' legislation on the date of the Directive's implementation. Under Article 1(6), a child's entry may be refused if the application for reunification is not made before he/she reaches the age of fifteen. At present, legislation containing such a rule is only present in one Member State. However, since the relevant date for the legislation's compatibility with the Directive is the date of the Directive's implementation, rather than the date of adoption by the Council of Ministers, there is nothing stopping other Member States from passing such legislation before the Directive is to be implemented. Still more restrictive is the derogation in Article 1 para. 3 whereby a child over the age of 12, arriving independently from the rest of his or her family, may be required to pass

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<sup>269</sup> Article 4(1)(c).

<sup>270</sup> Article 4(1)(d).

<sup>271</sup> Article 4(1)(b).

<sup>272</sup> Article 4(1) para. 2. Article 4(1) para. 2 also states that the children must be unmarried, a requirement that is not present in the Regulation 1612/68 applying to families of EU citizens exercising their freedom of movement. The requirement that children be unmarried has nevertheless been relatively uncontroversial.

<sup>273</sup> Regulation 1612/68 Article 10(a)

<sup>274</sup> See *Digest de jurisprudence du Comité européen des Droits sociaux*, in Conseil de l'Europe (ed.), *Charte sociale européenne - Vade-mecum*, Strasbourg, Conseil de l'Europe, 2000, pp. 202-203.

an integration ability assessment if such an assessment is required by the Member State's legislation at the time of implementation of the Directive. According to the Preamble of the Directive, this provision is meant to reflect the "children's capacity for integration at early ages". Yet studies on the optimum age for immigration are inconclusive at best, with some respected empirical studies suggesting that those emigrating at age 12 or more deal better on average with the challenges faced than those emigrating at age 7 to 11<sup>275</sup>. One would also have to question whether these two derogations would be compatible with Article 8 of the 1950 European Convention, particularly if the Member State's rules were strictly applied without consideration being given to the difficulty of returning to the country of origin for the sponsor and any other family members residing with him/her<sup>276</sup>.

The original and latter Commission proposals also created an obligation upon States to allow the entry of children who were of majority age and dependent upon their parents "by reason of their state of health"<sup>277</sup>. This was criticised as being too narrow in scope<sup>278</sup>, particularly when contrasted with the ECJ's interpretation of the notion of "dependency" in the 1968 Regulation which was held not to require any particular reason for such dependency but rather the mere provision of support by the sponsor<sup>279</sup>. The ECJ's broader notion of dependency would in fact be appropriate so as to cover cases such as adult unmarried women who may, in certain cultures and societies, be dependent upon their parents for economic, social and emotive reasons. In spite of all this, the final text adopted by the Directive not only fails to meet these concerns but also

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<sup>275</sup> See M. Inbar, *The Vulnerable Age Phenomenon*, New York, Russell Sage, 1976, reviewed in S. Cahan, D. Davis, R. Statub, *Age at Immigration and Scholastic Achievement in School-Age Children: Is There A Vulnerable Age?*, in "International Migration Review", vol. 35, no. 2, Summer 2001, pp. 587-595.

<sup>276</sup> See *Sen v Netherlands* (2001), op. cit. See also the criticism by the European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, *Report on the amended proposal for a Council directive on the right to family reunification*, OJ 7.5.2000 C 135, p.21

<sup>277</sup> Article 5(1)(e) COM (1999) 638, op. cit.

<sup>278</sup> See, among others, Caritas Europa, *Position on the Amended EU Commission Proposal For a Council Directive on the Right to Family Reunification*, December 2002, Paragraph II.2(2) <http://www.ccc-kek.org/English/ccmefamreu.htm> accessed 10 July 2003.

<sup>279</sup> See *Lebon*, Case 316/85, *ECR*, 1987, 2811, [1989].



states “Member States *may*, by law or regulation”<sup>280</sup> authorise the entry of adult children “unable to provide for their own needs on account of their state of health”<sup>281</sup>. This outcome was opposed by the European Parliament<sup>282</sup> and falls short of the obligations imposed upon States under Article 19(6) of the European Social Charter<sup>283</sup>. Moreover, while the 1968 Regulation imposes an obligation upon Member States to “facilitate” the reunification of EU citizens with family members such as adult children<sup>284</sup>, the 2003 Directive merely places any such possibility of reunification under Member States’ discretion. This difference is relevant because, whereas the obligation to facilitate reunification would appear to forbid a blanket ban on such family reunifications taking place<sup>285</sup>, the discretion granted by the 2003 Directive would not seem to forbid any such blanket ban.

#### IV.2.2.b) Spouses and Partners

The only other family member entitled to family reunification under the 2003 Directive is the sponsor’s spouse<sup>286</sup>. Under Article 4(5), Member States may require the sponsor and spouse to be 21 before the spouse is entitled to join the sponsor, a requirement not found in the 1968 Regulation applying to EU citizens. The provision is said to be included “in order to ensure better integration and to prevent involuntary marriages”<sup>287</sup>. This is revealing for two reasons. Firstly, the inclusion of such a provision is said to have been requested by the Netherlands who wished to reverse the trend by which 90% of third-country nationals residing in the Netherlands married someone from their country of origin. It would not therefore be excessively cynical to presume that the reasons included in the text of the Directive do not quite paint the

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<sup>280</sup> Emphasis added.

