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The right of family reunification

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THE RIGHT TO FAMILY REUNIFICATION UNDER SPANISH LAW AND THE CASE-LAW THEREOF *

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FAMILY REUNIFICATION UNDER SPANISH LAW FOLLOWING THE IMPLEMENTATION OF COMMUNITY LEGISLATION

SUMMARY: 1. Introduction. – 2. Family reunification in the spanish legal system. – 2.1. Conditions for the exercise of the right. – 2.2. Family members eligible for reunification. – 2.3. Required documents. – 2.4. Procedure. – 2.5. Renewal of residence permits. – 2.6. The access to work for joined family members. – 3. Family reunification under community law and its transposition into the spanish law. – 4. Comparing the directive with the spanish law. – 4.1. Conditions for the exercise of the right. – 4.2. Family members eligible for reunification.– 4.3. Procedural questions. – 4.4. Validity of temporary residence permits granted by family reunification. – 4.5. Individual retention of the right of residence of the joined persons. – 4.6. Right of access to employment. – 5. Administrative practice of family reunification: critical aspects. – 6. Conclusions.

1. *Introduction*

Signed in Rome on 4 November 1950 under the auspices of the Council of Europe, the European Convention on Human Rights (ECHR) was ratified by all

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* The present report has been realized in the framework of the European project "Lawyers for the protection of fundamental rights" GA no. 806974) and specifically within the work package on the review of the European legal framework on fundamental rights. Against this background, the beneficiaries of the said project chose to focus the analysis on two specific topics:

1) Family law and rights of the child, and in particular the right to family reunification;

2) Criminal law, and in particular fight against terrorism and the relevant rights of defendants, of pre-trial detainees and persons under investigation.

The present report explores the first topic on "The right to family reunification under Spanish Law and the Case-Law thereof", realized by Prof. Dr. Mª Esther Gómez-Campelo y Prof. Dr. Marina San Martín-Calvo, from University of Burgos.

Translation and review by Prof. Alba Fernández Alonso.

Member States of the European Union (EU). Its original system of protection of rights was based on the strict judicial control of individual rights.

Its Article 8, paramount in the subject matter of the present work, reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. 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 family is an integral part, constitutive of the social structure of a state, an attribute that constitutes an essential criterion of its identity. To the extent that the ECHR is an instrument of international law necessarily acknowledged by each Member State, respect for family life becomes a principle of *jus cogens*, an imperative international right that compels countries to specify its content under rules of rigorous respect for the norm cited. The manner it is carried out, its scope and effectiveness, extension, guarantees and limits shall be autonomously set by each State following a series of common basic parameters.

The principle guarantees the right to family life, so that exceptions are only tolerated when necessary, that is, when required by law and for appropriate purposes, with the aim of achieving a balance between the particular right and the interest of the State.

Having said this, considering the ECHR an international instrument seeking the transnational protection of human rights through the establishment of criteria or minimum standards of action requires good understanding of the object of such protection, the limits within it is framed. The creation and integration of a family is one of the inherent rights of the person that define the inviolable content of the rights proper to the dignity of the human being, an essence that is to be reflected in each internal norm. Thus, Title I of the Spanish Constitution (hereinafter CE) and, specifically, its Art. 18.1 – as far as the subject is concerned – enshrines the right to personal and family integrity and privacy. These rights, essential to guarantee human dignity and the development of personality, are also extended to foreigners as shared rights.

The Universal Declaration of Human Rights (UDHR) states in its Art. 16.3 that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State". In like manner, Art. 16 of the European Social Charter speaks of the family as "a fundamental unit of society".

The constant amendments of the legislation on foreigners have turned the study of this matter into a test of obstacles. Good proof of this are not only the changes that have taken place since the entry into force of the Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their

social integration[1] (hereinafter LOEx) together with its correlative Regulation (hereinafter RLOEx), but also one of its most important amendments, that of the LOEx 14/2003 and the adaptation carried out with the last Regulation (Royal Decree 557/2011), concerned with incorporating into the legal system the *acquis* of the EU in such complex matter.

The Community legislator's interest in the importance of proper control and management of migratory flows has been demonstrated by the analysis of Directive 2003/86/EC. It shall not be forgotten that this is the first legislative instrument on immigration in the EU, hence its theoretical significance and practical relevance. However, if we analyze its real reflection in each autonomous regulation, in this case the Spanish legislation, under a realistic and pragmatic approach, the objective of harmonization in such delicate matter – due to its traditional ascription to each national legislation subject to state circumstances of all kinds and attached to the tradition of each country and to its particular degree of sensitivity in such a thorny matter – it can be deemed that it is not producing the intended results, at least for now.

Since the mandatory transposition of the Community text on 3 October 2005, infringement proceedings have been initiated against many states for failure to communicate the transposition measures adopted (in the case of Luxembourg, a judgment was issued by the CJEU).

We will then analyze how the LOEx and its Regulation allow us to glimpse a complex post-transposition panorama by means of a wording that has tried to adapt internal regulations to the latest decisions adopted within the EU. Months after the publication of the Directive on reunification, the amendment of the LOEx of 2003 wanted to reflect some of the objectives set from Europe, such as the fight against fraud, the legal instruments to prevent migration chains, the independent obtaining of work and residence authorizations or the limiting circumstances that affect family members eligible for reunification.

The effective transposition of the Directive is also causing various problems, either because its weak binding nature makes countries adapt their legislation with excessive flexibility, or because of its incorrect application, which can affect respect for family life as a fundamental right – a circumstance that requires verification and regular monitoring by the European Commission –.

From the foregoing, we can anticipate some conclusions that will be reinforced in the work now presented. As a matter of fact, we are facing a slippery matter in which two attitudes are clearly opposed to the phenomenon of migration: the essential adoption of measures that have been imposed for decades by ratified Conventions – and that already have their own regulations – exhorting States before the legal obligation to protect the family and respect family life and, on the other

[1] Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (Arts. 16-19).

hand, the particular need of the State to limit and define the entry of foreigners and, of course, of their families, in view of economic, political, sociological or any other kind of reasons.

Specifying these rights, developing them and making them compatible with restrictive policies regarding the obtaining of state authorizations for access to European territory is a complex task whose future analysis is not exempt from interest.

2. *Family reunification in the spanish legal system*

This is about a temporary residence permit granted to the family members of foreigners residing in Spain, by virtue of the right recognized by the regulations that we will analyze in the following lines.

As stated above, the right to family reunification of foreign residents is enshrined in Directive 2003/86/EC of 22 September 2003 on the right to family reunification. In the Spanish legislation, Article 16.2 of the LOEx – *Title I Rights and Freedoms of Foreigners, Chapter II Family reunification* – (own translation) is presented as a right linked to family life and family privacy.

Nevertheless, while the right to family life is a fundamental right enshrined in Article 18 of the CE, which regulates family privacy as a dimension attached to personal privacy, the right to family reunification is only a right of legal configuration and therefore subject to the limits that the LOEx and the RLOEx [2] can establish (see the express reference in Art. 17.4 of the LOEx [3]).

Following that, we will analyze the applicable regulations regarding the conditions for exercising the right, the family members eligible for reunification, the legal procedure, the granting and renewal of the residence permit, the autonomous residence in Spain of the reunited family members and their right to family reunification. In addition, we will see how joined family members can access employment in Spain and the case of family reunification of direct ascendants of Spanish citizens. Finally, we will examine in which cases the regulations allow the conversion of situations of *de facto* family reunification into *de jure* family reunification.

[2] Regulation of Organic Law 4/2000, approved by Royal Decree 557/2011, of 20 April (Art. 52-58).

[3] Foundation in law 11 of STC, no. 236, 7 November 2007. BOE no. 295, 10 de December 2007, pp. 59-83. Available at https://www.boe.es/buscar/doc.php?id=BOE-T-2007-21162 (last access on 6 October 2019).

2.1. *Conditions for the exercise of the right*

Requirements:

- Not to be a citizen of a State of the European Union, the European Economic Area or Switzerland, or a relative of citizens of these countries to whom the regime of citizen of the Union applies.
- Not to be found irregularly in Spanish territory.
- To have no criminal record in Spain and in the previous countries of residence for existing crimes in the Spanish legal system.
- Not to be forbidden to enter Spain and not to be subject to an alert issued for the purposes of refusing entry in the territorial space of countries with which Spain has signed an agreement to this effect.
- To have a health care plan covered by the Social Security or a private health insurance.
- Not to suffer from any of the diseases that may have serious public health repercussions in accordance with the International Health Regulations 2005.
- Not to be, if applicable, within the period of commitment not to return to Spain made by the foreigner when taking part in a voluntary return program.
- To have paid the fee for processing the procedure.
- To have sufficient economic means (Art. 54 RLOEx) to meet the needs of the family, including health care, in the event of these not being covered by the Social Security.

The income contributed by the spouse or partner or another relative in the direct line and first degree residing in Spain and living with the sponsor may be computed (although income from the social assistance system shall not be computable). In the case of family units consisting of two members (sponsor and joined person) a monthly amount of 150% of the IPREM (Spanish acronym for Public Indicator of Income for Multiple Purposes), – which in the year 2019 amounts to 799 euros – is required.

For each additional member, 50% of the IPREM shall be added, which comes to 266 euros in the year 2019.

The RLOEx establishes that by Order of the Minister of the Presidency the amount of the means of living required for this purpose shall be determined, as well as the manner of proving their possession, by taking into account the number of persons who would become dependent on the applicant after the reunification. For this reason, and in order to carry out the calculation, the income of the spouse or partner or another relative in direct line and first degree (parents or children), residing in Spain and living with the sponsor can be included. Income from the social assistance system (unemployment benefit or social assistance, for instance) shall not be computable.

In 2019, Spain shall continue to demand the same amount of money as foreigners who want to join their families, a situation not new since the IPREM has repeated its values since 2010, remaining stable at 532.51 euros per month. The

most important increase was the one registered between 2006 and 2007, which represented an increase of 4.2%.

Having analyzed the aforementioned, it should be pointed out that Art. 54.3 of the RLOEx establishes that the amount of the economic means *may be reduced when the family member eligible for reunification is a minor, when there are exceptional accredited circumstances that advise such reduction based on the principle of the superior interest of the minor and the other legal and regulatory requirements for the granting of the residence permit for family reunification are met* [4] (own translation). This reduction applies exceptionally. Therefore, if sufficient economic means are not proven, the compliance with the rest of the requirements shall be assured in order to increase the probabilities that the reduction of the amount will be applied.

- Adequate housing. How can this requirement be proven? With a report of the social services of the respective municipality (Art.18.1 LOEx and Art. 55.2 of the RLOEx). See Instruction of June 2011, on accreditation of availability of adequate housing in procedures on residence for family reunification [5].

