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THE RIGHT OF MINOR CHILDREN TO FAMILY REUNIFICATION UNDER DIRECTIVE 2003/86/EC*

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ABSTRACT: The present contribution provides a general overview of the European legal framework concerning the right to family reunification of third-country nationals under Directive 2003/86/EC. Family reunification has been one of the main sources of immigration in the European Union. Particularly, the principal aim of the work is to address the family reunification of minor children through the assessment of the relevant case-law of the Court of Justice of the European Union.

KEYWORDS: family reunification – Directive 2003/86/EC– minor children – unaccompanied minors – migration of TCNs

1. INTRODUCTION

Over the last 30 years, family reunification has been one of the main sources of immigration in the European Union (European Commission, 2019). In particular, according to the latest Commission's report on the right to family reunification, in 2017 472,994 third-country nationals (TCNs) were admitted to the EU-25 on grounds of family reunification, amounting to 28% of all first permits issued to TCNs in the EU-25.

In light of the relevance of family reunification within the European Union, this paper seeks to provide a brief insight into the main features of family

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reunification under Directive 2003/86/EC, with a focus on the regime reserved to minor children.

The first section will outline the categories of family members entitled to family reunification and the procedural requirements to be fulfilled. Finally, the main case-law of the Court of Justice of the European Union (CJEU) concerning minors will be analysed.

2. THE EU LEGAL FRAMEWORK

2.1 Council Directive 2003/86/EC: objectives and values

Council Directive 2003/86 of 22 September 2003 constitutes the main European source on the Right to Family Reunification of TCNs, meaning any person who is not a citizen of the Union, residing lawfully in the territory of a Member State (Friedery et al., 2018). It applies to all Member States except Denmark and Ireland and shall not be confused with Council Directive 2004/38, which concerns the right of European citizens and their family members to move and reside freely within the territory of the Member States.

Overall, the Directive strives towards the attainment of three main goals:

1. enforcing the fundamental right to respect for private and family life and the right to marry and to found a family, enshrined in Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Arts. 7 and 9 of the Charter of Fundamental Rights of the European Union, as well as the right of the family to social, legal and economic protection contained in Art. 16 of the European Social Charter;
2. providing a fair treatment of regular migrants in compliance with the general principle of non-discrimination;

3. fostering the attainment of a more vigorous European integration policy, granting TCNs rights and obligations comparable to those of European citizens.

The Preamble makes reference to the main values that inspired the adoption of the Directive: the establishment of the Union as an area of freedom, security and justice and free movement of persons and protection of family life in compliance with the aforementioned provisions (recitals 1 and 2). Furthermore, the legislator acknowledges the importance of family reunification, which is considered to be "a necessary way of making family life possible" whilst ensuring "sociocultural stability" and promoting "economic and social cohesion" (recital 4).

A special attention to the delicate condition of minor children can be traced ever since the Preamble of the Directive. Minor children are expressly mentioned at recitals 9 and 11, which underline that the right to family reunification concerns in any case the "members of the nuclear family", namely the spouse and the minor children, and should be exercised in compliance with "the values and principles recognised by Member States with respect to the rights of women and of children". In the next paragraphs we shall see more in depth how this attention is reflected into the case-law of the CJEU.

2.2 Beneficiaries: the sponsor and the categories of relatives entitled to family reunification

The identification of the beneficiaries of the right to family reunification depends on the sponsor, which is defined as the TCN residing lawfully in a Member State and applying or whose family members apply for family reunification. However, being regularly resident in a Member State is not a sufficient requisite for obtaining family reunification, because the Directive requires the sponsor to hold a residence permit valid for one year or more and with a reasonable prospect of obtaining permanent residence (Art. 3).

As for the first requirement, Art. 8 of the Directive specifies that Member States may require the sponsor to have stayed lawfully on their territory for no more than two years before having his/her family member join them; alternatively, in case the legislation of the Member State takes into account its reception capacity, such Member State may provide for a waiting period of no more than three years between submission of the application and the issue of a residence permit to the family members.

As to the notion of "reasonable prospect" of obtaining permanent residence, the Directive does not offer any specification, thus leaving a considerable margin of appreciation to the Member States when evaluating the situation of the sponsor.

The categories of family members entitled to reunification are mentioned in Art. 4 and are:

a) the sponsor's spouse;
b) the minor children of the sponsor and/or her spouse, including children adopted in accordance with a decision, taken by the competent authority in the Member State concerned or which is automatically enforceable due to international obligations;
c) the minor children including adopted children of the sponsor or of the spouse, where the sponsor or spouse has custody and the children are dependent on him/her.