<sup>281</sup> Article 4(2)(b).

<sup>282</sup> European Parliament’s Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, *Report on the amended proposal... op. cit.*, Amendments 27-28, p. 22.

<sup>283</sup> See *supra* p. 63.

<sup>284</sup> Regulation 1612/68, *op. cit.*, Article 10(2).

<sup>285</sup> M. Denis, *La libre circulation des personnes dans l’ Union Européenne*, Brussels, Bruylant, 1995 reviewed in M. Nys, *op. cit.*, p. 200.

<sup>286</sup> Article 4(1)(a).

<sup>287</sup> Article 4(5).

whole picture<sup>288</sup>. Secondly, it is interesting to see that the Council appears to have taken a pick-and-choose approach to the cultural differences it wishes to approach. The Council discriminates here third-country nationals from EU citizens on the basis of cultural differences yet chooses to disregard other cultural differences such as the importance given to the extended family<sup>289</sup> and adult unmarried children<sup>290</sup>.

Of greater importance than the age limit imposed is the exclusion of unmarried partners from the scope of the Directive. In the 1986 *Reed* case, the ECJ, interpreting the term “spouse” found in Article 10 the 1968 Regulation, held that the notion did not include unmarried partners. The ECJ however based its decision on “the absence of any indication of a general social development which would justify a broad construction”<sup>291</sup>. As some have noted, “[i]t is doubtful whether in the 2000s the ECJ would follow this case-law anymore” since its decision was based upon prevailing social mores<sup>292</sup>. Ironically however, the Directive actually preempts such a broad interpretation of the term “spouse” by providing that Member States *may* authorize the entry and residence of unmarried partners, thereby implying that such partners are not included in the notion of “spouse”<sup>293</sup>. This represents a clear backward step in the progression towards equal treatment of unmarried and married partnerships, and perhaps more importantly, heterosexual couples and same-sex couples. It was after all only three years ago that, through the Nice Treaty, the ECT was amended so as to give it competence to adopt measures with a view to combating discrimination based on, inter alia, sexual orientation<sup>294</sup>. Six EU countries, as well as Australia, Canada, New Zealand and South Africa, already grant their citizens family reunification rights for same-sex

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<sup>288</sup> One should also distinguish between arranged marriages and involuntary marriages, with the far greater proportion of marriages of young people being arranged rather than involuntary. See [http://news.bbc.co.uk/1/hi/uk\\_politics/2446875.stm](http://news.bbc.co.uk/1/hi/uk_politics/2446875.stm); C. Tiburcio, *The Human Rights of Aliens Under International and Comparative Law*, The Hague, Kluwer Law International, 2000, p. 134.

<sup>289</sup> See infra p. 67.

<sup>290</sup> See supra p. 65.

<sup>291</sup> *Reed*, Case C-59/85, Judgment of 17.04.1986, (ECR) 1986, p. 1283.

<sup>292</sup> See J. Apap, N. Sitaropoulos, op. cit., p. 6.

<sup>293</sup> Article 4(3).

<sup>294</sup> See Article 13 TEC.

partnerships<sup>295</sup>. The European Court of Human Rights has recognized *de facto* long-term relationships as coming under the notion of “family life”<sup>296</sup> while there have been calls for family reunification rights for same-sex couples by the Parliamentary Assembly of the Council of Europe, and various NGOs<sup>297</sup>. Moreover, the original proposal by the Commission, approved by the European Parliament<sup>298</sup>, did not recommend an obligation on all Member States to grant family reunification to unmarried partners in a durable relationship. It merely proposed to do so when such durable relationships were recognised as equivalent to marriage in domestic legislation<sup>299</sup>. The effect of the provision was therefore only to abolish any discrimination towards third-country nationals when or if Member States took the steps to recognise same-sex or other unmarried partners in durable relationships and grant such relationships status equal to that of married partners<sup>300</sup>.

#### IV.2.2.c] Other Members of the Family

Whilst the 1968 Regulation imposes an obligation on Member States to allow for the family reunification of a worker with his or his spouse’s dependent relatives in the ascending line<sup>301</sup>, States retain a discretion under the 2003 Directive whether to allow the entry and residence of relatives in the direct ascending line of third-country nationals<sup>302</sup>. The rejection of both the Commission’s original proposal and a subsequent proposal by the European Parliament is indicative of the extent to which Member States

<sup>295</sup> Canada however is the only country to grant family reunification for same-sex partnerships where the sponsor is not a citizen but a legally resident migrant. See J. R. Jr. Edwards, *Homosexuals and Immigration*, Background, Center for Immigration Studies (USA) May 1999. <http://www.cis.org/articles/1999/back599.html> Accessed 10 July 2003

<sup>296</sup> See *X, Y and Z v. UK*, judgement 22.04.1997, Case no. 21830/93, para. 36.