[4] A number of High Courts have already ruled on this matter. However, the STSJ of Galicia of 21 March 2018, no. 174/2017 is noteworthy to be mentioned. Available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8386216&links=%22174%2F2017%22&optimize=20180518&publicinterface=true. (last access on 7 October 2019).

The sentence reads: *In view of this point, and the fact that the application for reunification is for three minor children, 5, 12 and 17 years old respectively, the Chamber understands that in this case the applicant's income must be valued, computing as stated in the judgment of the Court of First Instance the 963.82 euros of salary plus 289.14 euros (the 30% estimated as maintenance), which makes a total of 1252.96 euros, which although it is true, is lower and does not reach the economic means that would correspond for family units of 4 members – 1328 euros –. This circumstance makes it necessary to reduce the income requirement of the family unit on the basis of the principle of the best interest of the child, in accordance with the provisions of Organic Law 1/1996, of 15 January, on the legal protection of minors, as it meets the other legal and regulatory requirements for the granting of residence permits for family reunification.*

It is true that for family units such as that of the plaintiff, income is fixed that is not reached by the appealed for a small amount – not amounting to 100 euros –, but the individuals involved are minors and the Social Services of the City Council of Orense have reported favorably the applicant's roots, being this the only requirement that the applicant does not meet. Therefore, under the protection of the provisions of Art. 54.3 of the RLOEX, in this specific case that is examined, it is possible to reduce the pecuniary amount payable by the precise percentage in order to consider that the amount received by way of salary is sufficient for her maintenance and that of her family and, consequently, it is appropriate to annul the contested decision in the instance on the ground that it is unlawful and to recognize the right of the appellant to reunite her minor children and to obtain authorisation for temporary residence, by family reunification, applied for through administrative channels, since otherwise the right to the social, economic and legal protection of the family laid down in Article 39 of the Constitution would be infringed, as well as Article 3.1 of the United Nations Convention, of 20 November 1989 on the rights of the child and law 1/1996, of 15 January, on the legal protection of minors (own translation).

[5] Complete document in Spanish available at http://blogextranjeriaprogestion.org/wp-content/uploads/2014/10/instruccion-dgi-sgrj-4-20110001.pdf (last access 4 September 2019).

- The sponsor shall have resided in Spain for at least one year and have been granted authorization to reside for at least another year. In order to having ascendants join him or her, the sponsor must hold a long-term or long-term-EU authorization, which implies having been a legal resident in Spain for at least 5 years.

2.2. Family members eligible for reunification

If the sponsor fulfills the above requirements, he or she can apply for a residence permit for certain family members, who would be the ones to be joined. Of course, this does not apply to all the family members, but to those mentioned below, i.e. only the family members referred to in Art. 17.1 of the LOEx – almost the same ones cited in Art. 53 of the RLOEx – are eligible for reunification.

It is important to point out that the relative to be joined shall not be in Spain; it is assumed that he or she is in his or her country of origin. As a matter of fact, if the residence permit is granted, this family member shall apply for the corresponding visa at the Spanish consulate in the country of origin, as we will see later.

Precisely, one of the requirements for applying for family reunification is that the person to be joined is not in an irregular situation in Spain [6]. Moreover, according to the sentence cited in the footnote, in practice, the joined relative is recommended not to be in Spain, not even as a tourist, but in his or her country of origin or residence at the time of initiating the family reunification procedure.

The joined relative could be:

1. *Spouse or person with whom the applicant has an affective relationship similar to that of a spouse. The situations of marriage and analogous relationship of affectivity are incompatible.*

For these purposes, an analogous relationship to the conjugal one will be considered under the following circumstances:

[6] For this purpose, it is worth quoting STSJ of Madrid, no. 95/2017, 15 September 2017, which stated: *In the present case it is an indisputable question that the applicant, wife of the plaintiff, at the beginning of the reunification procedure (application before the corresponding government delegation) was domiciled in national territory without authorization or permission (...) In short, the regulations set out above are clear and forceful with regard to the fact that it is a necessary requirement for access to family reunification, such as the one for which the visa applicant, at the beginning of the file, is not in an irregular situation in Spain. On the basis of the abovementioned established fact, the applicant does not comply with that legal requirement, so that the contested acts, in those respects examined, are fully in accordance with law, which leads to the dismissal of the appeal* (own translation), available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8026547&links=%22974%2F2016%22&optimize=20170522&publicinterface=true (last access 7 October 2019).

- When this is registered in a public register and the registration has not been cancelled, or
- When the validity of an unregistered relationship constituted prior to the start of the sponsor's residence in Spain is proven by any legally admitted means of proof.

The spouse must not be *de facto* or *de jure* separated or have celebrated the marriage in fraud of law. In other words, marriages of convenience shall not be valid.

The most common way employed by the immigration authorities to check whether the marriage is one of convenience is through separate interviews of the spouses, a perfectly valid procedure in accordance with current regulations.

These interviews are of such important nature that they could lead to the denial of the family reunification visa by the corresponding consulate or embassy, even if the authorization has previously been obtained from the immigration authorities in Spain, as decided by the Supreme Court [7].

Reunification of more than one spouse or partner is not possible. In the event the spouse to be joined is a second or subsequent marriage, the dissolution and the situation of the former spouse or partner and their relatives with regard to common housing, pension for the spouse or partner and children must be proven (Art. 53.a) RLOEx).

2. *Children of the sponsor and of the spouse or partner, including those adopted (provided that the adoption produces effects in Spain), who are under eighteen years of age or disabled who objectively cannot provide for their needs due to their state of health.*

In the case of a child of one of the spouses or members of the couple, the latter must exercise sole parental authority or must have been granted custody and be in their charge (Art. 53.c) RLOEx).

[7] STS, no. 10/2013, 25 April 2014: *It is therefore perfectly compatible with the doctrine cited by the appellant, and certainly with the applicable legislation, that the Consulate rejects the visa application on the basis of facts revealed in the interview with the person concerned. Facts which must relate to the information set out in the provision, including that relating to the "alleged family relationship", where there is sufficient evidence to doubt its veracity. Such is the situation presented here. In the procedure initiated at the Consulate because of Mr. Mariano's visa application, he was summoned to an interview. The interview revealed his ignorance about the personal data and circumstances of the wife, who should know if there was a real personal relationship between them. For the representatives of the Administration, this ignorance constituted sufficient evidence to cast doubt on the reasons given for obtaining the visa. The consular Administration therefore assessed new data, deduced from the investigative activity of the visa file which falls within its exclusive competence, and on which a decision opposed to the previous granting of residence agreed upon by the Government Subdelegation could lawfully be based, as it did* (own translation), available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7035380&links=%2210%2F2013%22&optimize=20140505&publicinterface=true (last access on 7 October 2019).

3. *Minors or children with a disability and unable to provide for their own needs due to their state of health, provided they are legally represented by the sponsor (Art. 53.d) RLOEx).*

In this case, relatives such as siblings, grandchildren, nephews, etc. are being considered, about whom the sponsor acts as guardian, for example, legally appointed.

4. *Ascendants in the first degree of the sponsor – required to be long-term or long-term-EU residents – or of his or her spouse or partner, provided that they are dependent on him or her, are over sixty-five years of age and there are reasons justifying the need to authorize residence in Spain (Art. 53.e) RLOEx).*

In a broad sense, immigration offices require proof that the applicant has neither sufficient assets nor income in his or her country of origin, nor direct relatives (children or partner) who can take care of him or her.

They shall be deemed to be in charge if it can be proved that during the last year the sponsor has transferred funds or incurred expenses from his or her ascendant in an amount of at least 51% of the gross domestic product per capita [8] in annual computation of the country of residence of the latter.

From a more concrete and practical point of view, the main factor that is taken into consideration to accredit that the joined person is dependent on the sponsor, is when the second, *at least during the last year of his residence in Spain, has transferred funds or borne expenses of his relative, which represent at least 51% of the gross domestic product per capita, in annual calculation, of the country of residence of this one, as established, in the matter of indicators on income and economic activity by country and type of indicator, by the National Institute of Statistics* (own translation) [9].

5. Exceptionally, *the ascendant under sixty-five years of age may be joined when humanitarian reasons concur (among other cases, when the ascendant lives with the sponsor in the country of origin, or when he or she is incapable and un-*

[8] Information on the Gross Domestic Product per capita by country available at https://datos.bancomundial.org/indicator/NY.GDP.PCAP.CD?order (last access on 20 September 2019).

[9] The term 'dependent' is used both in Community family reunification and in general family reunification. Therefore, the notion of being dependent that we will see in the following judgment is applicable to the general regime, even though this was dictated in a case of Community family reunification. This decision stated: *A dependent is a person who is in a situation of dependence on the Union citizen concerned and such dependence must be of such a nature that it requires that person to have recourse to the assistance of the Union citizen to meet his basic needs and therefore what has to be demonstrated is that factual situation, namely a material assistance provided by the Union citizen, necessary for the satisfaction of the basic needs of his family member* (own translation). STSJ of Madrid, no. 974/2016, 10 March 2017, available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8026547&links=%22974%2F2016%22&optimize=20170522&publicinterface=true (last access on 7 October 2019).

der the guardianship of the sponsor or his or her spouse or partner, or when he or she is unable to provide for his or her own needs.

There are also humanitarian reasons if the applications of the spouses in the ascending line are submitted jointly and one of them is over sixty-five years of age.

