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# THE RIGHT TO FAMILY REUNIFICATION IN THE EU AND THE CASE-LAW IN ACCORDANCE THEREWITH

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# PREFACE

The present report has been realized in the framework of the European project "Lawyers for the protection of fundamental rights" GA n° 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 in the EU and the case-law in accordance therewith", realized by Prof. Dr. Mª Esther Gómez-Campelo y Prof. Dr. Marina San Martín-Calvo, from University of Burgos.

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# THE RIGHT TO FAMILY REUNIFICATION IN THE EU AND THE CASE-LAW IN ACCORDANCE THEREWITH

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# Family reunification: laying the foundations for the fundamental rights of immigrants to family life

## 1. THE PROTECTION OF FAMILY LIFE IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND IN THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

### 1.1. The protection of private and family life in the European Convention on Human Rights, in accordance with the principles recognized by Article 8 of the Convention

The right to family life is a fundamental, internationally recognized right of every person that the European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR[1]) directly recognizes in Article 8, which grants broad and generic protection to the structure family[2].

As a matter of fact, the first paragraph of Article 8 of the ECHR enshrines rights that are closely connected to the sphere of personality, such as the right to privacy, family life and respect for domicile. On the other hand, the second section of Article 8 of the ECHR, includes, in general terms, the protection of the individual against arbitrary or unjustified interference by public authorities.

The protection is extended in Article 60 of the ECHR, which states that *"none of the provisions of said Convention shall be interpreted as limiting or prejudicing those human rights or fundamental freedoms that could be recognized according to the laws of any high contracting party. or in any other agreement in which it is a party "*. The rights recognized in the ECHR impose on the State

[1] The European Convention on Human Rights, was adopted by the Council of Europe on November 4, 1950 and entered into force in 1953. Its purpose is to protect human rights and fundamental freedoms of persons subject to the jurisdiction of the Member States, and allows judicial control of respect for these individual rights. It is expressly inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations on December 10, 1948.

[2] CORTÉS MARTÍN, J.M., "*Inmigración y derecho de reunificación familiar en la Unión Europea: ¿mínimo común denominador de las políticas nacionales?",* Anuario de Derecho Europeo, no. 4, 2004, pp. 29-32.

Parties not only negative obligations, to refrain from carrying out actions that limit them, but also positive obligations, to actively protect them against the damages that may threaten them.

In order to ensure the observance of these provisions, the *European Court of Human Rights* is created by virtue of Article 19 of the ECHR as an instrument of control for the guarantee of human rights and fundamental freedoms recognized in the European Convention.

Also, the Court of Justice of the European Union has previously recognized the existence of fundamental rights as an integral part of the general principles of law and, therefore, of the normative hierarchy of the supreme law of the European Union. Among the fundamental rights of general scope recognized by the Court of Justice of the EU, is the right to respect for private and family life, as well as the right to family reunification or family unity.

### 1.2. The respect for private and family life in the Charter of Fundamental Rights of the European Union[3]

For a long time, the European Treaties did not include a written catalog of fundamental rights. Their scope was limited to referring to the ECHR. However, with the development of the European Union and the adoption of the Treaty of Lisbon, the situation has given a considerable change, since the EU has a legally binding Charter of Fundamental Rights[4].

Thus, Article 2 of the Treaty on European Union (TEU) states that the EU *"is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of people belonging to minorities"*.

In addition, Article 6 of TEU provides, in paragraph 1, the following:

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3 OJ C 202/389, 7.6.2016.

4 The Charter of Fundamental Rights of the European Union was proclaimed by the European Parliament, the Council of the European Union and the European Commission on December 7, 2000 in Nice. A revised version of the Charter was proclaimed on December 12, 2007 in Strasbourg, before the signing of the Treaty of Lisbon. Once ratified this, the Charter is legally binding for all countries, with the exceptions of Poland and the United Kingdom. The Charter is not part of the Treaty of Lisbon (it was expected to be part of the European Constitution, but as this was not approved, the forecast was modified). However, due to the reference in Article 6 of the Treaty of the European Union after Lisbon, it becomes binding for all Member States.

*"The European Union recognizes the rights, freedoms and principles set forth in the Charter of Fundamental Rights of the European Union of December 7, 2000, as adapted on December 12. 2007 in Strasbourg, which shall have the same legal value as the Treaties"*.

It also establishes, in paragraph 2, that the EU shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Charter of Fundamental Rights of the European Union devotes two articles (Art. 7 and Art. 9) directly to the family, as well as others more indirectly to the same subject. In this way, Article 7 of the Charter, in relation to the respect for private and family life, establishes, similarly to the ECHR, that *"Everyone has the right to respect their private and family life, their home and their communications."*

Therefore, this is a fundamental right, recognized to every person, either a community citizen or a national of third countries, and therefore it must be guaranteed to everyone in the community territory and by all the Member States. Likewise, Article 9 recognizes the right to marry, as well as to found a family. This article guarantees the right to found a family in accordance with the national laws that regulate the exercise of this right. Also Article 33 of the Charter (CDFUE), ensures the protection of the family in the legal, economic and social levels.

In light of the above, an important question arises. Is family reunification an absolute right or a relative one?

Human rights contained in international Treaties and national constitutions are generally not absolute, but are often qualified and subject to reasonable restriction. They have boundaries set by the rights of others and social concerns, such as public order, safety, health and democratic values. Since no right is absolute in order to balance individual and social interests, limitations on the rights are as important as its scope in determining its legal content[5].

[5] KLEIN, L., KRETZMER, D., "The concept of human dignity in human rights discourse", *Global Jurist Topic*, no. 3, 2003.

So, Article 52 of the Charter of Fundamental Rights, reflects this conflict of interests, trying to harmonize the interpretation by the jurisprudence of the European Court of Human Rights, regarding the provisions of the Charter with the regulations of Member States, stating that *"any limitation of the exercise of the rights and freedoms recognized by this Charter must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others"*.

Furthermore, Article 53 of the Charter, which refers to the level of protection established that none of the provisions of the said Charter may be interpreted as limiting or prejudicial to the human rights and fundamental freedoms recognized, in their respective scope of application, by the Law of the Union, international law and international conventions to which the Union or all the Member States are parties, and in particular the European Convention for the protection of human rights and fundamental freedoms, as well as the constitutions of the Member States. Consequently, the limitations that should be adopted, according to articles 52 and 53 of the Charter, can not be absolute, but must have certain limits, as well as be adapted to the principle of proportionality.

In the European Union law, the legal regime applicable to the right to family reunification will depend on the nationality of the subject who requests it. In fact, when we talk about family reunification, we should not think only of a subject from a third State residing in the European Union who tries to regroup his family, but it can also be a citizen of the Union, which aims to regroup relatives of third States. In practice, a different regime for family reunification is foreseen, depending on whether the applicant is a citizen of the European Union or, on the contrary, a national of a third State (not a member of the European Union). In the first case, we are dealing with the European family reunification regime included in Directive 2004/38 / EC89 applicable to citizens of the European Union and, in the second case, we are dealing with the immigration regime contained in Directive 2003/86 /CE[6], applicable to third-country nationals. We are, therefore, faced

[6] GÓMEZ CAMPELO, E., "El derecho a la reagrupación familiar según la Directiva 2003/86/CE", *en Actualidad Administrativa*, no. 13, 2003, pages 1551-1560.

with two different procedures that establish a more beneficial regime for European citizens than for third-country nationals[7].

## 2. THE COUNCIL DIRECTIVE 2003/86/CE, OF 22 SEPTEMBER 2003 ON THE RIGHT TO FAMILY REUNIFICATION

### 2. 1. Purpose of the Council Directive

The Council Directive 2003/86/CE of 22 September 2003 on the right to family reunification[8] discusses, after legal recognition, the need to establish the material conditions to its enforcement under common guidelines among the Member States.