<sup>297</sup> See Council of Europe, Parliamentary Assembly, Recommendation 1470 (2000), *Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe*; ILPA, *Response to the European Commission...* op. cit., p. 4; ECRE, *Position on Refugee Family Reunification*, July 2000, p. 8 <http://www.ecre.org/positions/family.doc> Accessed July 10 2003.

<sup>298</sup> See European Parliament’s Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, *Report on the amended proposal...*, op. cit., pp 11-12.

<sup>299</sup> COM (1999), op. cit., Article 5(1)(a).

<sup>300</sup> Article 5(2) para. 3 covers the evidence required for family reunification of unmarried partners such as registration. However, since the Directive neither sets an obligation to meet a minimum standard for unmarried partners, nor, under Article 3(5), prohibits the adoption of more favourable measures, the provisions in Article 5(2) para. 3 are not discussed in this paper.

<sup>301</sup> Regulation 1612/68, Article 10(1)(b).

<sup>302</sup> Article 4(2)(a).

opposed family reunification for dependent parents. The Commission's original proposal obliged Member States to grant entry and residence to dependent parents "who are dependent on [the sponsor or his/her spouse] and have no other means of family support in the country of origin". This would therefore have been far narrower in scope than the 1968 Regulation<sup>303</sup>, yet was still not adopted by Member States. Once this proposal was rejected by Member States, the European Parliament proposed an even narrower obligation covering cases in which the ascendants would be entitled to entry and residence when they had "no other means of family *or other* support"<sup>304</sup>. In this context one should note that the European Court of Human Rights held in *Marckx* that "family life" under Article 8 of the European Convention covers *at least* "the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life", the Contracting States thereby being under an obligation to allow such family ties to develop<sup>305</sup>. This would at least suggest that those third-country nationals who have children grow up in the Host State and hence cannot return to their country of origin would be entitled to have their parents join them under Article 8 of the European Convention when no other family members could provide support for the parents in the country of origin<sup>306</sup>. In sum therefore, with regard to third-country nationals' ascendants, the 2003 Directive falls well short of bringing third-country nationals' rights in line with those of EU citizens and fails to address the possible obligations contained in Article 8 of the European Convention.

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<sup>303</sup> See the ECJ decision in *Lebon*, op. cit.

<sup>304</sup> European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, *Report on the amended proposal....*, op. cit., pp. 20-21.

<sup>305</sup> *Marckx*, op. cit., para. 45. See also the importance given to physical, financial, emotional and psychological ties in determining family members according to the ExCom Standing Committee in ExCom Standing Committee, op. cit para. II (4).

<sup>306</sup> See *Sen*, op. cit. The fact that in *Sen* the Court did not deem it relevant whether other family members could care for the applicants' child in the country of origin would suggest that in the case of a third-country national's parents, proof of support from others outside the family would not preclude the entitlement to family reunification under Article 8.

### IV.2.3] Conditions Imposed Upon the Sponsor

#### IV.2.3.a] Temporal Requirements

While no waiting period is required for family members of EU citizens<sup>307</sup>, under Article 8 para. 1 of the 2003 Directive, “Member States may require the respondent to have stayed lawfully in their territory for a period not exceeding two years before having his family members join him/her”. Since the provision does not clearly state whether the sponsor may submit his/her application before the two years have passed, the wait may in practice amount to nearly three years before the sponsor’s family is permitted to join him/her.<sup>308</sup> Under Article 8 para. 2, Member State legislation passed before the implementation of the Directive may provide for a total waiting period of three years. This is a considerable extension from the original waiting period of one year proposed by the Commission.<sup>309</sup> According to the Commission’s original Explanatory Memorandum, “the qualifying period may not exceed one year, for otherwise the exercise of the right to family reunification would be devoid of substance”.<sup>310</sup> One should also note that a waiting period of three years was held to breach Article 19(6) of the European Social Charter<sup>311</sup>. This qualifying period was nevertheless extended following the stance taken by certain Member States that at least two years were required for the sponsor to integrate before other family members arrived. Not only does such an attitude contradict the widely accepted view of family reunification as aiding integration rather than requiring integration, but also displays seriously contradictory thought since it is these same Member States who have issues with the arrival of third-country nationals’ adolescent children. Austria and Germany, at present, impose some of the longest waiting periods. Austria wanted the Council to allow for a waiting period of five years, eventually settling for three. Yet Austria also

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<sup>307</sup> Regulation 1612/68, op. cit. Article 10(1)

<sup>308</sup> For the provisions relating to the period of time that a Member State may take in processing an application, see *infra* p. 70.

<sup>309</sup> COM (1999), op. cit., Article 10(1).

<sup>310</sup> *Ibidem*, Explanatory Memorandum.