2.3. *Required documents*

- **Official application form** (EX-02) in duplicate and duly completed and signed by the sponsor.
- **Copy of the sponsor's complete passport, travel document** or valid registration card.
- **Certified copy of the documentation that proves that the applicant has sufficient employment and/or economic resources** to meet the needs of the family. For this purpose, the following might be submitted:
  - In the case of salaried employees:
    - Copy of the employment contract.
    - If applicable, the last income tax return.
  - In the case of self-employed workers:
    - Accreditation of the activity carried out.
    - If applicable, the last personal income tax return.
  - In case of not carrying out any lucrative activity in Spain:
    - Certified cheques, traveller's cheques or payment letters or credit cards, accompanied by a bank certification of the amount available as credit on the aforementioned card or bank certification.
- **Documentation accrediting the availability of adequate housing**. For this purpose, a report issued by the competent body of the Autonomous Community of the sponsor's place of residence must be attached. This report may be issued by the local administration when this has been established by the autonomous community. This requirement may be justified by any means of proof admitted in Law in the event that the autonomous community or the local authority has not issued and notified the report within thirty days from the date of the request. In this case, the documentation provided must refer to: title enabling the occupation of the dwelling, number of rooms, use to which each of the dependencies is destined, number of inhabitants and conditions of habitability and equipment. A copy of the proof of having made the request for a report to the autonomous community or local administration must also be provided.
- **Copy of the complete and valid passport or of the travel document of the joined person**.
- **Copy of the documentation accrediting the family ties or kinship or** existence of the *de facto* union or representation together with:

  - In the event of joining the spouse or partner:
    - Affidavit of the applicant not to have another spouse or partner residing with him or her in Spain.
    - If he or she is married in a second or subsequent marriage, a court decision establishing the situation of the previous spouse and their children.
  - In the event of joining children:
    - If they are joined by a single parent: documentation accrediting the sole exercise of parental authority, having been granted custody, or proof that the other parent authorizes their residence in Spain.
    - If they are over eighteen and objectively unable to provide for their own needs, supporting documentation must be provided.
    - If they are adoptive children, the decision by which the adoption was agreed.
  - In the event of joining represented persons by the sponsor:
    - If the represented are over eighteen years of age and are not objectively able to provide for their own needs, supporting documentation shall be provided.
  - In the case of joining ascendants:
    - Documentation proving that the sponsor, during the last year of residence in Spain, has transferred funds or borne the expenses of the ascendant.
    - Documentation accrediting the reasons justifying the need to authorize residence in Spain.
    - If applicable, documentation proving that there are humanitarian reasons justifying the authorisation.
- **Proof of guaranteed health care**. If any of the children to be joined are over 26 years old, private medical insurance shall be needed; the working condition of the sponsoring parent would not be enough due to the fact that at that age they can no longer be included as beneficiaries in the Social Security.

Important information to be considered: when documents from other countries are provided, these shall be translated into Spanish or the co-official language of the territory where the application is submitted. In addition, all foreign public documents shall be previously legalized by the Consular Office of Spain with jurisdiction in the country in which the document has been issued or, where applicable, by the Ministry of Foreign Affairs and Cooperation, except in the case in which the said document bears an apostille stamp by the competent authority of the issuing country in accordance with the Hague Convention of 5 October 1961 or unless the aforementioned document is exempt from legalization by virtue of the International Convention.

2.4. *Procedure*

The procedure for family reunification is enshrined in Art. 18 LOEx and more precisely in Art. 56 RLOEx.

The legitimated subject, the sponsor, shall hand in personally (Art.56.1 RLOEx) and in official form (Art.56.3 RLOEx) the application for temporary residence authorization (Art. 18.1 LOEx and 56.2 RLOEx) in favor of the member(s) of his or her family whom he or she intends to join. This application shall be submitted to the competent body for procedure and decision, i.e. the government delegations in the uniprovincial autonomous communities and the government subdelegations in the provinces [10].

Together with the application, the abovementioned documentation included in Art.56.3 RLOEx shall be attached. The Regulation allows this request to be made when the foreigner holds a residence permit for one year and has requested authorization to reside for at least another year. However, in order to obtain the concession of the reunification, it will be necessary to wait until the holder has been recognized this right to reside for at least another year (Art. 56.1 RLOEx). The sponsor is therefore advised to apply for such renewal prior to the expiry of the initial authorisation (this can be done up to 60 days before).

The processing and decision of the file will be carried out in accordance with the provisions of Art. 56 RLOEx. When the application is accepted for processing, the temporary residence fee for family reunification must be paid within ten working days [11].

The period of decision of the applications will be forty-five days counting from the day after registration in the competent body to process them. Once this period has elapsed without the administration having given any notification, it shall be understood that the application has been rejected due to administrative silence. In the event of a favorable decision, the temporary residence authorization granted shall be suspended in its effectiveness until the issuance of the visa and the effective entry into Spain of the family member eligible for reunification (Art. 58.1 RLOEx).

As procedural peculiarities, when notification of the decision has not been possible, this shall be announced in the Single Edict Board (TEU in Spanish) [12].

If electronic notification has been chosen, or if the person is legally obliged to use the latter, the decision will be notified by publication on the website. If the

[10] Information on the address, telephone numbers and opening hours of the Immigration Office in the province of residence of the sponsor are available at: http://www.seap.minhap.gob.es/web/servicios/extranjeria/extranjeria_ddgg.html (last access on 6 October 2019).

[11] Sheet 790, Code 052, Epigraph 2.1. Initial authorization for temporary residence. The payment form may be downloaded from the internet site of the Secretary of State for the Civil Service.

[12] https://boe.es/tablon_edictal_unico (last access on 6 October 2019).

decision is not accessed within 10 working days of its publication, it will be deemed to have been notified.

In the case of a positive decision, the joined family member is granted two months from notification date to apply personally for the visa at the diplomatic mission or consular post in whose district he or she resides (in the case of minors, the visa application shall be submitted by his or her duly accredited representative). The rule also provides for the possibility, exceptionally, of acting through a representative or submitting the application at a different diplomatic mission or consular post.

Art. 57.2 of the RLOEx details the necessary documentation to be collected in order to formalize the visa application and contemplates the possibility of requiring the personal appearance of the applicant to conduct an interview for the purpose of a better assessment of the application.

The visa application must be accompanied by the following:

- **Ordinary passport or travel document recognized as valid in Spain** (valid for at least four months).
- **Criminal record certificate** issued by the authorities of the country of origin or of the country or countries in which the applicant has resided during the last five years (in the case of adults of criminal age).
- **Medical certificate.**
- **Original documentation accrediting family ties** and, where appropriate, legal dependency.

The deadline for the decision of the visa file, its notification, the need for personal collection within the period allowed for that purpose (and the consequences of not doing so within that period), shall be as provided in Art. 57 RLOEx.

Thus, it is established that the diplomatic mission or consular post will notify the decision of the visa within a maximum period of two months. After notification, the person concerned shall collect the visa in person within two months from that date (in the case of minors, the visa may be collected by their representative).

Once the visa has been collected, the joined person must enter Spanish territory within the period of validity of the visa, which shall not exceed three months.

After that, the joined person – within one month from his or her entry into Spain –, must apply personally (in the case of minors, the representative can proceed accompanied by the minor) for the Foreigners' Identity Card at the Immigration Office or Police Station of the province where the authorisation has been processed (Art. 58.3 RLOEx) [13].

[13] The instructions where to go, opening hours and to know if an appointment must be made in advance are available at http://www.seap.minhap.gob.es/web/servicios/extranjeria/extranjeria_ddgg.html (last access on 6 October 2019).

The decision to refuse a visa shall always be reasoned and inform the person concerned of the facts and circumstances established which, in accordance with the applicable rules, have led to the decision to refuse it (Art. 56 RLOEx).

The joined person will show **his or her passport or travel document at the time of the fingerprint procedure** in order to prove his or her identity **and shall present the following**:

- **Application for the Foreigners' Identity Card**, in official form (EX-17) [14] o **Proof of payment** of the card fee.
- **Three recent photographs in color**, white background, passport size.
- In the event that the **joined person is a minor, documentation accrediting the representation**.

The validity of the joined person's authorization shall be extended until the same date as the authorization held by the sponsor at the time of entry of the relative into Spain. That is to say, the temporary residence authorization granted to the joined family member shall have an identical validity to that of the sponsor (Art. 18.3 LOEx and Art. 58.3 RLOEx).

2.5. *Renewal of residence permits*

Article 61 of the RLOEx establishes the renewal of the temporary residence authorization granted under this case. The only particular details refer to the omission of the period of three months subsequent to the expiry date of the authorization, common in the rest of the cases of renewal of residences (section 1), and to the obligation to present and process the applications for renewal of the joined relative and that of the sponsor as one – unless there is a justifiable cause – (section 8). This is due to the fact that renewals are not obtained automatically, but the requirements set out in the law shall be met.

Finally, Article 58.3 *in fine* also establishes a singular aspect with respect to the validity of the renewed authorization of persons joined by a holder of permanent residence: their renewed authorization will be of a permanent nature. On this matter, there are those who have interpreted – erroneously, in our opinion, in accordance with what repeated decisions have stated – [15] that a case of access to

[14] Available at http://extranjeros.empleo.gob.es/es/ModelosSolicitudes/Mod_solicitudes2/index.html (last access on 7 October 2019).

[15] STSJ of Castilla-La Mancha, no. 299/2012, 14 April 2014: *When the paragraph says: the subsequent authorization of residence of the regrouped person "will be of a permanent nature", it refers, logically, to the case that this renewal is appropriate because the requirements for the same are met, not just because, having granted the first authorization, it is automatically renewed to the point of becoming a permanent residence authorization* (own translation). Available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7082385

permanent residence that circumvents the generic requirement of having resided continuously in Spain for five years is established which, however, is not contemplated in the cases that excepted this rule.

Based on Art. 61.9 of the RLOEx, the immigration authorities shall reach a decision within a period of three months following the filing date of the application, so that if the Administration does not decide in time, it will be understood that the decision is favorable, i.e. positive administrative silence would operate in this case [16]. From the judgment outlined in the footnote, it can be deduced that within those three months the Administration shall not only decide but also notify the decision. In the case of deciding within the three-month period, but notifying outside that period, the positive administrative silence would also operate and, consequently, the request would be understood as granted.

Finally, the rule raises two important questions:

a) *The maintenance of the right of the joined family members to reside in Spain on a personal basis*. The assumptions and conditions are included in Arts. 16.3 and 19.1 and 2 LOEx and developed in sections 1 to 6 of Art. 59 RLOEx:
   - When the spouse obtains the corresponding work permit.
   - In the event of having resided in Spain for five years without separation.
   - In the event of being a victim of domestic violence.
   - In the event of death of the sponsor.
   - When the marriage is broken (under the condition of a period of residence in common in Spain of at least two years).

   All joined family members, in case of break-up of the marriage or death of the sponsor or victims of domestic violence, shall retain their residence and shall depend for their renewal on the family member with whom they live.

&li nks=%22299%2F2012%22&optimize=20140529&publicinterface=true (last access on 7 October 2019).

[16] STSJ of Valencia, no. 455/2016, 21 March 2018: *In view of this appeal, we must point out that Article 61 of the Immigration Regulation, dedicated to the renewal of residence permits by virtue of family reunification and reproduced in the appealed sentence, establishes in its paragraph 9 that: It shall be understood that the decision is favorable in the event that the Administration does not expressly resolve within three months from the presentation of the application, a precept that we must put in relation to the dates that arise from the administrative file: the application was formulated on July 6, 2015, the decision is dictated on the 5th of October of 2015 but its notification is not attempted until the 19th of October (two attempts) and it is obtained on the 22nd of the same month, therefore, from the 6th of July until the 19th of October more than three months that this precept establishes have passed and, without prejudice to the actions that the Administration may carry out if it considers that the renewal is not in accordance with law, the truth is that the same was obtained by administrative silence and so it must be declared with revocation of the sentence of instance and estimation of the present appeal* (own translation), available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8419744&li nks=%22455%2F2016%22&optimize=20180613&publicinterface=true (last access on 8 October 2019).

b) *The right to family reunification of the joined persons*. The LOEx establishes in its Art. 17.2 (and so does the RLOEx in its Art. 60) that the family members shall only exercise their right to family reunification when they are holders of a residence permit and independent work and prove compliance with the rest of the legally established requirements. The Regulation states in detail the particular situation of each joined family member and the conditions that, in each case, are demanded of him or her.