Throughout 18 Recitals, the Preamble outlines the philosophy of the European legislators on integration policy for citizens legally residing in the territory and the rules to be enforced for its exercise. It therefore assumes that the respect to family life and the obligation to protect it is present all through the specific measures on reunification: "*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, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty*" (Recital 4).

From its very first principles, this Directive aims at sanctioning legal acknowledgement as a circumstance assumed *ab initio* and, incidentally, elucidating its restrictive approach*: This Directive shall not affect the possibility for the Member States to adopt or maintain more favorable provisions"* (Art. 3, 5).

[7] LAPIEDRA ALCAMÍ, Rosa., "La familia en la Unión Europea: el derecho a la reunificación familiar", *en la Revista Boliviana de Derecho*, Nº. 20, 2015, pages 216- 217.

[8] Official Journal of the European Union L251, of 3 October 2003. It applies to all Member States except Ireland, United Kingdom and Denmark and has been in force since 3 October 2003, acquiring legal status in the countries of the EU before 3 October 2005.

The chief purpose of a council rule is to adopt harmonized procedural criteria, and this Directive is no exception. Following the principles of subsidiarity and proportionality[9], it intends to achieve the defense and exercise of a global interest that has not necessarily need to match with those of each Member State.

## 2. 2. SUBJECT MATTER OF THE DIRECTIVE AND COMPARED APPLICATION IN THE MEMBER STATES

Throughout its articles, the Directive seeks to regulate exhaustively the institution in question, but highly considering the principles above-cited by sometimes offering general rules, at times vague, and occasionally so thorough that they even become case-specific. The legislator does not seem to have intended to build a stringent solution model, but actually to provide patterns to reach national harmonized answers.

Through the Report on the application of the Directive on the right to family reunification[10], an analysis of how the Member Stated have adapted its internal regulatory scheme to the prescriptions of the Directive is provided. We will now focus on the different aspects that make up the text, an examination that will allow us to know the legislative approaches of each country, their political philosophy on immigration and the means to adapt it to the council demands.

### 2.2.1. Family members to be reunified

[9] "*Since the objectives of the proposed action, namely the establishment of a right to family reunification for third country nationals to be exercised in accordance with common rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the Community, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives*" (Recital16). See QUIRÓS FONS, 2003, on the national process of communiterisation of national alien rights.

[10] Report from the Commission to the European Parliament and the Council. COM (2008) 610 final. Brussels, 8.10.2008. Article 19 of the Directive requests the Commission to periodically inform the Parliament and the Council about the development of its application, suggesting, if applicable, the necessary modifications. The Communication "A common immigration policy for Europe", of 17 June 2008 COM (2008) 359 final has been drawn up and further research has been carried out by the Odysseus Network, (2007) and the European Migration Network (2008).

The Directive stipulates to authorize the reunification of some relatives of the sponsor, although it does not allow them to exercise their discretionary power. Throughout Chapter II – made up by an only but lengthy article- the eligibility for reunification of the different members is reviewed. Needless to say that both the sponsor and the relatives to be reunified must be third-country nationals, because if any of them were nationals of a Member State of the EU, the Directive 2004/38/CE [11] would need to be enforced.

Members of the *nuclear family*, which according to the Directive is limited to the spouse and the minor children, would be eligible. The possibility of reunifying other relatives pursuant to domestic legislation, provided this regulatory national criterion does not imply any acceptance or commitment of the rest of the States, could be assessed. Historical tradition, the extent to which the status of blood ties is weighed up, or the commitment degree with regard to the social integration of foreigners are factors that will affect the each country's decision, thus letting each country interpret its own regulatory schemes providing a minimum as for the concept of *nuclear family*[12] stipulated by the Directive is applied.

***a) The spouse***

The right of the spouse is widely accepted in all legislations, and the European law could not be an exception in this regard. The status of unmarried spouse is presumably equivalent to spouse providing that the stability of the relationship can be verified[13].

[11] Directive 2004/38/CE 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.

[12] In the Spanish Law, family protection is regarded as a guiding principle of social policies. So is asserted in Article 39 of the Spanish Constitution and in several court´s judgments (S, for its abbreviations in Spanish) of the High Courts of Spain´s autonomous regions (TSJ, for its abbreviation in Spanish), for which we provide the following examples:

STSJ no. 52/2001, Madrid, 15 January 2001 (JUR 2001/132153)
STSJ no. 654/2001, 6 April 2001 (JUR 2001/209838)
STSJ no. 764/2001, Madrid, 4 May 2001 (JUR 2001/302294)
STSJ no. 1595/2001, Madrid, 12 September 2001 (JUR 2001/314413)

[13] Concerning the possible equivalence between marriage and common-law couples, the following Spanish court's judgments can be reviewed:

STS, 6 May 2000 (RJ 2000/5582)

The Court of Justice of the European Union, in its court's decision dated 17 April 1986 (Case 59/85 Reed[14]) defended the equivalence pursuant to the principle of non-discrimination as long as the receiving State would keep the same principle.

The generous and current interpretation of the principle is also regarded by our Spanish Constitutional Court (TC, for its abbreviation in Spanish) which, working on the basis that marriage and common-law unions are unequivocally different terms, states that "marriage and stable common-law unions shall be equivalent when the rules exclusively or predominantly provide for a situation of cohabitation and emotional nature" (STC 222/1992, 11 December). Other countries such as Sweden, the Netherlands, Denmark and the United Kingdom have also extended this criterion that allows reunification of common-law couples including, by extension, same-sex couples.

This guideline is subject to the regulations of each state under the provisions of its values, principles or particular rules. And so does the Directive stipulate on the one hand that the "*Member States shall authorize the entry and residence [...] of the sponsor´s spouse* (Art. 4, 1-a), and on the other hand specifies that "T*he Member States may [...] authorize the entry and residence [...] of the unmarried partner [...]* (Art.4, 3).[15]

Together with the above said, for public order reasons, even when polygamous marriage is accepted in the foreign country under the provisions of the state law, family reunification could only benefit

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STS, 6 June 2000 (RJ 2000/6119), in which some Constitutional Court judgments are cited, among them: 19 November 1990 (RJ 1990/8767), 21 October 1992 (RJ 1992/8589), 11 December 1992 (RJ 1992/9733), STS 20 March 2003 (RJ 2003/2422).

The interpretation of extramarital relationships has also been assessed by our Courts of Justice:

STSJ, Murcia, 5 October 1998 (RJ 1998/32067)

STS, 15 December (RJ 1998/ 29922)

STS, 9 March 2000 (RJ 2000/5397)

14 State of the Netherlands v. Ann Florence Reed, 1986

15 Underlining not included in original Article. On the concept of spouse, the following court's judgments might be reviewed:

STS, 23 March 1999, (RJ 1999/17206) on mutual help.

STSJ, Galicia, 6 May 1999 (RJ 1999/18870), on length of bond.

STSJ, Valencia, 13 October 1998 (RJ 1998/31874; RDGRN – Judgment of the General Directorate for Registries and Public Notaries, for its abbreviation in Spanish-, 27 September 2000 (BIMJ – Informative Gazette of the Spanish Ministry of Justice, for its abbreviation in Spanish-, no. 1881, 15 November 2000) on marriage of convenience.

one spouse, any of them but only one. The Directive asserts: "*In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorize the family reunification of a further spouse"*. This exception is likewise admitted in article 17, 1-a of the Immigrant Law 4/2000 by stating: "*Under no circumstance may a further spouse be reunified even when the personal law of the foreigner allows that marriage form*".

The right to family life to be guaranteed to the spouse residing and working in any European country, and which according to their state law would need a more complex cohabitation model, shall adapt to the rules that approve the marriage as a monogamous institution[16]. In this regard, Recital 11 of the Directive deals with the adoption of "*restrictive measures against applications for family reunification of polygamous households*".