The provision specifies that minor children must be below the age set by the law of the Member State and must not be married. Member States can also set a minimum age not exceeding 21 years for the sponsor and the spouse and request that the applications concerning family reunification of minor children have to be submitted before the age of 15. In addition, in case of shared custody of minor children, the Directive provides that Member States may authorise reunification provided that the other party sharing custody gives his/her agreement. Moreover, in the event of a polygamous marriage, if the sponsor is already living with a spouse, Member States shall not authorise family reunification to a further spouse.

Additionally, pursuant to Art. 4(2), Member States may also authorise entry and residence of first degree relatives in the direct ascending line of the sponsor or his/her spouse, provided that they are dependent on them and do not enjoy proper family support in the country of origin; the adult unmarried children of the sponsor or his/her spouse, provided that they are objectively unable to provide for their own needs on account of their state of health.

Finally, under Art. 4(3), Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification.

2.3 Procedure and requirements for the exercise of the right

The procedure to be followed for the submission and examination of the application is set forth in Art. 5. First of all, Member States are free to choose whether the application is to be submitted by the sponsor or the family members of the sponsor. The application shall be accompanied by the documentation concerning the family relationship and interviews may be carried out over the course of an investigation in order to verify the existence of a family relationship. In case of the unmarried partner of the sponsor, factors such as a common child, previous cohabitation or registration of the partnership may be considered.

The written notification of the decision should be sent to the person who submitted the application as soon as possible and in any event no later than nine months from the date of the application; however, in exceptional circumstances the time limit may be extended.

A decision rejecting the application shall be motivated and the consequences of an absence of decision within the established term determined by the national legislation. Finally, when examining an application, Member States should have due regard to the best interest of minor children.

As to the requirements for the exercise of the right to family reunification, Art. 6 provides that Member States may reject an application for entry and residence of family members on grounds of public policy, public security and

public health, while illness or disability do not constitute admissible grounds for rejection.

Pursuant to Art. 7, Member States may require the applicants to provide evidence that the sponsor has an accommodation regarded as normal for a comparable family in the same region in compliance with health and safety standards, a sickness insurance for himself/herself and his/her family in respect of all risks covered in the Member State where he/she resides, stable and regular resources enabling him/her to provide for his/her needs and his/her family members without recourse to the social assistance system of the Member State concerned.

3. The main case-law of the Court of Justice of the European Union concerning Minors

This paragraph presents the most relevant case-law of the CJEU concerning family reunification and minors. As a matter of fact, the implementation of the Directive has improved over time thanks to the interpretive guidance of the Court (European Commission, 2019).

In the premises, it is important to recall that Member States must prioritise the best interests of the child when examining family reunification applications. In addition, it should be noted that Directive 2003/86 provides for two derogations from the general provision of Art. 4(1) which concern the family reunification of minors. Firstly, Member States might require a minor, who is aged over 12 and arrives in the territory of such Member State independently from his/her family, to meet a condition for integration before authorizing his/her entry and residence.

Secondly, Member States are allowed to require that an application for family reunification is submitted by a minor before the age of 15. However, these provisions are *standstill clauses* meaning that they are accepted only in so far as they were present in Member States' national legislations on the date of the implementation of the Directive (European Commission, 2019). *In concreto*, only

the first derogation concerning the condition for integration and contained in the final subparagraph of Art. 4(1) was implemented by some Member States (European Commission, 2019). Moreover, such a provision was at the centre of a dispute between the European Parliament (EP) and the Council of the European Union before the CJEU (C-540/03, *European Parliament v Council of the European Union*, EU:C:2006:429).

According to recital 12 of the preamble of the Directive, the possibility to restrain the family reunification of children over 12 is justified by the will to safeguard the children's capacity for integration at early ages and to ensure that they acquire the necessary education and language skills in school. However, in the view of the EP such a provision was in violation of fundamental rights: particularly, the right to family life and non-discrimination. In addition, the Parliament recalled Art. 24 of the Charter of Fundamental Rights of the European Union which not only states the obligation to consider the child's best interests but also his/her right to have a personal relationship with his/her parents.

The CJEU held that, even though all these provisions stress the importance of family life for children and recommend Member States to consider the child's best interests, they do not create any individual right to enter the territory of the Member States. Neither they preclude a certain margin of appreciation to Member States when assessing an application for family reunification. However, the CJEU stated that such a discretion shall still be exercised in the light of Art. 5(5), reaffirming the principle of the best interests of the child, and Art. 17 of the Directive, which requires Member States to take due account of other factors, such as the nature and solidity of the person's family relationships and the existence of family, cultural and social ties with the country of origin. Consequently, the CJEU concluded that the final subparagraph of Art. 4(1) must be interpreted according to the right to respect for family life set out in Art. 8 of the ECHR.