<sup>311</sup> See the Conclusions of the Committee of Independent Experts cited in *Case Law on the European Social Charter: Supplement no. 3*, Council of Europe Press, 1993, p. 163.

required that applications be submitted before a child reached the age of fifteen<sup>312</sup>. Germany, similarly, was the Member State that pushed the Council to allow integration tests on children over the age of twelve<sup>313</sup>. If States had the migrant family's interests at heart, it would be rather incoherent to argue for long waiting periods whilst believing there to be difficulties in integrating older children. However, if States were merely attempting to limit the scope of the Directive so as to give themselves greater leeway to allow entry and residence when this did not clash with national interests, the twin approach used would clearly work well.

The provisions regulating the time by which States must process an application for family reunification have also been controversial. While the original Commission proposal imposed a deadline of 6 months upon States<sup>314</sup>, deemed reasonable by many NGOs<sup>315</sup>, this was eventually extended to 9 months and even longer in “exceptional circumstance linked to the complexity of the case”.<sup>316</sup> Furthermore, the consequences of no decision being taken in the allotted time are to be determined by domestic legislation<sup>317</sup> when a more effective policy would have been to impose an automatic acceptance of the application upon failure to meet the deadline<sup>318</sup>.

#### IV.2.3.b) Material Requirements

Under the 1968 Regulation, the sponsor must have housing considered “normal” for the region in which he is working. While the 2003 Directive imposes a similar obligation<sup>319</sup>, it also requires the sponsor to be able to provide for himself and his family sickness insurance<sup>320</sup> as well as “stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the

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<sup>312</sup> See supra p. 66.

<sup>313</sup> See supra p. 66.

<sup>314</sup> COM (1999), op. cit., Article 7(3).

<sup>315</sup> See, for example, *the Opinion of the Economic and Social Committee on the Amended proposal for a Council Directive on the right to family reunification*, OJ 7.10.2002, C 241/108 p. 2.

<sup>316</sup> Article 7(4) paras. 1-2.

<sup>317</sup> Article 7(4) para. 3.

<sup>318</sup> See ILPA, op. cit.

<sup>319</sup> Article 7(1)(a).

<sup>320</sup> Article 7(1)(b).

social assistance system of the Member State concerned”<sup>321</sup>. While these conditions could be deemed reasonable when the scope of the Directive covered relatives in the ascending line and dependent adult children, their inclusion in the final document merely serve to deny the core of family reunification to those third-country nationals who are too sick or poor to meet these requirements when it is these same third-country nationals who are most in need of the presence and support of their families<sup>322</sup>. While EU citizens working and residing in another Member State have the right to claim the same social advantages as a national of the Member State<sup>323</sup>, the 2003 Directive requires that the sponsor and family have no recourse to public funds for fear of breaching the requirements of the Directive. Many will even fail to claim those benefits to which they would still be entitled and which might not come under the scope of the Directive, such as child benefits, for fear of jeopardizing the family’s unity<sup>324</sup>. One might even question whether the provisions could be held to be compatible with Article 33 of the 2000 Nice Charter of Fundamental Rights of the European Union that states that the family shall enjoy “economic and social protection”. Since Member States may also limit the employment activities of family members such as the adult children and parents of the sponsor, these members of the family may have to go into unofficial work which cannot then be declared in assessing the family’s income<sup>325</sup>. As regards housing, according to the European Committee of Social Rights, Article 19(6) of the European Social Charter actually imposes an obligation upon States to *aid* migrants in finding suitable accommodation for the purposes of family reunification<sup>326</sup>.

With the imposition of these requirements, most draconian of all is the length of time for which the sponsor and his family must meet the above requirements. Under the 1968 Regulation, housing may only be assessed at the moment of the family’s entry into

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<sup>321</sup> Article 7(1)(c).

<sup>322</sup> See Caritas, *op. cit.*, para. 6.3 and R. Cholewinski, *Family Reunification and Conditions...*, *op. cit.*, pp. 282-284.

<sup>323</sup> Regulation 1612/68, *op. cit.*, Article 7(2). See *Hoeckx*, ECJ, C-249/83 and *Deak*, ECJ, C-94/84 summarised in J. Apap, N. Sitaropoulos, *op. cit.*, pp. 31-32.

<sup>324</sup> See L. Morris, *op. cit.*, p. 415.

<sup>325</sup> *Ibid.*, p. 414.

<sup>326</sup> L. Samuel, *Fundamental Social Rights – Case Law of the European Social Charter*, Strasbourg, Council of Europe, 1997, pp 415-416 quoted in J. Apap, N. Sitaropoulos, *op. cit.*, p. 10.

the Host State<sup>327</sup>. In the 2003 Directive however, autonomous residence permits to the family members may be granted after five years of residence<sup>328</sup>. During this five-year period therefore, Member States may refuse to renew a family member's residence permit where the conditions in Article 7 are no longer met<sup>329</sup>. If one considers the waiting period before family members are allowed to enter, a third-country national might work for a total of seven or eight years, paying income tax and national insurance, then suddenly have his family deported because he has recently lost his job. Similarly, a sponsor may have adequate housing for his spouse to come and join him yet the couple would be forbidden from having children for the first five years of the spouse's residence since their housing would no longer be considered "normal" with three family members living in it. Other equally shocking scenarios may be foreseen. At the time of entry, the resources, housing and insurance may only be enough to cover one out of two or more children, forcing the sponsor to "choose" which child should be allowed to enter. Furthermore, once a child had entered and settled, the deportation of the child or one of its parents after four years' cohabitation following a drop in resources or problems with housing or insurance would probably constitute a breach of article 8 of the European Convention on Human Rights<sup>330</sup>.