2.6. *The access to work for joined family members*

The residence permit for family reunification held by the spouse, partner and children of working age **enables them to work as salaried employees** (with an employment contract) **or as self-employed workers** anywhere in the national territory in any occupation and sector of activity **without the need to process any other administrative procedure**. This is enshrined in Art. 19 of the LOEx after its amendment in 2009 [17].

The authorization of residence for reunification is linked to that of the sponsor, and only allows spouses and children over the age of 16 to reside and work, in accordance with Article 7 of the Workers' Statute; thus, they will be authorized to work without the need to process any other administrative procedure (Article 19.1 LOEx). This means that foreigners in this situation are not obliged to request a change of their Foreigner's Identity Card in order to make this circumstance knowledgeable since when they meet this condition, – although not expressly mentioned therein –, by direct application of current legislation they are already authorized to work without any further procedure.

However, if the worker wants to obtain a card independent of the person who has joined them, he or she must request a modification of the authorization, and prove to have sufficient economic resources. They renewal of their card shall only be requested upon expiration and in conjunction with the sponsor's, unless any other reason to do so. On the other hand, if five years of residence can be proven, the joined person can apply for a long-term residence permit, which allows him or her to work without any limitation.

3. *Family reunification under community law and its transposition into the spanish law*

At its meeting in Tampere on 15 and 16 October 1999, the European Council acknowledged the need to harmonize national legislation on the conditions for

[17] Organic Law 2/2009, of 11 December, amendment of Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration.

admission and residence of third-country nationals, and the importance of ensuring fair treatment of third-country nationals residing legally in the territory of the Member States, together with the interest that a more vigorous integration policy should aim at granting them comparable rights and obligations to citizens of the European Union.

Furthermore, as stated in Recital 2 of Council Directive 2003/86/EC, of 22 September 2003, on the right to family reunification (hereinafter the Directive), "measures on concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law".

Accordingly, the Directive is adopted in order to establish in Community Law common rules for the exercise of the right to family reunification available to third-country nationals legally residing in the territory of the Member States.

The Directive considers family reunification "is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State" (Recital 4). Moreover, it also considers that, in order "to protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria" (Recital 6).

When considering this European standard, it should be borne in mind that:

- The Directive is directly applicable.
- The Directive does not affect the power of Member States to adopt or retain more favorable provisions.
- The Directive contains standstill measures, which are only exceptionally applicable when they are provided for in the legislation of the State wishing to impose them on the date of adoption of the Directive.
- The Directive will apply only to the family reunification of third-country nationals in a Member State of the Union who are not subject to the Community system, and of the refugees whom it regulates in a particular way.

On the basis of the above, there is a clear basic difference between family reunification and the community family card. The temporary residence card of a relative of a European Union citizen differs from family reunification in that the former is granted to certain relatives of a Spanish citizen or of an EU citizen resident in Spain, while family reunification applies to relatives of non-EU foreigners. The regulations, requirements and characteristics of each type of permit are different and should not be confused.

Before the entry into force of Royal Decree 240/2007, of 16 February, on the entry, free circulation and residence in Spain of citizens of the Member States of the European Union and of other States party to the Agreement on the European Economic Area, the direct ascendants of Spanish citizens and those of their spouses were under Community legislation as they were included within its scope

of subjective application (Art. 2 of Royal Decree 178/2003, of 14 February). In accordance with the foregoing, the family reunification of these ascendants was carried out under the conditions and according to the procedure established in this respect in said Community legislation.

The aforementioned Royal Decree 240/2007, of 16 February, in its third final provision, paragraph two, added to the RLOEx an additional provision, the twentieth, which reads: *Regulations applicable to family members of Spanish citizens who are not nationals of a Member State of the European Union or of a State party to the Agreement on the European Economic Area* (own translation). This additional provision has been annulled [18].

According to this, the direct ascendants of Spanish citizens and those of their spouses were excluded from the scope of application of Community legislation unless, at the time of its entry into force, they were already holders of a valid or renewable community resident family member card.

In other words, in accordance with the previous criterion, which has now expired, since the entry into force of Royal Decree 240/2007, of 16 February, the family reunification of direct ascendants of Spanish citizens or their spouses shall be governed by the provisions of the common regulations on immigration (LOEx and RLOEx), so that what a Spaniard had to do to join his direct ascendants was exactly the same as what a foreigner subject to the general aliens regime in Spain had to do to join his or her own. Consequently, when the applicant is a Spanish citizen, the regime of community family reunification shall be applied and not the general one.

Furthermore, the foreigner residing in Spain by family reunification and holder of a temporary residence card of a family member of the Union can raise the complex issue of his or her health care in Spain, because although the government authority has granted him or her a family reunification visa of a community nature, this does not simply mean the automaticity in health care charged to public funds. A very recent ruling of the Supreme Court has just indicated that since the regulations stipulate that the applicant must have sufficient resources and health insurance so that the resident is not a burden for social assistance, the health coverage must be maintained by the sponsor during the time he or she resides in Spain. Therefore, the applicant is not unprotected, but is covered by a third party,

[18] STSJ of Madrid no. 298/2016, 18 July 2017: *As of the judgment of June 6, 2010, given the terms in which Art. 2 (and annulled the Twentieth Additional Provision of the Regulations on Immigration), Royal Decree 240/07 – independently and outside the Directive – as a provision of domestic law, is also applicable to the reunification of foreign family members of Spaniards (whatever their nationality), whether or not they have made use of their right to free movement and residence within the Common European Space, and specifically its Art. 7.* (own translation), available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8106586&li nks=%22298%2F2016%22&optimize=20170724&publicinterface=true (last access on 7 October 2019).

the Spanish relative, being already unnecessary for the Spanish public health system to cover these needs [19]. This reflects the aforementioned ruling on the right to health care of a Spanish citizen who joined her mother, of Cuban nationality, who was granted the *temporary residence card of a relative* of a European Union citizen, under the provisions of Royal Decree 240/2007.

The judgment puts forward the argument that in order to be able to reside as a joined citizen without a job, one must prove to have sufficient economic means to meet the needs of the family, including health care through a public or private health insurance, contracted in Spain or in another country. Thus, the family of the citizen applying for reunification does not become *a burden for social assistance in Spain during their residence* [20].

4. Comparing the directive with the spanish law

Reference will be made only to issues that have not been transposed, to those that have been transposed but in a different way and to those that, although faithfully transposed, are of interest for the conclusions of this work.

The same scheme used to analyze the Spanish law will be followed. Thus, mention will be made to the conditions for the exercise of the right, family members, procedural issues eligible for reunification, the authorization of granted residence, the maintenance of the right of residence on an individual basis and, eventually a reference to the right of access to employment will also be included.

4.1. Conditions for the exercise of the right

The few differences between the Directive and Spanish law can be seen in:

[19] TS, Fourth Chamber, Social Division, Plenary Session, Judgment 364/2019, of 13 May 2019, Appeal 1068/2018. See *Diario La Ley*, no. 9458, Judgment of 17 July 2019, available at http://djari0olaley.laley.es/content/Documento.aspx?params=H4sIAAAAAAAEAMtMSbH1CjUwMDAztjQ1NjFRK0stKs7Mz7Mty0xPzStJBfEz0ypd8pNDKgtSbdMSc4pT1RKTivNzSktSQ4sybUOKSlMBSjcGXUUAAAA= WKE (last access on 8 October 2019).

[20] NGOs such as Amnesty International or Médecins Sans Frontières have already spoken out against the judgment: *It is further proof that the Royal Decree Law of 2018 does not guarantee universal access to health care, as dozens of protection mechanisms of the United Nations and the Council of Europe are calling for. The Supreme Court has disregarded more than 70 favorable sentences to these people in different Courts of Justice, and have bought the argument that people who come through a reunification procedure have medical insurance and do not need Public Health. Even those who come illegally have that right, it doesn't make sense* (words by the Head of Economic, Social and Cultural Rights at Amnesty International Spain, own translation).

This ruling is neither of the taste of the Foreign Lawyers Association that regrets the resolution of the Supreme Court, which accuses of avoiding applying the Royal Decree of 2018 that takes up the Universal Health.

A. The wording of the requirement to have a dwelling: "accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned" (Art. 7.1 a) of the Directive), as opposed to the more generic and imprecise expression from Art. 55 RLOEx: *adequate to meet the needs of the applicant and the family* (own translation).

B. The requirement to have economic resources, Art. 7.1.c) of the Directive specifies "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members".

For its part, Art. 54 RLOEx speaks of the accreditation of employment and/or sufficient economic resources, without further precision.

On the other hand, Art. 7.2 of the Directive states that "Member States may require third country nationals to comply with integration measures, in accordance with national law"; in the Spanish law there is no such measure and, therefore, it is not currently required as a condition for family reunification.

Under Community law, the Directive "shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence" (Art. 3.1). Moreover, "Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years" (Art. 8 Directive). The Spanish law requires in any case the applicant to hold a renewed residence permit (Art. 38 and Art. 56.1 RLOEx).

Finally, a standstill clause is introduced "where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members" (Art. 8 Directive). This is a requirement that cannot be used by the Spanish Law since it was not included in our legislation before the adoption of the aforementioned Directive.

4.2. *Family members eligible for reunification*

The Directive indicates that "it is for the Member States to decide whether they wish to authorize family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor" (Recital 10 Directive).

With regard to spouses, our legislation requires that there be no separation *de facto* or *de jure* (Art. 53 RLOEx), while the Directive omits such extremes (Art. 4.1 (a); on the other hand, it does establish the possibility – controversial and highly questioned doctrinally speaking – of requiring a minimum age for spouses without exceeding the age of twenty-one in order to avoid forced marriages (Art. 4.5), a circumstance that does not appear in the Spanish legislation.

With regard to polygamous marriages, both regulations express in the same terms the impossibility for a sponsor to join another spouse if he or she already had one living with him or her in the territory of the Member State (Art. 4.4 Directive and Art. 17.1 a) LOEx and Art.53 RLOEx).

In the case of minor children, children of the sponsor of a parent other than the one with whom he or she currently lives, the possibility of limiting his or her family reunification is regulated in Art. 4.1.c) of the Directive in relation to 4.4 *in fine*, an aspect that the Spanish law does not consider.