Following this, and notwithstanding the different approaches, the authenticity of the marriage is a requirement always present in the mind of the Community legislator who shall be specially sensitive to the emergence of white marriages or convenience ones.

Such concern is also reflected on the provisions of the Directive, particularly in Article 16, sections 2-b and 4. Therefore, the Member State concerned may reject an application for entry and residence or to renew the residence of the family with the purpose to family reunification if a marriage is deemed vitiated, that is to say, if the marriage has been taken with the sole purpose of allowing the person in question to enter or reside in a country. Similarly, the Member States shall be allowed to undertake controls and specific checks if suspicion of fraud is considered, being in like manner allowed to draw up rules to prevent reunification if the purposes of the union are deemed unlawful.

However, some rules are liable for certain dangerous presumptions of culpability when a spouse is a third-country national. In this instance, in the Netherlands and Austria, an immigration officer personally evaluates each application. Due to the Community sensibility that this issue raised, a

[16] GÓMEZ CAMPELO, 2008 and SOLANES CORELLA, 2008.

Council Resolution[17] on the measures to be adopted when combating marriages of convenience was drawn up. Fighting against this matter between citizens of the European Union and third-country nationals residing in a Member State with a citizen of a third country is one of the main goals of the Resolution with a view to preventing the avoidance of the rules relating to the entry and residence of third country nationals.

In fact, that must have been the teleology lying behind article 4,5 of the Directive, which allows the Member States to make a favorable reunification conditional on a minimum of age of the foreign sponsor and his/her spouse set at 21 years. It is expected from the States to demand a minimum of age when reunifying the resident and his/her spouse, who under no circumstance shall be older than the age of 21, being this requirement devised to ensure couple integration and, above all, to avoid any forced marriage. Many countries including Belgium, Lithuania, the Netherlands and Cyprus have already enforced this additional requirement with regard to age. In fact, Cyprus requires a minimum length of a year of marriage before applying for reunification.

***b) Children***

As for minor children, one of the issues that nowadays causes more controversy raises when relating the polygamous family and the right to reunify the children from all of the spouses. Even if the Directive allows the reunification of all minor foreign children only if the sponsor has their custody and if these are dependent on him/her (Art. 4, 1-c), the fact is that, as a general rule, the children of the spouses not considered as such by the reception legislation shall be excluded from this right, unless acting in the interest of the children prevailed, pursuant to the Convention on the Rights of the Child (1989). Where the article 4, 4 says *in fine* "[…] *Member States may limit the family reunification of minor children of a further spouse and the sponsor*", we may proceed to interpret it in connection with the above cited Recital 11, therefore not deeming as spouse a person bound to the sponsor by links not regarded in the regulations of the Member States. When the child to be reunified is older than 12 and is separated from the family, the Directive allows the

[17] Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience. Official Journal C 382, OF 16 December 1997.

Member State to check whether he/she meets the conditions for integration before authorizing entry and residence (Art. 4, 1-d *in fine*).

Be that as it may, the application of the subject matters of the Directive has been somewhat hostile, particularly its literal contents. In fact, the European Parliament filed an appeal against the Council of the European Union[18]. In the Case C-540/03, the annulment of the last subparagraph of Article 4 (1), Article 4(6) and Article 8 of this Directive was claimed. In regards to the content of Article 4, the Parliament deemed it discriminatory in respect to human rights, particularly the right to family life and deemed it to incur discrimination based on the age of the affected parties. Moreover, and due to the fact that the Directive does not explicitly define the concept of "integration", the States could substantially restrict its content[19].

Three years after and having undertaken a detailed analysis of the grounds given by the appellant, the CJEU delivered judgment in favor of the maintenance of the cited principles as it deemed them to comply with the Community goals without interfering with the integration policy and the international Treaties in force. For the High Court, the absence of a definition of such a vague concept as "integration" could not lead – and in fact does not lead – to an arbitrary exercise of the Member States against the fundamental rights of their citizens; the assessment of the interests, the weighing of the objective circumstances (family bonds, social links or the degree to which the person will get involved in the new society) will reveal the national body in charge the compromise of the sponsors under proportionality and respect principles[20].

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[18] Action brought on 22 December 2003. The Judgment of the CJEU was reached on 27 June 2006. CJEU/2006/177.

[19] ÁLVAREZ RODRÍGUEZ, 2004

The previously cited judgment by the CJEU, reads: "The Council observes that Article 8 of the Directive does not in itself require a waiting period and that a waiting period is not equivalent to a refusal of family reunification. The Council also submits that a waiting period is a classical element of immigration policy that exists in most Member States and has not been held unlawful by the competent courts. It pursues a legitimate objective of immigration I - 5837 JUDGMENT OF 27. 6. 2006 — CASE C-540/03 policy, namely the effective integration of the members of the family in the host community, by ensuring that family reunification does not take place until the sponsor has found in the host State a solid base, both economic and domestic, for settling a family there" (Finding 93).

[20] The Advocate General, J. Kokott, defended the effectiveness and full validity of the questioned principles. Nevertheless, a consistent body of authors has shared, totally or partially, the disputable arguments of the European Parliament. See MONEREO ATIENZA, 2007; CANEDO ARRILLAGA, 2006; ÁLVAREZ RODRÍGUEZ, 2006; or IGLESIAS SÁNCHEZ, 2007.

In its Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment, the Commission of the European

### 2.2.2. Family members eligible for reunification

Furthermore, the Directive allows but does not force the Member States to extent the reunification to other relatives "excluded" from the concept of nuclear family. This way, relatives in the ascending line, dependent children of legal age or unmarried couples shall be eligible for reunification providing the national legislation deems it applicable. Article 4, 2 alludes to:

***a) Relatives in the ascending line***

"*First-degree relatives in the direct ascending line of the sponsor or his or her spouse where they are dependent on them and do not enjoy proper family support in the country of origin*". In contrast, Article 17, 1-d of the Immigration Law only refers to the concept "*Relatives in the ascending line*". Nowadays, half of the Member States allow the parents of the sponsor and his/her spouse the exercise of this right. Among them we find Belgium, the Czech Republic, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Sweden and Spain.

***b) Children of legal age***

This section refers to children of legal age of the sponsor or spouse who are unmarried and are evidently unable to provide for their own needs owing to their health condition. The state of dependency, of material inability to manage on their own is a firm requirement.

***c) Unmarried couples***

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Communities, COM (2003) 3.6.2003, states: "the right to family reunification is, by itself, an indispensable instrument for integration." (See page 5).

Article 4, 3 mentions the registered partnership –without going deeper into this matter–, and the unmarried partner with whom the sponsor has a stable and proven relationship, meaning that (Art.5, 2) the application shall be submitted together with documents that attest the bond. Belgium, Germany, Finland, the Netherlands, Sweden, Portugal and Lithuania explicitly consider these both possibilities. In the Spanish Law, the judgment law of the High Court and the Supreme Court allow a wide interpretation in spite of the lack of legal concretion.

### 2.2.3. Requirements for reunification

The right to reunification forces the applicant to have a stable administrative status and a legal residence pursuant to the provisions of the state law[21].
Interviews and other informative meetings intended to clear up any possible doubts about the sponsor and his/her relatives are carried out in all countries. Occasionally, DNA tests are performed with the purpose of justifying those family bonds in countries such as Spain, the Netherlands, Lithuania, Italy, France, Austria, Finland, Belgium and Germany. In Lithuania and Belgium, the sponsor assumes the cost of the test. In the Netherlands, the sponsor shall assume those costs if no kinship is evidenced, but the national authorities, as all countries that consider this procedure, shall take on them if otherwise proven.