#### IV.2.4] Family Members' Legal Status and Security of Residence

##### IV.2.4.a] The duration of a subsidiary residence permit and validity of a relationship

The five-year period in which a residence permit may be withdrawn exceeds the time-limit of four years recommended by the Council of Europe Committee of Ministers<sup>331</sup> and the time-limit of three years recommended by the European Network Against Racism (ENAR)<sup>332</sup>. Under the 1968 Regulation, as long as the spouses are not

<sup>327</sup> See *Commission v Germany*, Case 249/86, [1989] ECR 1263.

<sup>328</sup> Article 15(1).

<sup>329</sup> Article 16(1)(a).

<sup>330</sup> See *Berrehab*, op. cit.

<sup>331</sup> Council of Europe, *Recommendation of the Committee of Ministers to Member States on the legal status of persons admitted for family reunification*, Rec(2002)4, Adopted 26.3.2002.

<sup>332</sup> ENAR, "The right to family reunification is a human right": *A step towards equal rights for third-country nationals in the EU*, Brussels, 2002, p. 8 [http://www.enar-eu.org/en/campaign/Fam\\_Reunion%20position%20paper-ENG.pdf](http://www.enar-eu.org/en/campaign/Fam_Reunion%20position%20paper-ENG.pdf) accessed 10 July 2003.



divorced, Member States may not withdraw the worker's spouse's residence permit on the grounds of separation<sup>333</sup>. Under the 2003 Directive however, Member States may withdraw a family member's residence permit where the sponsor and family member "no longer live in a full marital or family relationship"<sup>334</sup> or where either party is found to be in a stable relationship with another person<sup>335</sup>. The Directive fails to affirm that States are nevertheless under a duty, even following separation or divorce, not to deport the parent of a child when that child may not follow the parent abroad<sup>336</sup>. Also, the possibility of having one's residence permit withdrawn upon separation from the sponsor may create a situation for many women in which they suffer domestic violence in the home, yet cannot leave their spouse for fear of deportation and loss of everything constructed in the preceding four years' residence in the Host State. Under Article 15(3), the authorization of an autonomous residence permit following the death of the sponsor remains at the discretion of the State so that a spouse widowed after nearly five years' residence in the host country may also face deportation.

Member States may also refuse to renew or withdraw a residence permit if a marriage or adoption was contracted for the "sole purpose of enabling the person concerned to enter or reside in a Member State"<sup>337</sup> and may conduct "specific checks" on the occasion of the renewal of a residence permit when they have reason to suspect such a purpose<sup>338</sup>. These provisions are however open to abuse. Firstly, "specific checks" should not come to constitute a breach of the family's right to respect for their private life under article 8 of the European Convention on Human Rights<sup>339</sup>. Secondly, the notion of the marriage or adoption being for the sole purpose of entering or residing in the Member State and as such a ground for refusal or withdrawal of authorization is one that should be treated with great care. In the United Kingdom, under the 1988

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<sup>333</sup> See *Diatta*, Case 267/83, ECR, 1985, 567 [1986], 2 CMLR 164 quoted in J. Apap, N. Sitaropoulos, op. cit., p. 24.

<sup>334</sup> Article 16(1)(b).

<sup>335</sup> Article 16(1)(c).

<sup>336</sup> See Berrehab, op. cit.; and Kroon, op. cit. See also Council of Europe, Recommendation of the Committee ... op. cit.

<sup>337</sup> Article 16(2)(b).

<sup>338</sup> Article 16(4).

<sup>339</sup> See ILPA, op. cit.; ENAR, op. cit.,

Immigration Act, a similar “primary purpose” clause targeted all those assumed to have an economic motivation in migrating and hence covered many whose marriage was genuine. For this reason the clause was abolished in 1997<sup>340</sup>.

IV.4.2.b] The duration of autonomous residence permits and the right of appeal

Although the Directive imposes an obligation to grant the family member an autonomous residence permit after five years’ residence<sup>341</sup>, the Directive delegates to national legislatures the task of determining the duration of the autonomous residence<sup>342</sup>. Therefore, family members are not necessarily entitled to a permanent residence permit and may come to hold a residence permit shorter in duration to that of the spouse or children and hence need to apply for renewal in the future, creating further insecurity and distress for the individual and family as a whole. In addition, the sponsor’s and family members’ right of appeal is drafted in very weak terms. Article 18 merely provides for the “right to mount a legal challenge”<sup>343</sup>, with Member States determining the procedure and competence for any such legal challenge<sup>344</sup>. The Directive does not even state that any such appeal shall have suspensory effect. The provision therefore falls below the standard of protection required by Articles 8 and 13 of the European Convention on Human Rights and also Article 47 of the 2000 Nice Charter of Fundamental Rights of the European Union<sup>345</sup>.