The Directive also contains two other standstill clauses with regard to minors. One in the last paragraph of Article 4.1.d) "Member States may authorize the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement 2, and another in Article 4.6: "Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15". In both cases, there is no parallelism in the Spanish law.

With respect to the ascendants, Article 2. a) of the Directive determines that the residence of ascendants in direct line may be authorized in the first degree and the Spanish law establishes the same limitation with respect to the degree, – Art.17.1.d) LOEx and Art.53 RLOEx –. Similarly, the Directive states as a requirement for authorizing the residence of these family members to be dependent on them and lack adequate family support in the country of origin – Art. 2.a) –. The Spanish legislation uses the following wording: *when they are dependent, are over sixty-five years of age and there are reasons that justify the need to authorize their residence in Spain* (Art. 17.1 (d) LOEx and Art. 53 RLOEx, own translation).

The Directive covers the possibility of joining unmarried adult children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs because of their state of health – Art. 4.2.b) –. On this point, the Spanish law shows a more restrictive approach, as it limits the possibility to the case of the incapacitated when the applicant is also their legal representative (Art. 17.1 (c) LOEx and Art. 53 RLOEx). The Directive includes the possibility of authorizing the entry and residence of the unmarried couple or registered partner (Art. 4), in the same manner of the Spanish law, which reads: *the person who maintains with the resident foreigner a relationship of affectivity analogous to the conjugal one will be equal to the spouse to all the effects foreseen in this chapter, provided that said relationship is duly accredited and meets the necessary requirements to produce effects in Spain* (Art. 17.4 LOEx, own translation).

4.3. *Procedural questions*

Recital 13 of the Directive refers to the importance of establishing a system of rules of procedure that are efficient, transparent and fair in order to provide an adequate level of legal certainty. Art. 5.1 of the Directive provides for the possibility for the applicant or the family member to submit an application for entry and residence. The Spanish legislation has opted for the first option (Art. 56.1 RLOEx). In the last paragraph of Art. 5.3, the Directive makes it possible for an application for family reunification to be submitted when the family members are already in its territory. This precept provides legal cover for the conversion of *de facto* family reunification into a *de jure* situation, a circumstance not included in the Spanish legislation.

4.4. *Validity of temporary residence permits granted by family reunification*

In its Arts. 13.2 and 13.3, the Directive stipulates that the first permit shall have a minimum duration of one year – which may be renewed – and that the duration of the family members' residence permits shall not exceed the expiry date of the residence permit held by the sponsor.

With identical tenor, as stated in our regulations (Art. 58. 3 RLOEx), the validity of the authorization of the joined person shall be extended until the same date as the authorization held by the sponsor at the time of entry of the relative in Spain.

4.5. *Individual retention of the right of residence of the joined persons*

Recital 15 of the Directive provides that the integration of family members should be encouraged. To this end, the joined persons shall have access to a status independent of the applicant (in particular in the event of the break-up of the marriage). All the cases provided for in Art. 15 of the Directive are covered by the Spanish legislation.

However, the Spanish law does not enshrine a transposition of Art. 17 of the Directive with regard to the possibility that, when refusing an application for family reunification or the renewal of the residence permit obtained in this case, account is taken of the nature and solidity of the person's family ties and the duration of his or her residence in Spain, as well as the existence of family, cultural or social ties with his or her country of origin.

4.6. *Right of access to employment*

Art. 14 of the Directive provides that the members of the sponsor's family shall have the right, in the same way as the sponsor, to take up employment, whether employed or self-employed; it likewise states that Member State may

lay down the conditions to be met by those family members in order to pursue such activity, but may not lay down a period of more than twelve months during which that State may assess the situation on its labor market. Access to work may also be limited for relatives in the ascending line (Art. 59.5 RLOEx) and for joined unmarried adult children (the latter case has not been transposed into Spanish law). The RLOEx (Art. 58.4) establishes that the joined relatives will be able to accede to a residence and work permit without being subject to any term and without the national employment situation being valued for its concession.

5. *Administrative practice of family reunification: critical aspects*

1. There is an evident and worrying lack of uniformity in the system of attention to citizens in the *submission of applications*: in each Government Delegation and Subdelegation, the offices in charge of receiving applications have different systems for dealing with this submission. In recent years, prior appointments have become more widespread, and provided that there are no difficulties in obtaining them or excessive delays in getting citations, the degree of satisfaction of the interested parties has improved considerably.

2. With regard to the time when *applications are admitted for processing*, there are offices where an attempt is made to make the applicant desist from filing or, simply, the petition is not collected and the corresponding resolution of inadmissibility for processing is not issued in those cases in which the complete documentation or any of the documents that may be considered substantial in the process is not provided at the time of filing.

One of the most worrying points concerns the *documentation of the application*, since there is an enormous variation in the conditions required to prove compliance with each of the requirements (certified or uncertified copies of the applicant's passport, documentation proving the relationship in original or photocopied, certified or not). This situation is aggravated if, in addition, the RLOEx does not specify the documentation with which it must be accredited, for example, the availability of sufficient means of subsistence. The same happens with regard to the accreditation of the availability of adequate housing (sometimes certain titles are required, which shall or shall not meet certain registration requirements) and economic dependency.

This situation can likewise be observed in terms of the *time taken to resolve the case*, which is also noticeable depending on the province in which the case is processed.

4. One of the most precarious and questioned aspects relates to the housing requirement. Discrepancy is found when it comes to assessing the availability of suitable housing (due to the lack of concreteness of the term "have" (whether

ownership/rent/transfer, etc.) as well as in the documentation that justifies that the dwelling meets the requirements set out in the norm in order to be able to exercise the right to family reunification. The discrepancy is here extraordinary:

a) Municipalities that take several months to issue the report. In these cases, the foreigner has been advised that, from the very moment they request the report it is advisable to go to the notary without waiting for a response from the local authority (so the procedure and the period foreseen in the RLOEx – 15 days – is meaningless).
b) Municipalities that charge high fees for issuing the report, of which there is no official model, so each city council makes a different one. Moreover, in some cases it is the social workers who make the report and in others it is an urban planning technician.
   The content also differs, as many reports do not express whether or not the housing is considered sufficient but are limited to enumerate their characteristics.
c) On the other hand, the reports cannot be appealed and, sometimes, in the event of an unfavorable report by the city council, the interested party goes to the notary's office to overcome the obstacle, without there being sufficient coordination between bodies to prevent this type of practice.

5. The same problems, which also cause a *great discrepancy of administrative practice*, are to be found in the assessment of what is understood by the following wording:

a) *"There must be reasons justifying the need"* (own translation) to authorize the residence in Spain of the applicant's relatives in the ascending line.
b) The quality of being dependent. Doubts that seem to persist despite the fact that the RLOEx has clarified the question: when it is proven that at least during the last year of his residence in Spain the sponsor has transferred funds or borne expenses of his or her family in a proportion that allows inferring an effective economic dependence.

6. As far as the *submission of visa applications* is concerned, similar situations arise when family reunification applications are made, so that in some consulates an appointment can even be made by telematically and, in others, long queues have to be made in order to obtain an appointment.

As for the *documentation to be presented*, there are consulates that require documents that are not strictly those that the RLOEx establishes for the presentation in the form of the visa application (although the consulate has the faculty to require any other document, it makes no sense to ask for those referring to the sponsor, which were already incorporated in the application for authorization of residence by virtue of family reunification).

Another questionable aspect is the current practice of consulates consisting of reviewing the assessment made by the Government Delegation or Subdelegation with respect to the existence of reasons justifying the need to authorize the residence in Spain of ascendants.

One of the effects of non-compliance with the deadlines is posed with visa applicants who were minors when the family reunification process began and who, during the long process, have reached the legal age. In many cases, the application is refused for this reason without considering that it is due to a delay in the procedures beyond the control of the interested parties. It is quite common to find *visa refusal decisions insufficiently motivated and lacking a correct individualized assessment of the file*. Occasionally, they are notified on a standard form that contains a brief list of the requirements laid down in the standard indicating those, which in the opinion of the consulate, have not been sufficiently accredited.

6. *Conclusions*

The Spanish legislation on the right to family reunification responds to the purpose of protection of the family and respect for family life enshrined in the instruments of International Law signed by Spain, taking the traditional Spanish family model (spouse, descendants and ascendants) as the first reference to determine the family that can be joined, although it includes other family realities that are manifested today in our society (such as, for example, relations of affectivity analogous to conjugal relations).

We are faced with rules with a strict adherence to the principles of due process of law, both in the terms in which the right is recognized and in the procedure legally established to make that right effective (preferential treatment within the deadlines, requirement to motivate resolutions, access to administrative and judicial remedies). In spite of this situation, a certain imbalance in the procedure to follow shall be acknowledged, a scenario that has been reflected in the previous pages.

In order to respect and broadly guarantee the aforementioned right to family life, it may be inferred from the analysis carried out that the Spanish legislation has duly transposed the applicable Community legislation, adopting broad criteria permitted by the Directive and respecting the advances that had been consolidated in the successive preceding regulations. This has been easily observed both in the Immigration Law and in the Regulation, but also in the array of standstill clauses introduced by the Directive and which, precisely because of their very nature, could not be incorporated into our legal system because they dealt with issues that were already more beneficially regulated in the Spanish law on the date of adoption of the Directive (for example, the impossibility of verifying integration criteria in the case of family reunification of minors over the age of twelve who arrive inde-

pendently of their family; the impossibility of requiring the family reunification of minors to take place after they reach the age of fifteen; or the impossibility of establishing waiting periods between the application and the granting of residence for those who can be reunited, taking into account the State's reception capacity).

The use of the technique of the indeterminate legal concept is a questionable and, of course, improvable aspect. Leaving the interpretation and development and evaluation of the diffuse legal contents to administrative practice in the different provinces causes great differences when joining in one place or another in Spain, which results in undesirable legal insecurity. The profile of the requirements demanded for family reunification should be marked by instructions from the competent bodies, which has so far rarely been done. This can be observed, for instance, in the case of the reunification of ascendants, the requirement that there are sufficient reasons justifying the need to authorize their residence in Spain.

Similarly, the diversity is also manifested in the management of the procedures, in what refers fundamentally to time of processing according to different delegations of government of the national territory, becoming more conspicuous, if possible, in the consulates. And if we are talking about the processing of visas, the lack of legal security and the discrepancies of administrative practice are very evident in the consulates, as it has been seen previously.

As a last negative remark, we would point out the setback suffered by the family reunification of Spanish ascendants, as it ceased to be a case that fell under the protection of Community regulations and was attracted to the sphere of the general regime for foreigners. This modification is being very much questioned due to its scarce justification and for provoking a differentiated treatment between Spaniards who joined their ascendants before the entry into force of the last reform of the Community Regulation and those who wish to do so after that date.