The authorization to the sponsor to the to reside in the country for a period of validity of one year is a firm requirement and, cumulatively, the sponsor "*has reasonable prospects of obtaining the right of permanent residence*"[22] (Art.3, 1). Moreover, the Directive asserts "*Member States* ***may require*** *the sponsor to have stayed lawfully in their territory for a period not exceeding* ***two*** *years, before having his/her family members join him/her*[23]" (Art. 8). This is however not what Article

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[21] On this matter, see the Council Regulation (EC) no. 1030/2002M of 13 June 2002 laying down a uniform format for residence permits for third country nationals. Official Journal of the European Union L157, 15 June 2002.

[22] To know the regulation in force of the residence permits to which the Directive refers, see Council Regulation (CE) 1030/2002 of 13 June 2002, laying down a uniform format for residence permits for third country nationals. Official Journal of the European Union L157, 15 June 2002.

[23] As detailed in the previously mentioned Report from the Commission on the application of this Directive, the European Convention on the Legal Status of Migrant Workers (1977) states a waiting period that shall not exceed twelve months. Its scarce ratification by France, Italy, the Netherlands, Portugal, Spain and Sweden, together with other countries out of the European Union such as Albania, Turkey, Moldavia and Ukraine, has extremely limited its approach. Words in bold not included in the original Article.

18, 2 of the Organic Law 14/2003 of 20 November[24], amending Organic Law 4/2000, states: *applicants shall exercise their right to family reunification in Spain after having residing legally for a period of one year and are authorized to stay for at least one more year*[25].

What seems unquestionable is the more favorable approach of the Spanish text, that is its lower level of exigency and its unwillingness to exhaust the two years allowed by the Directive and its legal certainty provided by the absence of vague legal terms such as "reasonable prospects" found in the Directive. This problematic circumstance is shared with Luxembourg, Lithuania, Malta and Cyprus[26]. In the case of France, a minimum period of 18 months of residence is required, whereas Sweden and the Czech Republic demand a permanent permit.

***a) Procedure***

The procedure to be followed is stated in Chapters III (Art. 5) and IV (Art. 6, 7, 8). Among all the Member States, only four lack of a specific procedure to carry out reunification. It is the case of the Czech Republic, Hungary, Latvia and Poland that prefer to proceed by applying its general regulations on immigration.

Apparently acting from a quite different perspective to that of the Spanish Law, the Directive allows the Member States to determine who shall submit the application for entry and residence in person, the sponsor or any other member of the family to be reunified. Almost all countries require the sponsor to proceed in person, but some exceptions are found in Hungary and Austria, where this possibility is only granted to the relative to be reunified. The case of Portugal is somewhat exceptional as it only allows the relative to personally hand in the application provided he/she is

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[24] Official Gazette of the Spanish State no. 279 of 21 November 2003.

[25] Author's translation.

[26] The Report from the Commission on the application of this Directive shows the problematic of Cyprus that requires a permanent residence permit to apply for reunification and states a rule of four-year maximum residence after which permits are not renewed, apparently excluding third-country nationals from the right to apply for family reunification.

within Portuguese territory (invoking the exception stated in Art. 5, 3 that allows the application to be submitted by relatives already in its territory).

In spite of this, both Art. 17 of the Immigration Law and Art. 1 of the Directive make equally clear that, in general terms, the right to reunification shall only be exercised by a third-country national residing in a Member State; in other words, the sponsor shall be a holder – and not an applicant– of a residence permit. Despite this condition established by the Community legislator, countries such as the Czech Republic, Finland, Portugal and Poland do not mention this basic requirement.

This determining factor required by the Spanish legal system theoretically hinders what the already mentioned Art. 5, 3 *in fine* stipulates when establishing that "*By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory*". This points out that the general rule requires the relative to be residing out of the sponsoring country at the moment the application is initiated. However, different situations might be considered, and such is the case of Austria, where the presence of the relative is allowed under humanitarian circumstances. On the other hand, Cyprus' legal system admits no exception.

The Directive makes no allusion to the administrative charges to be paid by the applicant, and in the cases when payment is required (that is the case of all Member States except for Italy and Portugal), it is not specified if those charges arise from the issuance of the visa for family reunification or from the application as such. The minimum charge, almost symbolic in Spain and Belgium, amounts to €35 in the Czech Republic and Estonia whereas it can reach the amount of €1368 in the Netherlands.[27]

***b) Material Requirements***

[27] The Report from the Commission on the application of this Directive explains that an application for a visa for family reunification costs €830, the integration test €350 and the issuance of a residence permit for a temporary stay €188.

With reference to the material requirements for the exercise of the right, the foreign sponsor shall, when submitting the application, prove[28] a series of particulars that are discretionarily left to the determination of each Member State:

1. "[*...] stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family*" (Art. 7, 1-c), the kind and regularity of the documentary evidence will be determined by each State. Increasing amounts based on number of relatives to be reunified are expected, which sometimes implies such a high demanding level that could even seriously hinder the exercise of the right, particularly in the case of the youngest foreigner sponsors (in Finland, a amount of € 450 must be provided for each reunified child, a figure than is doubled for each member in Estonia).
2. This principle does also require sickness insurance for the sponsor and his/her relatives (Art.7, 1-b). For half of the Member States, this is an enforceable requirement obligatory, whereas Hungary allows an alternative to insurance or enough means to face an illness. It remains arguable whether this last condition, not considered in the Directive, could be incorporated to a national legislation.

3. "*Accommodation regarded as normal*" in terms of size, security and salubriousness (Art. 7, 1-a), so that the expenses are not chargeable to the sponsoring country without having recourse to the social assistance system of the Member State. The requirements regarding the housing conditions may vary, and whereas many countries simply demand accommodation regarded as "normal", others call for a specific number of squared meters dependent on the number of people to be accommodated. Austria and Belgium require the sponsor to meet this condition before the arrival of his/her relatives, an aspect that poses practical doubts as for the reunification procedure, which could extend over time and bring costs sometimes impossible to cover by the sponsor. In Poland, this condition is so demanding that accommodation is a requirement even for refugees (a demand that contravenes Art. 12 of the Directive).

***c) National Integration Measures***

[28] BLÁZQUEZ RODRÍGUEZ, 2003.

Among the requirements to exercise the right to reunification, some countries demand third-country nationals to comply with certain integration requirements specified in Art. 7.2. It is thus an optional condition that, if applicable, can be included in the national legislation and, as in the case previously stated, can lead to confusion due to its lack of accuracy. The integration policies include education and training as fundamental pillars of the procedure.

The Netherlands, Germany and France have already incorporated and slightly modified[29] these measures as a firm requirement. In all cases, basic language competence is a requirement that can be particularly considered in each case. Other states call for this requirement once reunification has been verified through the attendance to integration courses, mainly based on language skills (Austria, Greece or Cyprus). Lithuania only requires a basic command of the language if the sponsor has the intention of applying for permanent residence. In France, the reunified relative must additionally sign a "reception and integration contract" which compels the undersigned to make an effort to fit in as a family member of a new State.

### 2.2.4. Autonomous residence permit

Delving into the right, we observe that one of the consequences arising from family reunification is the access to a job for the foreign relatives. That is in fact the aspect that shows the initial dependence of the reunified relative on the sponsor (length of initial residence permit that cannot exceed the length of the sponsor's; limitations on the exercise of a remunerated economic activity). It is necessary to point out that the exercise of a profitable activity on a self-employed or on an employee basis is a legitimate claim of the reunified relative. The expectation of this right clearly exists, but each country will determine the conditions and "*shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labor market before authorizing family members to exercise an employed or self-employed activity*" (Art.14, 2 *in fine*), a situation that will give rise to the economic and legal dependency of the

[29] JAULT-SESEKE, 1996. For instance, Germany offers integration courses, imposing fines amounting to € 1000 to the attendants in case of repeated no-show. Activities aimed at encouraging participation of the immigrants in social life are also common. In the Netherlands, the knowledge of the customs and traditions in the Dutch society is a determining factor that shall be verified in a test, whose mark is not challengeable but can be repeated until the applicant proves knowledge of these contents.

reunified relative, as the issuance of an autonomous residence permit is conditional on an working permit[30].