IV.2.5] Family Members’ Socio-Economic Rights

The Directive recognises the family’s right, as the sponsor’s, of access to education, employment, self-employment, vocational guiding, training and retraining<sup>346</sup>. However, States that allow for the entry and residence of the sponsor or spouse’s

<sup>340</sup> See L. Morris, op. cit., p. 413 and ILPA, op. cit.

<sup>341</sup> Article 15(1).

<sup>342</sup> Article 15(4).

<sup>343</sup> Article 18 para.1.

<sup>344</sup> Article 18 para.2.

<sup>345</sup> See the statement made by Prof. Pieter Boeles of Leiden University in Caritas Europa, *Right for Families to Live Together or Right for EU Member States to Derogate from Human Rights?* press statement. <http://www.cec-kek.org/English/Presstatementfamreunfina20020304.pdf> accessed 10 July 2003.

<sup>346</sup> Article 14(1).

parents or adult unmarried children may restrict their access to employment and self-employment<sup>347</sup>. While the adult children may suffer from serious disabilities and parents may also be dependant on the sponsor or spouse, this should not bar them from taking up employment or starting their own business, particularly in view of the EU's role in abolishing discrimination on grounds of age and disability<sup>348</sup>. States may also limit access to employment and self-employment activities for the first twelve months of the family member's residence<sup>349</sup>. As noted by ExCom in the context of refugee families, but equally applicable to all migrant families, economic opportunities that are open to the sponsor but not the spouse may imbalance family structures and create domestic problems<sup>350</sup>, as well as slowing down the process of integration into the new society. Articles 14(2) and 14(3) also constitute limitations that are not faced by family members of EU citizens. Neither the restrictions imposed on adult children and parents of the sponsor nor the temporary work limit are allowed under the 1968 Regulation.

#### IV.2.6] Specific Provisions Concerning Refugees and Other Refugee-Specific Issues

##### IV.2.6.a] Favourable treatment of refugees

The most favourable provisions in the Directive are those that apply specifically to refugees<sup>351</sup>. Refugees who are unaccompanied minors are entitled to have their parents join them<sup>352</sup>. The proof required to establish the family links is also more flexible in that Member States may not reject applications based solely on the lack of documentary evidence<sup>353</sup>. Also, no child of a refugee's family may be required to take an integration test<sup>354</sup>. Furthermore, under Article 12(1) para.1, the requirements in Article 7 relating to housing, health insurance and resources may not affect the application for family reunification of a refugee. Lastly, Member States may not require a refugee to have resided in the Host State for a determinate period of time before

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<sup>347</sup> Article 14(3).

<sup>348</sup> Article 13 ECT. See ILPA, op. cit.

<sup>349</sup> Article 14(2).

<sup>350</sup> ExCom, op. cit., para. 22.

<sup>351</sup> Chapter V: Articles 9-12.

<sup>352</sup> Article 10(3)(a).

<sup>353</sup> Article 11(2).

<sup>354</sup> Article 10(1).

family reunification is granted<sup>355</sup>. It should nevertheless be noted that these provisions were already applied by most if not all Member States<sup>356</sup>.

IV.2.6.b] Limitations in the protection offered to refugees and their families

The most serious limitation in the Directive's implementation of refugees' right to family reunification is that the notion of refugee is limited to those entitled to refugee status under the 1951 Refugee Convention<sup>357</sup>. Individuals authorised to reside in a Member State on the basis of a subsidiary form of protection are not only excluded from the provisions specifically applicable to refugees but are also expressly excluded from the Directive as a whole<sup>358</sup>. While the Commission's original proposal included such complementary or de facto refugees<sup>359</sup>, this was then scrapped because Member States could not agree on a common definition of those entitled to subsidiary protection<sup>360</sup>. While it is the Community's intention to agree upon a Directive on the right to subsidiary protection, including the right to family reunification<sup>361</sup>, there is no guarantee that such a Directive will be agreed upon in the foreseeable future. Those enjoying subsidiary protection should therefore have, at the least, enjoyed the same rights as those third-country nationals covered by Article 3(1), until the other Directive came into force<sup>362</sup>.

The Directive also expressly excludes asylum seekers<sup>363</sup> from its application. While the 1997 Dublin Convention allows for the reunification of an asylum seeker with a member of his family who has been already been granted refugee status under

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<sup>355</sup> Article 12(2).

<sup>356</sup> See ECRE, *survey of provisions for refugee family reunion in the European Union*, research paper, November 1999, <http://www.ecre.org/research/survey.doc> accessed 10 July 2003.

<sup>357</sup> Article 2(b). For the limitations in the 1951 Convention's protection of de facto refugees see supra p...

<sup>358</sup> Article 3(2)(c).

<sup>359</sup> COM (1999), op. cit., Explanatory Memorandum para. 8, Article 2(2)(c), Article 5(4).