In conclusion and with general character, we can say that the regulation of family reunification in our legal system responds to a basic integrating objective. However, the statistical data repeatedly show the difficulties regarding access to work for joined family members, an aspect that notably limits this integrative nature. It would have been of interest to have information on applications and concessions for family reunification submitted and processed, as well as for joined family members that are actually working, in order to draw a map of the spatial distribution of family reunification in Spain, both at provincial and Autonomous Community level. However, this information is not available.

The Spanish Implementation of the European Charter on Human Rights with Regard to Family Reunification: a Case-Law Analysis

1. *Introduction*

The Spanish implementation of the Charter of Fundamental Rights of the European Union (CFREU) [21] and specifically of its Article 7 which, similar to Article 8.1 of the European Convention on Human Rights (ECHR) [22], establishes that "everyone has the right to respect for his or her private and family life", is made effective through Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (hereinafter LOEx), known as the Immigration Act [23] and its implementing Regulation.

The Regulation of LOEx, following its reform by Organic Law 2/2009 and approved by Royal Decree 557/2011 (hereinafter RLOEx [24]) is currently in force in our country.

The European Union provides for a different regime for family reunification, depending on whether the sponsor is a citizen of the European Union or a national

[21] The CFREU was proclaimed by the European Parliament, the Council of the European Union and the European Commission on 7 December 2000 in Nice and entered into force on 18 December 2000. Revised on 1 December 2009, the current version is in force since 1 January 2010. Doc. 2010/C 83/02, OJ C 83/389, of 3 March 2010.

[22] Adopted in Rome on 4 November 1950, it has undergone several modifications and revisions, the last of which was the implementation of the provisions of Protocol no. 14, in force since 1 June 2010.

[23] This Act has been the subject of numerous reforms since its approval, the most important of which are those operated by Organic Law 14/2003, of 20 November and Organic Law 2/2009, of 11 December.

[24] Royal Decree 557/2011, of 20 April, approving the Regulation of the Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, following its reform by Organic Law 2/2009.

of a third country outside the European Union. In the first case, we would be before the European system of family reunification protected by Directive 2004/38/EC [25] and, in the second case, before the immigration system regulated by Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [26]. Two different procedures are therefore envisaged in which the regime established for European citizens is significantly more beneficial.

The Supreme Court (TS, *Tribunal Supremo* in Spanish) itself has indeed declared in repeated case-law that *the possibility of joining must be applied with less restrictive criteria – although under no circumstance with unconditional character – when the sponsor is a citizen of the European Union, which, moreover, is logical since the situation of the sponsor is qualitatively different depending on whether he is a citizen of the European Union or a legal resident who is a national of a third country* (STS of 20 October 2011, Third Chamber, own translation) [27].

With regard to the first of these cases, i.e. the right to family reunification when the applicant is a Community citizen, Royal Decree 240/2007, of 16 February, on the entry, free movement and residence in Spain of citizens of member countries of the European Union and of other States party to the Agreement on the European Economic Area [28] was approved, which, *inter alia*, transposes Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 into the Spanish law. On this subject, it is necessary to point out that the transposition was not absolute. The implementation of Article 7 of the Directive, relating to the right of long-term residence, was postponed and was carried out through the Fifth Final Provision of Royal Decree-Law 16/2012, of 20 April, on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its benefits [29].

[25] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[26] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. OJ no. L 251/12, 3 October 2003.

[27] In the same vein, STS, 19 October 2015 (appeal no. 1373/2015), 25 February 2016 (appeal no. 2827/2015), 11 July 2016 (appeal no. 1373/2015), 11 July 2016 (appeal no. 2827/2015). 499/2015) and 10 October 2016 (appeal no. 335/2016); as well as judgments of 1 June 2010 (appeal n. 114/2007) and 26 December 2012 (appeal no. 2352/2012). All available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 23 September 2019).

[28] BOE, no. 51, 28 February 2007, pp. 8558-8566. Available at https://www.boe.es/buscar/act.php?id=BOE-A-2007-4184, (last access on 23 September 2019).

[29] Royal Decree 240/2007, of 16 February, on the entry, free movement and residence in Spain of citizens of member countries of the European Union and of other States party to the Agreement on the European Economic Area did not at the time include all the requirements deriving from Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. That situation caused serious economic damage to Spain, as the Court of Auditors pointed out, in particular as regards the impossibility of guaranteeing reimbursement of the costs incurred in providing health and social services to European citizens. In order to remedy this situation, the Fifth Final Provision of Royal Decree-Law 16/2012 of 20 April on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its services transposes into its literal practice Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, including the conditions for the exercise of the right of residence for a period exceeding three months. The aim was to avoid the serious economic damage caused to Spain by European citizens who travelled to our country and made use of the Spanish public services (especially health services), given the impossibility of guaranteeing reimbursement of the expenses incurred in providing health and social services to these European citizens.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification was one of the first decisions taken by the EU following the assumption of competence in this area imposed by the Treaty of Amsterdam, as part of a package of measures aimed at regulating the conditions of entry and residence of non-EU citizens in the EU [30]. Despite its clearly restrictive nature, or perhaps pre-

[30] Prior to the Treaty of Amsterdam, a number of resolutions had already been adopted with the aim of gradually harmonizing the various laws of the Member States on immigration and family reunification. However, the Community policy on family reunification, in the strict sense, does not begin until the adoption of the Treaty of Amsterdam and the introduction in its Articles of a new title called "Visas, Asylum, Immigration and other policies related to the free movement of persons", aimed at unifying state legislation in this area. See APARICIO CHOFRÉ, L., "La aplicación de la directiva comunitaria sobre el derecho a la reagrupación familiar, cinco años después", *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, no. 57, pp. 143-162.

With respect to the Community legislation prior to the approval of Directive 2003/86/EC, the following instruments shall be cited:

In the category dedicated to the fight against illegal immigration, we highlight:

- Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas.
- Council Regulation (EC) No 574/1999 of 12 March 1999 determining the Non-EU Member Countries whose nationals must be in possession of visas when crossing the external borders of the Member States.
- Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.
- Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.
- Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence.
- Council Regulation (EC) No 1030/2002 of 13 June 2002 (amended by Regulation 380/2008 of 18 April 2008) laying down a uniform format for residence permits for third-country nationals.
- Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air.
- Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data.
- Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

cisely because of it, it marked a decisive milestone in the matter by becoming the European Union's first unified legal instrument in the field of legal immigration and family reunification.

There is no doubt that the main ideas underlying the text are, on the one hand, the maximum limitation of the number of family members eligible for reunification and, on the one hand, the great discretion given to the Member States with regard to their transposition into national law, which has led to the obligatory modification of many of the national provisions on the subject.

In Spain, the legal regime for family reunification of foreign nationals of third-countries citizens is regulated in Articles 16 to 19 of LOEx, as well as in Articles 52 to 61 of Royal Decree 557/2011, of 20 April, which approved the RLOEx.

In addition, various instructions from the Directorate General of Immigration that have a special impact on the subject at hand shall be considered. In particular, we refer to the one relating to the family reunification of minors and persons with disabilities over whom the applicant has legal representation (DGI/SGRJ/01/2008), which clarifies the situation of the fostering of foreign minors by Spanish citizens or foreign residents based on the document known as "*kafala*" (DGI/SGRJ/06/2007); the one that indicates the accreditation of the provision of adequate housing in the administrative procedures of family

- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

In the group that regulates the specific rights of foreigners residing in the European Union, the following stand out:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.
- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.
- Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.
- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

All Council Directives available at https://eur-lex.europa.eu/homepage.html?locale=en, (last access on 24 September 2019).

reunification (DGI/SGRJ/04/2011), the one relative to the constancy of the previous governmental report in the files of authorization of residence and in particular the one of the Art. 53.1(i) RLOEx (DGI/SGRJ/09/2008); and, finally, that relating to the submission of foreign documents in proceedings concerning immigrants (DGI/SGRJ/06/2008) [31].

2. *The case-law of the Constitutional Court*

Since the first Organic Law on Foreigners was passed in Spain in 1985, doubts have been raised regarding the compliance of some of its precepts with the Spanish Constitution (hereinafter CE), especially with regard to the regulation of the fundamental rights of immigrants [32], which seem to have their origin in the interpretation of Article 13.1 of the EC of 1978 (which establishes in paragraph 1 that foreigners in Spain "*shall enjoy the public freedoms guaranteed by the present Part, under the terms to be laid down by treaties and the law*" [33].

These suspicions of unconstitutionality did not cease with the approval of the current LOEx, suspicions that were channeled through up to eight appeals before the Constitutional Court (TC, *Tribunal Constitucional,* in Spanish). The situation is complicated by the peculiar Spanish division of competences, in which state competences are added to those assumed by the different autonomous communities and local administrations. As a consequence, the current legal status of non-EU foreigners in Spain is configured around several legal bodies: the CE itself, the European legislation, state legislation on the matter, and very particularly, the regulations arising from the autonomous communities, all among which important differences are detected that lead to conflicts of competence between the State and the autonomous communities.

[31] See VARGAS GÓMEZ-URRUTIA, M., "Una lectura crítica de los vínculos familiares a la luz de la Directiva 2003/86/CE y de las normas españolas de extranjería", *Cuadernos de Derecho Transnacional* (octubre 2018), vol. 10, no. 2, pp. 732-751.

[32] In fact, LO 7/1985, of July 1, was declared unconstitutional in several of its precepts by STC 115/1987, of July 7, available at http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/847, (last access on 3 October 2019).

[33] From STC 11/1983, of 21 February, in which the Constitutional Court ruled for the first time on an appeal for a petition for constitutional protection (*recurso de amparo*, in Spanish) filed by a foreign citizen, to the judgments handed down at the end of 2007, which ruled on eight appeals of unconstitutionality against LO 8/2000, which modified several precepts of LO 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, the Constitutional Court has been developing case-law aimed at recognizing a wide range of fundamental rights in favor of foreigners. See, M.ª del C. VIDAL FUEYO, *Constitución y Extranjería*, Madrid, Centro de Estudios Políticos y Constitucionales, 2004, p. 326; and S. GARCÍA VÁZQUEZ, *El Estatuto Jurídico-Constitucional del extranjero en España*, Valencia, Tirant monografías, 2007, p. 445.

It is therefore essential to define the scope of competence of the legislator in this matter, and, in this sense, the interpretation of the Constitutional Court is unavoidable [34].