This optional clause has allowed seven Member States to limit the access to a job by making the authorizations conditional on the verification of their labor markets (Austria, the Czech Republic, Germany, Greece, Hungary, Slovenia, and Slovakia). The Directive does not authorize excluding certain members of the reunified family during the periods immediately after admission in the territory. However, that is the case of countries contravening the principles of the Community text such as Germany, Hungary and Slovenia. By the time being, Finland, France, Estonia, Lithuania and Luxembourg have not introduced any restrictive measure in connection with the labor market that could affect a foreigner under a regulated status in their territories. Currently, a total of 28 Member States apply a maximum period of 5 years, although this can be reduced to 3 in the cases of France, the Netherlands, the Czech Republic and Belgium. Hungary, Romania and Finland do likewise state national specifications regarding this period.

Article 15, 4 of the Directive refers to the national legislation when specifying the conditions relating to the granting and duration of the autonomous residence permit. The absence of a law that, in addition to what Art. 15, 4 stipulates, could guarantee the granting of an autonomous residence permit, was the result of the hindering task of the 8 Member States who agreed on each country's competence to decide on their course of action. The consensus reached by Bulgaria, Estonia, Finland, Hungary, Italy, Romania, Poland and Slovenia has granted a wider scope for action to the Member states that is both common and legally unacceptable.

**2.2.5. Reasons for rejection**

The application for entry and residence for the purposes of family reunification and the renewal of a residence permit already granted might be rejected on assessed grounds, particularly the following: public policy, public security or public health. The severity of the offence against public

[30] Art. 19 in Organic Law 14/2003 of 20 November , after the enactment of Organic Law 14/2003 of 20 November.

policy or public security committed by the relative shall be assessed by the pertinent legal system[31]. The assessment shall be made through the implementation of proportionality and weighing criteria together with the evaluation of personal circumstances. When concerning public health, illness or disability are not deemed to be compelling reasons for the withdrawal or rejection of a residence permit (nevertheless, Member States as Estonia[32], Slovenia and Romania do regard these conditions as weighty grounds).

The accuracy arising from Art. 6 of the Directive is stated when referring to Art. 17, stating that when rejecting an application, withdrawing or refusing to renew a residence permit, "*Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin".* This provision clearly shows a willingness to grant more maneuver power to the state competent authorities when it comes to decision making, appraising through principles of transverse nature, a myriad of circumstances established in the interest of the family to be guarded by each State that could affect the decision either favorably or unfavorably.

In its report on the application of this Directive of October 2008, the European Commission the case of the Netherlands, considers with worry the case of the Netherlands and its strict enforcement of the requirements demanded by this "horizontal clause" (level of income, having passed the integration test, age limit, etc.). With regard to this circumstance, the Commission likewise considers the regulations of Luxembourg, Austria and Slovakia. In this way, the necessity and proportionality principles are held as essential factors to consider in the decision reached by the national competent authorities.

By way of derogation, and with regards to the particular reception capacity of the State in question, the second paragraph of Art. 8 of the Directive states: "*a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence*

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[31] SANZ CABALLERO, 2008. The specific assessment of the circumstances by the each state´s legal system has contributed to the coining of the term "sovereignty clause" to refer to these three grounds. See FERNÁNDEZ SÁNCHEZ, 2006.

[32] Estonia applies a criterion that goes too far from the Directive provisions: "a threat for other people", a statement inaccurate and void of legal certainty.

*permit to the family members*". If we add this waiting period to the maximum period of 2 years that a country demands to the sponsor, it is utterly clear how the acknowledged right to family reunification cannot be exercised in practice during a period of 5 years. What is more, the State cannot guarantee that a favorable decision will be reached after this period if its reception capacity is limited.

The right to family life and respect of their own private life granted to all foreigners living in a country, under the requirements regarded in this Directive, makes a realistic, committed and deficient in demagogy approach absolutely imperative[33]. In any case, the reaction was immediate and the European Parliament, in the aforementioned Case C-540/03, filed and action for annulment of Art. 8 as it considered that similar cases could be subject to different judgments depending on the principles based on the reception capacity of each country. According to the Parliament, it stands as a disproportionate measure that hinders the necessary balance between conflicting interests.

The CJEU, in the above-mentioned court's judgment of 27 June 2006, did not deem the principle to be in detriment of the respect to family life regarded in Art. 8 of the ECHR. The margin for appraisal of the State is reckoned to be limited and reasonable and guarantees reunification in good condition. The determining factors for the exercise of such right are stipulated by the Spanish Law and Regulations of Immigration in a restricted sense and under a strict principle of *numerous clausus*, and therefore its compliance unfailingly implies the suitability of the subject for the right. The ambiguous and unclear statement "reception capacity" of the sponsoring country is not mentioned in any case, probably because it is assumed that above all the uncertain and vaguely defined state interests, the so frequently acclaimed right to the development of family life shall prevail[34].

[33] The following court´s decisions bring to light the fact that family reunification is a right of human nature that entails a great social significance:

STS of 24 April 1993 (RJ 1990/11942)

STS of 19 December 1995 (RJ 1995/9883), of 2 January 1996 (RJ 1996/252), of 12 May 1998 (RJ 1998/4958), of 21 December 1998 (RJ 1999/374) or of 28 December 1998 (RJ 1999/375).

Judgment of the ECtHR of 28 November 1996 (RJ 96/12146).

[34] The importance of this right explains that "[…] in any case, the most favorable interpretation to family reunification shall prevail […]", as stated in the STJS Valencia, 259/2001 of 14 March 2001 (JUR 2001/162985).

### 2.2.6. Right to effective judicial protection

The length of the process (Art. 5, 4) shall be as short as possible and its decision shall be put into effect without delay with regards to the legitimate expectations of the person, establishing a maximum period of nine months from the date on which the application was submitted. Whichever the decision reached, this shall be provided in writing. In this way, in case of rejection of application due to any of the circumstances regarded by the Directive, the sponsor and relatives shall be duly informed about their right to mount a legal challenge[35]. This guideline highlights the regulatory discrepancies of the Member States as for the material scope of the contents and the affected parties entitled to those legal challenges; this does not prevent countries such as Germany, Cyprus, Greece, Italy, Poland, Latvia and Slovakia from not offering legal aid.

## 2.3. CONCLUSIONS OF THE APPLICATION OF THE DIRECTIVE

The analysis of Directive 2003/86/CE provided in the previous pages has patently shown the intention of the Community legislator when faced with the importance of an optimal control and management of the migration flows. It shall not be forgotten that this Directive constitutes the first legislative tool for immigration in the EU, hence its theoretical significance and practical relevance. However, if we are to analyze its real approach in the autonomous legislations from a realistic and practical perspective, the aim of the harmonization of such a sensitive issue, -due to its attachment to national legislations, subject to so many state situations of all kinds and tightly bound to the traditions of the country and its sensitivity towards such a knotty matter- is not producing the expected results, at lest for now.

The implementation of the Directive has so far caused several problems probably attributable to its binding nature that allows the States to adapt their regulations with excessive leeway, or arising from its mistaken application that can affect the respect to family life as a fundamental right, a situation that needs to be periodically examined and controlled by the European Commission[36].

[35] Art.18

[36] LA SPINA, 2007

Years after its drafting, the need to "*assess the implementation and the need for modification of Council Directive 2003/86/EC on the right to family reunification*"[37] is still claimed.