In 2012, the CJEU restated the same reasoning in *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L* (joined cases C-356/11 and

C-357/11, *S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*, EU:C:2012:776). The latter regarded the similar situation of two TCNs – Mr O and Mr L – whose applications for a resident permit were rejected by Finnish authorities. In addition, they had similar family situations, meaning that their respective spouses, who were legally residing in Finland, had the custody of a child who was a citizen of the Union because he/she was born from a previous marriage with a Finnish national and were also the mothers of a TCN born from their current marriages with Mr O and Mr L. The Court held that the provisions of Directive 2003/86 must be interpreted in light of the Arts. 7 and 24 of the Charter of Fundamental Rights of the European Union and of Art. 5(5) of the Directive itself. These provisions require Member States to examine family reunification applications considering the interests of the concerned child and with the aim of promoting family life.

Lastly, *A and S v Staatssecretaris van Veiligheid en Justitie* (C-550/16, *A and S v Staatssecretaris van Veiligheid en Justitie*, EU:C:2018:248) has been considered part of the recent proactive trend of the CJEU to dissuade Member States from opposing to the right to family reunification of refugees as a means to solve the recent migratory crisis (Bartolini, 2018). Particularly, it marks an important step toward the protection of children in migration. The case concerns an Eritrean girl who arrived as an unaccompanied minor in the Netherlands and applied for asylum. However, before she was granted asylum, she attained her majority and so, when she applied for family reunification, her application was rejected on grounds that she was not a minor anymore at the date on which the application was submitted.

According to Art. 2(f) of Directive 2003/86 an unaccompanied minor is a TCN or stateless person below 18 arriving in a Member State unaccompanied by an adult responsible. Consequently, the question referred to the CJEU was whether Art. 2(f) covers also a TCN or stateless person below the age of 18 when he/she enters the territory of the Member State and applies for asylum but attains the age of majority during the asylum procedure, which is eventually granted to

him/her, and applies for family reunification. In other words, the crucial question was which date is to be considered in such cases for the purpose of the Directive (Bartolini, 2018).

Firstly, the CJEU recalled that recital 8 of the Directive provides for more favourable conditions for refugees exercising their right to family reunification. Indeed, Member States have an obligation to authorise the family reunification of first-degree relatives in the ascending line of the refugee sponsor – without any margin of discretion – under Art. 10(3)(a) of the Directive. Moreover, the Court noted that neither the Directive specifies the relevant moment for being considered an unaccompanied minor benefitting from the right to family reunification nor it does leave such determination to the national legislation of Member States. In this case, a European autonomous and uniform interpretation must be given to the question referred considering the general scheme and objectives of Directive 2003/86.

Consequently, as asylum applicants are entitled to family reunification under Directive 2003/86 solely when their asylum application had a positive final decision, the CJEU concluded that only the date on which the asylum application is submitted can be used as a means to assess the age of a refugee for the purposes of family reunification, thus enabling identical treatment and foreseeability to be guaranteed for all applicants. Indeed, in this way, the application for family reunification will depend on the applicants and not on the national administration's effectiveness, diligence and speed in dealing with an application.

In this judgement, the CJEU is implicitly stressing that administrative delays cannot amount to restricting unaccompanied minors' right to family reunification (Bartolini, 2018). As a matter of fact, the Court recalls the best interests of the child to stress the importance of processing asylum applications concerning minors as soon as possible due to their vulnerability (Bartolini, 2018).

As it is apparent from the reconstruction of the case-law of CJEU, a crucial obligation for Member States is to pay due respect for the best interests of the

child, which is also a notion that the Court recalls consistently in its judgements concerning family reunification (European Commission 2019).

BIBLIOGRAPHY

Case-law

Court of Justice, judgement of 27 June 2006, C-540/03, *European Parliament v Council of the European Union*.

Court of Justice, judgement of 6 December 2012, C-356/11 and C-357/11, *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*.

Court of Justice, judgement of 12 April 2018, C-550/16, *A and S v Staatssecretaris van Veiligheid en Justitie*.

Academic publications

R. Friedery, F. Marcelli, *The right to Family reunification in European Union law and the CJEU Jurisprudence*, in R. Friedery, L. Manca, R. Roßkopf, *Family Reunification: International, European and National Perspectives*, BWV Berliner Wissenschafts-Verlag, 2018, p. 49-77.

Websites

S. Bartolini, *The Right to Family Reunification of Unaccompanied Minor Asylum Seekers before the Court of Justice of the EU*, in *European Law Blog. News and comments on Eu law*, 7 May 2018, https://europeanlawblog.eu/2018/05/07/the-right-to-family-reunification-of-unaccompanied-minor-asylum-seekers-before-the-court-of-justice-of-the-eu/ (last accessed 19 January 2020).

European Commission, *Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification*, 8 October 2008, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008DC0610 (last accessed 19 January 2020).

European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification*, 29 March 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0162 (last accessed 22 January 2020).