The case-law of the Constitutional Court is evidently based on the fact that Article 13.1 of the CE configures the entire legal-constitutional regime of the fundamental rights of foreigners in Spain, starting from a broad interpretation of the expression "*public freedoms*", elaborating the famous tripartite theory that is synthesized in the following formula:

There are rights that correspond equally to Spanish citizens and foreigners and whose regulation must be equal for both – all those directly linked to the dignity of the person would be part of this group –; there are rights that do not belong in any way to foreigners (those recognized in Art. 23 of the CE, with the exception contained in Art. 13.2). There are others that will or will not belong to foreigners according to the provisions of treaties and laws, being then admissible the difference of treatment with the Spanish citizens as to its exercise. (STC 107/1984, FJ 4, own translation).

So, how does the tripartite theory fit in with the issue we are now dealing with, i.e. the right to family reunification? It seems that the recognition of the right to family reunification, as a subjective right of the immigrant who has obtained a residence permit, is consistent with the principles and values that inspire our democratic regime and with the social and legal protection of the family contained in Article 39.1 CE. Therefore, it would be incumbent on the legislator the obligation to promote the exercise of the right to family reunification, in order to facilitate the integration of immigrants and the defense of the model of social and democratic State of Law enshrined in the EC.

However, connecting the right to family reunification with the content of the fundamental right to privacy enshrined in Article 18.1 CE is even more complicated. There is no doubt that foreigners, regardless of their administrative situation, enjoy the right to family life and family privacy under the same conditions as Spanish citizens, but the faculties granted to them by this right refer exclusively to the protection "*of an area of their own and reserved from the action and knowledge of others*" (STC 231/1988, FJ 3, own translation). In other words, the law is protecting areas of privacy against possible illegitimate intrusions by third parties outside the family, but under no circumstance does it enable their owners to demand that the public authorities guarantee them a life in common with their closest relatives.

In this sense, the decision of the Constitutional Court STC 236/2007 clarified in its F.J. 11 that although the ECtHR has not expressly deduced the right to family privacy (Art. 8.1 ECHR) a right to family reunification, it has considered that such a connection is possible in cases worthy of special consideration, such as those cases in which "*family life is not possible anywhere else, due to legal or factual impediment*" (own translation), (Decision of the ECtHR Sen case, 21 December 2001; *Boultif case*, 2 August 2001), but these are very specific cases of reunification connected with special situations of asylum or refuge, not with a supposed legal infraction [35].

A different situation arises in the regulation of the conditions and requirements for family reunification by regulatory means, even if the content or limits of the right to privacy are not affected (Art. 18.1 CE). In accordance with the provisions of Article 13.1 CE, which establishes a reservation of law in relation to the rules regulating the exercise of the rights recognized throughout Title I "Fundamental Rights and Duties", the right to family reunification must be regulated by law.

On the other hand, it is obvious that this right is connected to Article 19 CE, relating to entry and establishment, and to the defense of the family by Article 39 CE, which, as a guiding principle of social and economic policy, will require legislative development (Article 53.3 CE), which together with the international treaties that include the right to family reunification, the case-law of the European Court of Human Rights on the matter and Council Directive 2004/86/EC, of 22 September 2003, harmonizing the system of family reunification of non-EU nationals residing in a Member State, we must consider that we are dealing with a matter that must necessarily be regulated by law.

3. The case-law of the Supreme Court

When approaching the present study, we have found an enormous number of resolutions issued by the Supreme Court in matters of family reunification, specifically by its Third Chamber, the Contentious-Administrative Chamber, as this jurisdiction is competent to hear matters related to the foreigners.

The enormous activity carried out by the Third Chamber of the Supreme Court accounts, on the one hand, for the enormous judicialization of matters related to immigration and foreigners, as a consequence of the large number of administrative procedures generated by these matters.

The difficulties encountered by Spain are well known in the European Union, as a result of massive immigration attracted by the special geographical situation of our country just a few miles from North Africa. It is obvious that the administrative procedures of expulsion of non-EU foreigners in an illegal situation generate an enormous number of judicial procedures in the area of contentious-administrative jurisdiction, which we are now concerned with.

[34] VIDAL FUEYO, M.C., "La jurisprudencia del Tribunal Constitucional en materia de Derecho Fundamentales de los Extranjeros a la luz de la STC 236/2007", *Revista Española de Derecho Constitucional*, no. 85 (January-April 2009), pp. 353-379.

[35] VIDAL FUEYO, M.C., "La jurisprudencia del Tribunal Constitucional ...", cit.

But these are not the only proceedings on which the Supreme Court has been compelled to rule repeatedly. Moreover, the issue we are dealing with now, family reunification, has generated no little case-law; and if the volume of decisions of the Supreme Court is huge, the volume of decisions of the Lower Courts is much greater, a fact that can be checked by checking the Superior Courts of Justice and the Provincial Courts of Contentious-Administrative Matters.

Accordingly, we have chosen to produce this report by focusing on the most recent case-law, and only that coming from the Supreme Court.

Similarly, we have grouped the decisions of the Third Chamber of the Supreme Court into two large groups, in the sense expressed in the introduction to this paper. We will firstly analyze the latest judgments handed down when the applicant is a Spanish citizen, or a citizen of another EU Member State; and, secondly, the most recent case-law relating to cases in which the applicant is a non-EU foreign citizen.

In both groups, we will list the most significant resolutions in relation to the thorniest issues brought before the Supreme Court.

3.1. *The case-law of the Supreme Court when the sponsor is a citizen of the EU*

One of the main issues raised in Spanish domestic law in relation to the right to family reunification relates to the application of Directive 2004/38/EC, with regard to Article 8.1 of the ECHR, and specifically to the interpretation of Article 7 of the Directive; in the sense of whether the requirements laid down by that legal provision are also applicable to cases in which a Spanish citizen intends to reunite non-EU family members.

The Contentious Chamber of the Supreme Court, in a recent resolution of 7 June 2019 [36], pronounces in relation to this thorny question, that is, whether Article 7 of Royal Decree 240/2007, of 16 February, (in the current wording, introduced by the Fifth Final Provision of Royal Decree Law 16/12, of 20 April, on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its benefits) could be applicable to the reunification of non-EU family members of Spanish citizens residing in Spain. This controversial question, on which there is consolidated case-law [37], has been positively

[36] STS no. 786/2019, de 07/06/2019 (Third Chamber), Roj: STS 1872/2019, ECLI: ES:TS:2019:1872, Available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[37] All in all, judgments of the Third Chamber of the Supreme Court 1295/2017, of 18 July, delivered in appeal 298/2016 which is set out in the contested appeal; and subsequent judgments of 11 June 2018 (ECR 1709/17), 3 July 2018 (ECR 4181/17), 30 October 2018 (ECR 3047/17) and 6 November 2018 (ECR 5468/17). Also cited are STS no. 365/16 of 7 September (appeal 908/15) of the Second Section of the Bilbao Chamber, as well as those of 1 and 21 July 2015; STS no. 324/15 of 13 December of the La Rioja Chamber (appeal 143/15); STS no. 509/15 of 9 September of the TS

resolved, since the Supreme Court considers that the aforementioned Royal Decree 240/07, independently of and outside the Directive and as a provision of domestic law, is also applicable to the reunification of foreign family members, whatever their nationality, of Spanish citizens, whether or not they have made use of their right to freedom of movement and residence within the European Common Area, and specifically Article 7 thereof [38].

In the words of the Supreme Court, this is how the very important STS of 1 June 2010, which partially amends Article 2 of Royal Decree 240/2007 by deleting the expression '*other Member State*' from the aforementioned Article 2.1, must be interpreted, thus broadening the subjective scope of application of the aforementioned Royal Decree – which no longer coincides with Directive 2004/38 EC –. This modification implies the inclusion of the family members who are related in the Article, whatever their nationality, to the "*citizen of the European Union or of another State party when they accompany him or join him*" (own translation). The intention behind this resolution is clear, as it obeys the purpose of equating in Spain – for the purposes of reunification – foreign family members independent of their nationality who accompany or join either European citizens or Spanish citizens, both residents (European citizen and Spaniard) in Spain.

Thus, the Court affirms that "*it is true that Spanish citizens may not be limited – except in the cases provided for by law – to their fundamental right to move and reside freely in Spanish territory (Article 19 CE), but this does not prevent them from being subject to the same requirements or conditions when they seek to reunite foreign family members, in this case the same as the rest of European citizens*" (own translation).

Regarding the effect of this interpretation on the right to family privacy, the STS of 7 June 2019 concludes that "*limitations on the family reunification of 'foreigners' by Spanish citizens residing in Spain (such as those imposed on the reunification of family members by foreigners legally residing in Spain under the Aliens legislation) do not negatively affect the fundamental right to family privacy,*

Chamber of the Balearic Islands (appeal 30/15), All available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[38] The aforementioned STS of 1 June 2010 (Third Chamber), Roj: STS 4259/2010 – ECLI: ES:TS:2010:4259, stated that *Royal Decree 240/2007, of 16 February, will be applicable, whatever their nationality, and in the terms provided by it, to relatives of a Spanish citizen, when they accompany him/her or join him /her* (own translation). In this way, the expression "another Member State" is deleted, and *equipped the relatives of Spanish European citizens to the relatives of non-Spanish European citizens, who are within the subjective scope of Article 2 of Royal Decree 240/2007, must, obviously, and for the same reasons stated there, the content of said system, contained in Final Provision Three 2 of Royal Decree 240/2007, of 16 February (at that time Additional Provision Twentieth of Royal Decree 2393/2004, of 30 December), will disappear, thus annulling Additional Provision Twentieth of the Immigration Regulation* (own translation), available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

recognized in Art. 18.1 CE, having declared STC no. 186/13, in line with no. 236/07, that our Constitution does not recognize a 'right to family life' in the same terms as the case-law of the European Court of Human Rights has interpreted Art. 8.1 ECHR , and even less a fundamental right to family reunification, since none of these rights forms part of the content of the right to family privacy guaranteed by Art. 18.1 CE" (own translation). In similar terms, the subsequent STS of 10 June 2019 is pronounced [39].

Once this question has been resolved, it is worth asking whether the conditions for the exercise of the right to family reunification are resolved peacefully by the TC.

Therefore, in order to determine whether a relative of a EU – or Spanish – citizen is dependent on the latter, the host Member State must assess whether, in the light of his or her economic and social circumstances, he or she is or is not in a position to provide for the basic needs. On the other hand, the need for material support must be in the state of origin or provenance of the family member at the time he or she applies to establish himself or herself with the Community national, as established in the settled case-law of the CJEU and of the TS itself. Thus, the Supreme Court, in its Judgment of 8 May 2017, defines the concept of "*dependent person*" clearly defining it as "a person who is in a situation of dependency on the Union citizen in question and such dependency must be of such a nature that it requires that person to have recourse to the assistance of the Union citizen to satisfy his basic needs and therefore what has to be demonstrated is that factual situation, namely material assistance provided by the Union citizen, necessary for the satisfaction of the basic needs of his family member" [40] (own translation).