The specification of these rights and its further implementation so as to bring them into line with the restrictive measures on obtaining the state authorizations to enter European territory remains a complex undertaking whose forthcoming analysis will arouse the interest of many.

# The CJEU case-law in the right to family reunification

## 1. Introduction

It is widely known that Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereinafter, the Directive) is one of the most significant documents of those approved within the European Union in this matter. This chapter addresses the analysis of such CJEU case law in the field in order to interpret the above-mentioned legal framework.
First, I have addressed the study of the judgments that I considered the most significant for the purpose of this work. Then, I deemed appropriate to classify its content by subject, following the numerical order established by the Directive itself. In all the case law analyzed we will examine compliance with the applicable legal framework.

## 2. Family reunification of minors and refugees *(Article 2 (f) in relation with Article 10 (3)(a) Directive)*

### 2.1. Case C-550/16, A, S (2018)

[37] Stated in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Common Immigration Policy for Europe: principles, actions and tools, COM (2008) 359 final. Brussels, 17.6.2008.

Case *A, S v Staatssecretaris van Veiligheid en Justitie*[38] gave the Court the opportunity to rule on the protection to be granted to persons who enter the European Union as minors, obtain refugee status when they have attained the age of majority while their application for protection is being considered, and, after having obtained that status, initiate a family reunification procedure.

In the present Case, the referring court asks whether Article 2(f) of the Directive shall be construed to mean that a third-country national or stateless person below the age of 18 at the time of his/her entry into the territory of a Member State and of the submission of his/her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is, thereafter, granted asylum with retroactive effect to the date of his or her application shall be regarded as a *minor* for the purposes of the Directive.

The applicants, A and S, consider that question calls for an answer in the affirmative, whereas the Netherlands and the European Commission take the opposite view. More specifically, the Netherlands Government submits that it is for Member States to define the relevant moment for determining whether a refugee must be regarded as an *unaccompanied minor* within the meaning of Article 2(f) of Directive. Conversely, the Commission considers that this moment may be determined on the basis of the Directive.

Finally, the CJUE resolves this issue proclaiming, in the same vein as the Advocate General did[39], that:

> *"Article 2(f) of Directive 2003/86/EC of 22 September 2003 on the right to family reunification, read in conjunction with Article 10(3)(a) thereof, must be interpreted as meaning that a third-country national or stateless person who is below the age of 18 at the time of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the*

[38] Case 550-16, A, S v Staatssecretaris van Veiligheid en Justitie, ECLI:EU:C:2017:824.
This reference for a preliminary ruling concerned the interpretation of Article 2(f) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. The request was made in proceedings between A and S, who are Eritrean nationals, and the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, Netherlands) concerning the latter's refusal to grant them and their three minor children a temporary residence permit for the purposes of family reunification with their elder daughter.

[39] Opinion of Advocate General Bot, delivered on 26 October 2017.

*asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a 'minor' for the purposes of that provision."*

## 3. Accreditation of stable and regular resources without recourse to the social assistance system of the member state concerned *(Article 7 (1)(c) Directive)*

In Article 7, the Council Directive determines, the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States. When a family member applies for authorization to join a resident, a Member State may require the latter to have stable and regular resources sufficient to maintain the family, "*without recourse to the social assistance system of the Member State concerned"*. In this regard, there have been several sentences pronounced by the CJEU in relation thereof.
The most significant ones in our view are stated below:

### 3.1. Case C-578/08 *Rhimou Chakroun* (2010)

In *Case Chakroun v Minister van Buitenlandse Zaken*[40] the husband has regular and sufficient resources to cover subsistence expenses generally necessary, but this does not deprive him of being able to receive certain types of special assistance benefits. In this framework, the Raad van State (Council of State) asks for a more detailed clarification of the criterion *"without resorting to the social assistance system"* and questions whether the Directive allows a distinction to be made according to whether the family link arose before or after the entry of the resident in the Member State.

The Court understands that the expression *"resort to the social assistance system"*, mentioned in Article 7 (1) (c) of the Directive, must be interpreted as meaning that it does not allow a Member State to adopt regulations on regrouping family members who have been denied the residence

[40] Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken* (Reference for a preliminary ruling from the Raad van State), ECLI:EU:C:2010:117. In this case-law, the main dispute concerns the request of a Moroccan citizen to meet her husband, also a Moroccan national and a legal resident in the Netherlands since 1970, with whom he had married in 1972. The provisional residence permit was denied because the husband lacked sufficient resources. In fact, Mr. Chakroun's unemployment benefit amounted to €1,322.73 net per month, including holiday pay, that is, an amount lower than the income standard applicable to the formation of a family, established at €1,441, 44.

permit but whose sponsor has shown sufficient stable and regular resources for his own support and that of his spouse, but who, given the amount of his income, may nevertheless be entitled to claim special assistance benefits in case there are specific and individually determined expenses necessary for their subsistence, to deductions granted by the municipal authorities based on income support measures within the framework of municipal basic income policies.

In the Court's opinion, since authorization of family reunification is, under the Directive, the general rule, the faculty provided for in Article 7(1)(c) shall be accurately interpreted. Furthermore, the room for maneuver that the Member States are granted, must not be used in a manner that would undermine the objective of the Directive, which is to promote family reunification and its effectiveness thereof.In addition to that, the Directive, in particular Article 2(d), shall be construed to preclude national legislation which, in applying the income requirement set out in Article 7(1)(c) of that directive, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State[41].

Having regard to that lack of distinction intended by the European Union legislator, based on the moment when family is constituted, and taking account of the necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness, the Member States do not have discretion to reintroduce that distinction in their national legislation transposing the Directive. Furthermore, the ability of a sponsor to have regular and sufficient resources to maintain himself/herself and the members of his/her family within the meaning of Article 7(1)(c) does not depend on whichever manner on the moment when the family was formed.

### 3.2. Case C-558/14, *Mimoun Khachab* (2016)

A different situation arises when the sponsor no longer has stable and sufficient resources at the time of submitting the application. This is the situation of Case *Mimoun Khachab v. Subdelegación del Gobierno en Álava*[42], in which the Court declares that the competent authority of the Member

[41] Opinion of Advocate General Sharpston, delivered on 10 December 2009. Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken.*

[42] Case C-558/14, *Mimoun Khachab* (2016), ECLI:EU:C:2016:285. Request for a preliminary ruling under Article 267 TFEU from the High Court of Justice of the Basque Country, Spain, made by decision of 5 November

State concerned, in this Case-law the Spanish authorities, may withdraw an authorization of family reunification where the sponsor no longer has stable, sufficient and regular resources, as referred to in Article 7(1)(c). The licence to withdraw an authorization means that the national authority may require the sponsor to have such resources beyond the date of submission of his/her application[43]. As a result, the Court rules the following:

> *"Article 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as allowing the competent authorities of a Member State to refuse an application for family reunification on the basis of a prospective assessment of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources which are sufficient to maintain himself and the members of his family, without recourse to the social assistance system of that Member State, in the year following the date of submission of that application, that assessment being based on the pattern of the sponsor's income in the six months preceding that date."*

Consequently, Article 7(1) of Directive 2003/86, read in conjunction with Article 16(1)(a) and Article 3(1), does not preclude the Member States from permitting their competent authorities to carry out a prospective assessment of the resources of the family reunification claimant; that is to say, to take account not only of the resources the sponsor has when the application for family reunification is submitted, but also of the resources he/she will have after submitting the application.

### 3.3. Joined Cases C-356/11 and C-357/11 *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L* (2012)

2014, received at the Court on 5 December 2014, in the proceedings Mimoun Khachab v. Subdelegación del Gobierno en Álava.