<sup>360</sup> COM (2000), op. cit., Explanatory Memorandum, para. 2.

<sup>361</sup> Ibidem.

<sup>362</sup> For the importance of family reunification for those enjoying subsidiary protection see supra section III]2.

<sup>363</sup> Article 3(2)(b).

the 1951 Refugee Convention<sup>364</sup>, it does not cover the reunification of family members who are all seeking asylum and who may be scattered among various Member States having been separated during flight. At present, no Member State allows for the family reunification of asylum seekers<sup>365</sup>. Nevertheless, asylum seekers often wait many years to have their asylum applications decided. This separation will naturally cause distress to the family members and weaken family bonds. Ironically, one might note that at least one State has accepted the latter assertion. In the Netherlands, an Ethiopian lady who had arrived in 1981 seeking asylum, and was granted refugee status in 1988, had not been allowed by the immigration authorities to have her son enter the State and reside with her on the grounds that the family link had been broken by the long absence of contact between the two<sup>366</sup>. Since many countries are putting in place or plan to put in place fast-track procedures to determine manifestly unfounded claims for asylum, the Directive might have allowed for the family reunification of family members of asylum seekers awaiting final determination of status who have been through such a fast-track procedure<sup>367</sup>. Alternately, the Directive might have allowed for the reunification of asylum seekers with their family members who are also seeking asylum in another Member State, the Member State with the greater number of family members taking the other family members<sup>368</sup>.

While the inclusion of a child refugee's parents represents a positive aspect of the Directive, Member States retain a discretion on whether to authorise the entry and residence of any other member of the family or legal guardian even when the child is orphaned or cannot trace his parents. Yet a State's refusal to allow for the family reunification of an orphaned child, legally resident as a de facto refugee, with his aunt, his only living relative, was held to constitute a breach of Article 8 of the European

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<sup>364</sup> Article 4 1997 Dublin Convention, discussed in J. J. M. Arribas, *Los Estados Europeos Frente Al Desafío De Los Refugiados Y el Derecho de Asilo*, Madrid, Editorial Dickinson: Universidad de Burgos, 2000, pp. 169-173.

<sup>365</sup> ECRE, *survey ... op. cit.*

<sup>366</sup> J. Carlier, *op. cit.*, p. 560.

<sup>367</sup> See Hailbronner, *op. cit.*, p. 452.

<sup>368</sup> See ECRE, *Position on Refugee Family Reunification*, July 2000 para.40 <http://www.ecre.org/positions/family.doc> accessed 10 July 2003.

Convention on Human Rights by the European Commission of Human Rights<sup>369</sup>. The Directive does not therefore meet the standards required by Article 8 of the European Convention on Human Rights.

While refugees may at first be exempt from the housing, insurance and resources requirements of the Directive, this exemption may be withdrawn if the refugee does not apply for family reunification in the three months subsequent to the granting of refugee status<sup>370</sup>. Yet, as the European Court of Human Rights stated in *Sen*, a decision to be or remain separated from one's child should not be considered irreversible<sup>371</sup>. This would be the case particularly where unforeseeable events such as the death or illness of the child's other parent might be the reason for the refugee's latter application for family reunification.

Lastly, Member States may refuse entry to family members of third-country nationals generally under grounds of public health<sup>372</sup>. This measure may prove to be particularly restricting to family members of refugees who will, more often than not, come from areas in the world suffering from poor sanitation and healthcare and with diseases such as AIDS widespread. In view of the severity of both the refugee's position and that of his family member, public health should not therefore be used as a ground for the denial of family reunification<sup>373</sup>. The cruelty of State refusal on grounds of public health was recently highlighted by a Pakistani refugee who burnt himself to death in front of the Canberra Parliament in protest at the Australian authorities' refusal to allow his wife entry on public health grounds<sup>374</sup>.

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<sup>369</sup> *Nsona v Netherlands*, judgement of 6.7.1994, no. 23366/94.

<sup>370</sup> Article 12(1) para.3.

<sup>371</sup> *Sen*, op. cit..

<sup>372</sup> Article 6(1).

<sup>373</sup> See ECRE, *Comments on the Amended Proposal for a Council Directive on the Right to Family Reunification*, September 2002, [www.ecre.org/statements/frusep02.shtml](http://www.ecre.org/statements/frusep02.shtml) accessed July 10 2003.

<sup>374</sup> See Refugee Council of Australia, *On Family Unity and Family Reunification Obligations in Relation to Family Unity*, Discussion Paper. [http://www.refugeecouncil.org.au/html/position\\_papers/FAMILY\\_UNITY.html](http://www.refugeecouncil.org.au/html/position_papers/FAMILY_UNITY.html) accessed 10 July 2003.