In short, it must be reliably demonstrated that the sponsor, in an effective and real way and not merely formally, is an integral part of the family of the applicant and therefore the latter must keep him or her in everything necessary to live with dignity. How should this be accredited? By referring to the Court of Justice of the European Union's uniform interpretation of this indeterminate legal concept.

With regard to this aspect, the CJEU, in its judgment of 9 January 2007 (Case C-1/05. *Yunying Jia v Migrationsverket*) interpreting the requirement "*dependant*", already contained in Directive 73/148 – now repealed by Directive 2004/38/E – stated that in order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national[41].

In any event, the mere undertaking by the Community citizen or his or her spouse to assume responsibility for the members of the family in question does not prove that there is a real situation of dependence on them, as it is consistently held in the case-law of the Supreme Court.

These are judgments of the Third Chamber of the Supreme Court of 10 June 2013 (appeal no. 3869/2012), 24 July 2014 (appeal no. 62/2014) and 10 October 2016 (appeal no. 335/2016), among others. It is therefore essential to prove economic dependence, as well as the reasons justifying the need for reunification. This is without prejudice to the fact that, as demanded by the Supreme Court itself, it is necessary to carry out an individualized analysis, based on non-restrictive criteria, of the social and economic situation of the applicant and his or her relatives [42].

3.2. *The case-law of the Supreme Court of Spain when the applicant is not a citizen of the EU*

One of the most controversial issues has been the assessment of the sufficiency of economic means for the authorization of residence by family group.

In a recent judgment of 17 June 2016, the Third Chamber of the Supreme Court ruled on this question, which presents an unquestionable cassational interest for the formation of case-law. The question raised consists of determining wheth-

[39] STS no. 789/2019, 10 June 2019 (Third Chamber), Roj: STS 1871/2019 – ECLI: ES:TS:2019:1871, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[40] STS no. 778/2017, 8 May 2017, (Third Chamber), (appeal no. 1712/2016), Roj: STS 1685/2017 – ECLI: ES:TS:2017:1685, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[41] The abovementioned judgment of the CJEU of 9 January 2007 (Case C-1/05. Yunying Jia v. Migrationsverket) interpreting "the status of 'dependent' family member is the result of a factual situation characterized by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or by his spouse (see, in relation to Article 10 of Regulation No 1612/68 and Article 1 of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), Lebon, paragraph 22, and Case C-200/02 Zhu and Chen [2004] ECR I-9925, paragraph 43, respectively.", available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0001, (last access on 3 October 2019).

"The Court has also held that the status of dependent family member does not presuppose the existence of a right to maintenance, otherwise that status would depend on national legislation, which varies from one State to another (Lebon, paragraph 21). According to the Court, there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly" (Lebon, paragraphs 22 and 23).

[42] The above-cited STS (Third Chamber) 8 May 2017 (appeal no. 1712/2016), 20 October 2011 (appeal no. 1470/2009) and 26 December 2012 (appeal no.2352/2012), available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

er, in the granting of temporary residence permits for exceptional reasons of social roots, when the exemption from the employment contract is requested, in order to accredit the sufficiency of economic means, it is possible to resort to the analogical application of Article 54 of the RLOEx [43], referring to family reunification or, on the contrary, it is possible to make a discretionary assessment of that sufficiency in the light of the specific circumstances of each case.

The Third Chamber of the TC understands that the regulatory treatment given to applications for residence permits for family reunification is different from applications for temporary residence permits for reasons of social roots supported by family ties. There are, therefore, important differences between the application for a residence permit for family reunification, whereby a resident foreigner may join in Spain his or her family members referred to in Article 53 of RLOEx who are outside the national territory, and the application for a temporary residence permit for reasons of social roots derived from family ties, which already contemplates a continuous stay in Spain for a minimum period of three years by the person applying for that temporary residence.

The Supreme Court resolves this question by understanding that, in authorizations for temporary residence for exceptional reasons of social roots based on family ties, in order to accredit the sufficiency of economic means, when the exemption from the employment contract is requested, it is not possible to resort to the analogical application of Article 54 on family reunification, being appropriate, on the contrary, a discretionary assessment of sufficiency in view of the specific circumstances of the case [44].

A different issue is the renewal of residence authorizations by family reunification and the scope, for the purposes of its refusal, of the assessment (or absence of assessment) of other circumstances such as those established in Article 17 of Directive 2003/86/EC, identifying Articles 61.3.b as legal rules that should in principle be interpreted 61.3.b.2 and 54.1 of Royal Decree 557/2011, of 20 April, in relation to Articles 7, 16 and 17 of Directive 2003/86/EC, the Third Chamber of the TC pronounces in cassation, by means of a judgment dated 18 June 2018, ruling that the requirement of accreditation of sufficient economic means on the part of the sponsor is unavoidable, even taking into account "*the mandate of weighting of the various concurrent circumstances resulting from the European legislation referred to above*" [45] (own translation). The provisions of Article 61 are thus observed.3 of Royal Decree 557/2011 (ROLEx) which, for the purpose of renewing a residence permit for family reunification, requires the sponsor to have – among other requirements – sufficient employment and/or economic resources to meet the needs of the family, including health care if not covered by the Social Security, in an amount that represents 100% of IPREM (Spanish acronym for Public Indicator of Income for Multiple Purposes) on a monthly basis, this amount may be reduced when the family member is a minor, in accordance with article 54.3 of Royal Decree 557/2011.

Another of the requirements demanded by the Royal Decree is that the applicant must have no criminal background. The issue was raised before the Third Chamber of the TC by means of an appeal in cassation against the judgment handed down by the Administrative Chamber of the National Court in Spain (AN, *Nacional,* in Spanish) on 21 March 2012. The TS decided to submit a preliminary question to the CJEU in the following terms:

> *"Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependent of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004 (C-200/02), and of 8 March 2011, (C-34/09), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?".*

[43] Article 54 of Royal Decree 557/2011, of 20 April, approving the Regulations of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, as amended by Organic Law 2/2009, establishes the following parameters:

1. *The foreigner who requests authorization of residence for the regrouping of his relatives must prove at the time of submitting the application that he or she has sufficient economic means to meet the needs of the family, including health care, and also taking into account the number of family members who already live with him or her in Spain at his or her expense, in the following amounts:*
   a) *In the case of family units that include, computing the applicant and when the person reunited arrives in Spain, two members: an amount representing 150% of the IPREM per month shall be required.*
   b) *In the case of family units that include more than two persons on arrival in Spain: an amount that represents 50% of the IPREM (Spanish acronym for Public Indicator of Income for Multiple Purposes) monthly for each additional member.*
2. *Authorizations will not be granted if there is no prospect of maintaining economic means during the year following the date of submission of the application. This income maintenance forecast for that year must be made taking into account the evolution of the applicant's means in the six months prior to the date of submission of the application.*
3. *The requirement for this amount may be reduced where the reuniting family member is a minor and where exceptional circumstances exist.*
   Likewise, the amount may be reduced in relation to the reunification of other family members for humanitarian reasons.
4. *Income from the social assistance system shall not be computable for these purposes, but income contributed by the spouse or partner of the foreign sponsor, as well as by another family member in the first degree direct line, who is a resident in Spain and who lives with the latter* (own translation).

[44] STS no. 832/2019, (Third Chamber), (appeal no. 1023/2018), Roj: STS 1992/2019 – ECLI: ES:TS:2019:1992, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[45] STS no. 1030/2018, 18 June 2018, (appeal no. 308/2016), Roj: STS 2526/2018 – ECLI: ES:TS:2018:2526.

The CJEU ruled that *"Article 21 TFEU and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependent and resides with him in the host Member State."*.

"Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union" [46].

Finally, we refer to another issue that has generated no small amount of case-law: the subject of marriages of convenience. In this sense, and in accordance with Article 17 of LOEx, foreign residents can join in Spain their spouses who are not separated *de facto* or *de jure*, provided that the marriage was not celebrated in fraud of law or, in other words, that it is a marriage of convenience or simulated marriage, for migratory purposes and to their children and those of the spouse, including adopted children, provided that they are under eighteen years of age or persons with disabilities who are objectively unable to provide for their own needs due to their state of health [47].

4. *Conclusions*

In view of the above, we can conclude that the implementation in Spain of the European legislation on family reunification and, specifically, of the provisions contained in Article 7 of the CFREU and Article 8.1 of the ECHR has been done correctly, but in a rather restrictive way, especially in some aspects, such as those related to the regulation of the fundamental rights of immigrants, which could initially be opposed to the provisions of Article 13.1 of the Spanish Constitution, which guarantees foreigners the same rights as Spaniards.

These suspicions of unconstitutionality required the intervention of the Constitutional Court itself and the consequent intervention of some precepts of the LOEx.

However, this constitutionally recognized equality between Spanish citizens and foreigners does not extend to the right to family privacy, referred to in Article 18.1 CE, in the sense that public authorities must guarantee foreigners a life in common with their relatives in Spain. The Constitutional Court has stated that this constitutional precept only refers to the prohibition of illegitimate interference by third parties in the family environment.

In the same sense, as could not be otherwise, the TS has been requiring strict compliance with the requirements established by the Spanish internal regulations to facilitate family reunification, especially the economic requirements, when the applicant is Spanish or a community citizen, without references to the right to family privacy can prevail over the administrative provisions.

Sufficiency of economic means is also one of the requirements that the TS has most often had to resolve when the applicant is a national of a non-EU country. In most cases, the TS has aligned itself with the most rigorous positions. The TS is more comprehensive when there are minors involved. Thus, the requirement that the applicant has no criminal record when the refusal of the family reunification permit obliges the minor children to leave the territory of the European Union has been ignored.

However, as inferred from the European Directives to which we have referred to at the beginning of this report, and as acknowledged by the TS itself: *"the possibility of reunification must be applied with less restrictive criteria when the applicant is a citizen of the European Union"* (own translation), the truth is that the Spanish jurisprudential interpretation is not very flexible in the matter of foreigners, and even less in the subject we are dealing with. It is true that some lower courts are more permeable, but that is, unfortunately, not the general trend.

Certainly, the criteria have hardened in recent decades – without any kind of hesitation – due to the massive immigration flow from the coasts of North Africa, a very serious current problem in Spain. The very complicated situation deriving from this uncontrolled immigration could shed some light on the restrictive jurisprudential interpretation of our TS.

[46] STS no. 15/2017, 10 January 2017, (Third Chamber), (appeal no. 961/2013), Roj: STS 9/2017 – ECLI: ES:TS:2017:9, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[47] STS, 14 May 2016, (Third Chamber), (appeal no. 2080/2015), Roj: STS 1058/2016 – ECLI: ES:TS:2016:1058, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

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