[43] In this case, the High Court of Justice of the Basque Country has doubts regarding the interpretation of Article 7(1)(c) of Directive 2003/86, pursuant to which the right to family reunification is conditional upon the applicant having, at the time of submitting the application for reunification, *"stable and regular resources which are sufficient"*. It questions, in particular, the compatibility with that provision of the Spanish legislation which allows the national authorities to refuse an application for family reunification where, on the basis of the pattern of the claimant's income in the six months preceding the date of submission of the application for family reunification, it is likely that this claimant will be unable to retain, in the year following that date, the same level of resources as he had on that date, so as to ensure that he will be in a position to continue to maintain his family after it is admitted to the Member State's territory.

The established case-law doctrine experiments a substantial change when minors are involved, as in *Case O. and S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L.*[44]. When this happens, the CJEU considers that Article 7(1)(c) of the Directive shall be interpreted as meaning that, while Member States have the faculty of requiring proof that the sponsor has stable and regular resources sufficient to maintain himself/herself and the members of his/her family, this faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter of Fundamental Rights of the European Union.

These Articles require the Member States to examine applications for family reunification in the interest of the children concerned and also with a view to promoting family life and avoiding any undermining of the aim and the effectiveness of the Directive. In addition to this, the Court emphasizes that the authorization of family reunification is the general rule; so, the faculty provided for in Article 7(1)(c) of the Directive shall be strictly interpreted. The margin that the Member States are recognized to have must not therefore be used in a manner that would undermine the objective and the effectiveness of the Directive.

The Court accepts that Articles 7 and 24 of the Charter, while emphasizing the importance of family life for children, cannot be construed to deprive the Member States of their margin of appreciation when examining applications for family reunification. However, in the course of an examination and when determining in particular whether the conditions laid down in Article 7(1) of the Directive are met, it insists that the provisions of the Directive must be interpreted and applied regarding Articles 7 and 24(2) and (3) of the Charter of Fundamental Rights of the European Union, which require the Member States to examine the applications for reunification in question in the interest of the children concerned and with a view to promoting family life. It is therefore for the competent national authorities, when implementing the Directive and examining applications for family reunification, to make a balanced and reasonable assessment of all the interests at stake, taking particular account of the interests of the children concerned.

[44] Joined Cases C-356/11 and C-357/11 *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L* (2012), ECLI:EU:C:2012:776

4. **Use of misleading information, false or falsified documents** ***(Article 16(2)(a) Directive)***

4.1 **Case C-557/17*, I.Z* (2019)**

A different case arises when the residence permit has been fraudulently obtained. This is the situation of ***Case C-557/17, I.Z.***[45], in which the right to family reunification was obtained on the basis of fraudulent information provided by the sponsor, even when the holder of that permit was unaware of the fraudulent nature of that information.

In these circumstances, the CJEU is categorical in stating that Article 16(2) (a) shall be construed to mean that in the event that the documents submitted had been counterfeited for the purpose of issuing residence permits to family members of a third-country national, the fact that they were not aware of the fraudulent nature of the documents does not prevent the Member State from withdrawing those permits pursuant to this provision. However, in accordance with Article 17 of the same Directive, the Court allows the competent national authorities to carry out, beforehand, an individualized examination of the situation of the family members, performing a reasonable assessment of all the interests involved.

5. **Right to entry and residence for family members of citizens of EU** ***(Article 3(2) (a) of Directive 2004/38 8/EC 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 and Directive 2003/86/EC)***

**5.1 Case C-83/11,** ***Rahman and others*** **(2012)**

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[45] Case C-557/17, *I.Z.* (2019), ECLI:EU:C:2019:203. In this case, the issuing authority (Council of State, Netherlands), enquires whether a residence permit issued to a family member of a third-country national under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, obtained on the basis of fraudulent information provided by the sponsor, can be withdrawn where the holder of that permit was unaware of the fraudulent nature of that information. In a similar vein the referring court asks whether, in order to lose long-term resident status, as it arises under Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, the holder of that status must have been aware of the fraud, in so far as the status in question would have been obtained on the basis of fraudulent information. See Opinion of Advocate General Mengozzi, delivered on 4 October 2018.

***Case Rahman and others***[46] provides the Court for the first time with the opportunity, in the words of the Advocate General, to rule on the scope of the provisions of Article 3(2) of 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[47].

The reference for a preliminary ruling arouse from a dispute between M. S. Rahman, F. R. Islam and M. Rahman, both Bangladeshi nationals, and the Secretary of State for the Home Department (UK), following the refusal by the latter to issue residence permits for the United Kingdom to the former as dependent members of the family of a national of a Member State of the European Economic Area (EEA)[48]. In order to review the conformity of the United Kingdom legislation with Directive 2004/38, the Upper Tribunal (Immigration and Asylum Chamber), London, considered it necessary to refer to the Court for a preliminary ruling.

The applicable legal framework in this judgment was, on the one hand, Article 7 of the Charter of Fundamental Rights of the European Union, which states that *"everyone has the right to respect for his or her private and family life, home and communications"* and, on the other one, Directive 2004/38 that recognizes, in accordance with a graduated system, a right of residence for *'family members'*, who are defined in Article 2(2) thereof as the spouse or the partner with whom the Union citizen has contracted a registered partnership, which is recognized as equivalent to marriage by the legislation of the host Member State, the direct descendants who are under the age of 21 or are dependent and those of the spouse or partner, as well as the dependent direct relatives in the ascending line and those of the spouse or partner.

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[46] Case C-83/11, *Rahman and others v Secretary of State for the Home Department* (2012), ECLI:EU:C:2012:519

[47] Opinion of Advocate General Bot, delivered on 27 March 2012.

[48] Mahbur Rahman was a Bangladeshi national, working in the United Kingdom, who married an Irish national on 31 May 2006. Muhammad Sazzadur Rahman, Fazly Rabby Islam, and Mohibullah Rahman, respectively the brother, half-brother and nephew of Mahbur Rahman, applied for residence permits for the United Kingdom as members of the family of a national of an EEA Member State. Those applications were refused by the Entry Clearance Officer in Bangladesh on 27 July 2006 as the respondents in the main proceedings had been unable to demonstrate that they were dependent on Mr and Mrs Rahman in Bangladesh. After the Secretary of State for the Department of the Interior rejected that request, they appealed to the Immigration Judge, who granted his request, considering that they were "dependent".

Directive 2004/38 also takes account of extended family members, requiring the Member States, under certain conditions, to facilitate their entry and residence in their territory. In this regard, Recital 6 in the preamble to Directive 2004/38 states:

> *"In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."*

Finally, the Court, following the criteria of the Advocate General, resolved that:

1. The Member States are not required to grant every application for entry or residence submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of that Directive (spouse, direct descendants under the age of 21, the dependent direct relatives in the ascending line and those of the spouse or partner as defined), even if they prove to be dependent on that citizen;
2. In order to fall within the category, referred to in Article 3(2) of Directive 2004/38, of family members who are "*dependants*" of a Union citizen, the situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he/she applies to join the Union citizen on whom he is dependent.
3. On a proper construction of Article 3(2) of Directive 2004/38, the Member States may, in the exercise of their discretion, impose particular requirements relating to the nature and duration of dependence.

### 5.2 Case C-635/17, *E.* (2017)

A different situation raises when right to family reunification is denied relying on the lack of

official documentary evidence of the family relationship, as the most recent case rules on the matter in **Case C-635/17, *E. v Staatssecretaris van Veiligheid en Justitie***[49]. A. was an Eritrean national benefiting from subsidiary protection in the Netherlands, who claimed to be the aunt and guardian of E., a minor of Eritrean nationality residing in Sudan.