#### IV.2.7] The True Impact or Lack Thereof of the Directive on Family Reunification Rights Across the EU

The final text of the 2003 Directive has attracted widespread criticism from civil society and bodies such as the EU's Economic and Social Committee<sup>375</sup>. While the Commission's first proposal represented a positive harmonisation of third-country nationals' right to family reunification and narrowing of discrimination between third-country nationals and EU citizens, the final text adopted by the Council neither harmonises family reunification rights across the EU nor substantially narrows the differences between third-country nationals and EU citizens. The final text, in fact, is far closer to the 1993 Copenhagen Rules than to the 1968 Regulation that applies to EU citizens. The Directive, in many respects, fails to meet the standards required by the European Social Charter and the European Convention on Human Rights, as well as the goals of the Tampere European Council Summit. This state of affairs is made worse by the limitations of the ECJ's role in the interpretation and oversight of the Directive. Firstly, since the Directive does not have as its core purpose the free movement of workers, as did the 1968 Regulation, it would most probably not be subject to the same level of teleological interpretation<sup>376</sup>. Secondly, under Article 68 of the ECT, only a court of last instance may make a referral to the ECJ for a ruling on a Community measure adopted under Title IV of the ECT.

The Directive will therefore have very little effect upon the right to family reunification of third-country migrants. Some small changes in domestic policy may occur, such as Austria having to shorten the waiting period imposed on third-country nationals from five years to three<sup>377</sup>. Nevertheless, most present Member State policies will remain unchanged, with most States already having policies more favourable than

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<sup>375</sup> Ibid; ILPA, op. cit.; Caritas Europa, op. cit.; *Opinion of the Economic and Social Committee on the Amended proposal for a Council Directive on the right to family reunification*, op. cit.

<sup>376</sup> See *Rush Portuguesa*, C 113/89, (1990) ECR I, p. 1417.

<sup>377</sup> See *ssupra* section IV.2.3.a].

those obligatory in the Directive<sup>378</sup>. Also, the failure to include a standstill clause in the Directive means that Member States with more favourable measures may restrict these and bring their policies into line with the minimum standard set in the Directive. The Commission, in fact, refused to include a standstill clause requested by the European Parliament for the exact purpose of not impeding harmonization. This would suggest that the Commission would rather see the harmonization of family reunification rules through the lowest common denominator approach than to protect family reunification rights wherever possible<sup>379</sup>. Also indicative of the true nature of the Directive is the change made to Article 1. While this originally stated that the purpose of the Directive was to “establish a right to family reunification for the benefit of third-country nationals”<sup>380</sup>, this was eventually amended to “the purpose of this Directive is to determine the conditions for the exercise of the right to family reunification”<sup>381</sup>. This highlights the extent to which the Directive has been adapted to serve economic needs rather than humanitarian principles.

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<sup>378</sup> See, for example, for Portugal, Articles 56 and 57 of the Decreto Lei no 244/98, 3.3.98, Regime de Entrada, Permanencia, Saida e Afastamento de Estrangeiros do Territorio Nacional; and A. G. Dias Pereira, *A Protecção Juridica da Familia Migrante*, in J. J. Gomes Canotilho (ed.), *Direitos Humanos, Estrangeiros, Comunidades Migrantes e Minorias*, Oerias, Celta, 2000, pp. 81-100, p. 95.

<sup>379</sup> See COM (2000), op. cit., Explanatory Memorandum, Amendment 9.

<sup>380</sup> COM (1999), op. cit., Article 1.

<sup>381</sup> Directive 6912/03, Article 1.



## CONCLUSION

Family Reunification appears to remain an issue in which economic interests and policies influenced by some of the electorate supersede basic, fundamental principles of fair treatment and respect for one's family life. Governments, while differing in their attitudes to a certain extent, have successfully walked a tightrope at the domestic and international level. While recognising in many different international texts, the principle of family reunification and the duty to facilitate such reunification, they have carefully avoided recognising family reunification as a precise and enforceable human right. At the domestic level, States have granted the bare minimum of family reunification rights in order to acquiesce domestic courts and actors in civil society, while retaining the discretion to grant more favourable rights of family reunification to those whom Governments wish most to receive as migrants and when this matches the economic interests of the State.

Meanwhile, the one truly effective judicial human rights body, the European Court of Human Rights, fearing a loss of legitimacy through excessive review on matters as delicate as immigration, has proved incapable of protecting aliens' rights to family reunification. Its jurisprudence has been criticised within the Court itself and by observers, not only for its excessively deferential nature, but also for incoherence and lack of clarity. The recent decision in *Sen*, though no less clear, may however prove to be a turning point in the Court's case law.

Domestic courts, on the other hand, have proved in certain circumstances to be relatively effective in ensuring States' respect for aliens' rights to family reunification. The eventual outcome of this defence of alien rights however, has been the shift of policy from the domestic level to the European Community level where measures may not be restrained by domestic courts and where the judicial oversight by the ECJ has also been curtailed. This lack of future, strong judicial oversight, combined with certain Member States' unorthodox and somewhat reactionary positions on family reunification and other Member States' and civil society's unwillingness or inability to exert greater

pressure and influence, have resulted in the eventual reversal of recent initiatives to bring the right to family reunification forwards along the road to recognition as a fundamental human right.

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