On this basis, A. lodged, on behalf of E., an application for family reunification with the competent Netherlands authorities (16 April 2015). In support of that application, she submitted a document from the Eritrean Liberation Front (ELF) of 6 April 2015, according to which she is E.'s aunt and his guardian since the death of his biological parents, an event that occurred when he was five years old. She also claimed that, after they fled Eritrea, which occurred in 2013 when E. was ten, he had lived with her in Sudan until she left for the Netherlands. At this moment, E. was residing in Sudan with a foster family, with whom he had not family ties.

The Dutch authorities rejected the application for family reunification on the basis that no official documentary evidence had been provided to substantiate the family relationship between E. and A., since the only document provided, the ELF statement, was not authorized. On the other hand, the Secretary of State was of the opinion that a sufficient explanation had not been given of the impossibility of providing official documentary evidence, since Eritrea issues documents of that type, such as death certificates or certificates of guardianship, that could prove that E.'s parents had died and that the applicant was his legal guardian.

In order to give a decision, the applicable legal framework was Article 11 (2) of Directive 2003/86, which states:

> *"Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision*

[49] Case C-635/17, *E.v Staatssecretaris van Veiligheid en Justitie* (2019), ECLI:EU:C:2019:192, request for a preliminary ruling under Article 267 TFEU from the *Rechtbank Den Haag Zittingsplaats Haarlem* (District Court, The Hague, Netherlands). In this case-law, the question that arises is whether a national authority could reject the application for family reunification introduced by a beneficiary of international protection where the beneficiary has failed to explain in a plausible manner the reasons as to why he cannot provide any official records attesting to the existence of a family relationship. See, Opinion of Advocate General WAHL, delivered on 29 November 2018.

*rejecting an application may not be based solely on the fact that documentary evidence is lacking."*

As a result, the Court rules:

*"Article 11(2) of Directive 2003/86 must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, in which an application for family reunification has been lodged by a sponsor benefiting from subsidiary protection in favour of a minor of whom she is the aunt and allegedly the guardian, and who resides as a refugee and without family ties in a third country, that application from being rejected solely on the ground that the sponsor has not provided official documentary evidence of the death of the minor's biological parents and, consequently, that she has an actual family relationship with him, and that the explanation given by the sponsor to justify her inability to provide such evidence has been deemed implausible by the competent authorities solely on the basis of the general information available concerning the situation in the country of origin, without taking into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin"*[50].

## 6. Establishment by national law of the conditions relating to the granting and duration of the autonomous residence permit *(Article 15 (4) Directive)*

### 6.1 Case C-484/17, *K* (2018)

In other cases, the referring court is given the competence to assess the implementation of the

[50] The judgment handed down on 13 mars 2019, does not support the theories of the Advocate General, which, in a thoughful report, propose that the Court answer as follows: *"Article 11(2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as not precluding national legislation under which the beneficiary of international protection is obliged, for the purposes of the assessment of his application for family reunification, to explain in a plausible manner the reasons why he is not able to provide official documentary evidence of a family relationship, provided that the competent national authority considers his explanations in the light not only of the relevant general and specific information concerning the situation in his country of origin but also of the particular situation in which he finds himself."* See Opinion of Advocate General, WAHL, delivered on 29 November 2018.

requirements established by the Directive. Such is the Case C-484/17*, K v Staatssecretaris van Veiligheid en Justitie*[51], request for a preliminary ruling from the Raad van State (Council of State from Netherlands), in application of Article 15(1) and (4) of the Directive.

In this case-law, the CJEU establishes that:

> *Article 15(1) and (4) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification does not preclude national legislation, such as that at issue in the main proceedings, which permits an application for an autonomous residence permit, lodged by a third country national who has resided over five years in a Member State by virtue of family reunification, to be rejected on the ground that he has not shown that he has passed a civic integration test on the language and society of that Member State provided that the detailed rules for the requirement to pass that examination do not go beyond what is necessary to attain the objective of facilitating the integration of those third country nationals."*

However, the CJEU emphasizes the need for such requirements to be confirmed by the referring court, always and in any case.

### 6.2 Case C-257/17, *C and A* (2018)

A similar situation arises in Case C-257/17, *C and A v. Staatssecretaris van Veiligheid en Justitie* (State Secretary for Security and Justice, Netherlands), concerning the State Secretary's rejection of C and A's applications to change their fixed-term residence permits and, in respect of C, the withdrawal of her fixed-term residence permit[52].

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51 Case C-484/17, *K v Staatssecretaris van Veiligheid en Justitie* (2018), ECLI:EU:C:2018:878

52 Case C-257/17, *C and A v. Staatssecretaris van Veiligheid en Justitie* (2018), ECLI:EU:C:2018:876. In this Case, the Court consider, on one side, Article 15 (1) of Directive 2003/86 that states: *"Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor".* Likewise, the Court remark Article 7 (1) and (2) of the Wet Inburgering (Law on Civic Integration), that reads as follow: *"A person subject to the civic integration requirement must acquire spoken and written knowledge of the Dutch language at least to level A2 of the Common European Framework of Reference for Languages, and knowledge of Dutch society within three years."*

In the present case, the CJEU likewise understands that Article 15 (1) and (4) of the Directive does not exclude the national legislation that allows an application for an autonomous residence permit, submitted by a third-country national who has resided for more than five years in a Member State by virtue of family reunification. In the opinion of the Court, the application may be rejected if the applicant has not proven to have passed a civic integration test in the language and society of that Member State, provided that the detailed rules for the requirement to pass that examination do not go beyond what is necessary to achieve the objective of facilitating the integration of third-country nationals.

Therefore, the legislation of the Member State, in this case the Netherlands, which requires a certain level of knowledge of the Dutch language within a period of three years, should be observed.

### 6.3 Case 138/13, *Naime Dogan* (2014)

The CJEU had issued a resolution radically opposed to the previous ones in Case 138/13, *Naime Dogan* v *Bundesrepublik Deutschland* [53], in wich Ms. Dogan, who was illiterate, had been denied her visa for the purposes of family reunification by the German Embassy in Ankara, considering that Naime Dogan *"chose her multiple choice answers at random and also learned and reproduced three standard sentences by heart"*. In the words of Advocate General, Mr. Mengozzi, *"An established case of illiteracy may — having regard to, inter alia, the interested person's age, economic circumstances and social background — constitute an obstacle which is difficult to overcome. Making authorisation of family reunification for a spouse conditional on his/her literacy may, therefore, depending on the circumstances, be disproportionate to the objective of integration pursued by the measures adopted under Article 7(2) of Directive 2003/86 and frustrate the effectiveness of that directive."*[54]

Accordingly with the established criteria of the Advocate General, the CJEU considers that such a

[53] Case C-138/13 Naime Dogan v Bundesrepublik Deutschland, ECLI:EU:C:2014:2066

[54] Opinion of Advocate General Mengozzi, delivered on 30 April 2014, Case C-138/13, *Naime Dogan versus Federal Republic of Germany*

regulation inhibits family reunification, as it hardens the conditions of admission into the territory of the Member State concerned. That restriction must be considered ineffective, unless it could be justified by an overriding reason of general interest, favors the legitimate objective pursued and does not go beyond what is necessary to achieve it. In this sense, the German law goes beyond what is necessary to attain the intended objective, given that the lack of proof of the acquisition of sufficient linguistic knowledge automatically leads to the denial of the request for family reunification, without considering the specific circumstances of each case.

## 7. National law requiring the sponsor and his/her spouse to have reached the age of 21 by the date on which the application for family reunification is lodged (Article 4(5) Directive)

### 7.1 Case C-338/13, *Marjan Noorzia* (2014)

Article 4(5) of the Directive allows Member States, in order to ensure better integration and to prevent forced marriages, to require the sponsor and his/her spouse to be of a minimum age, that in any way can exceed 21 years old, before the spouse is able to join him/her.
The minimum age fixed by the Member States by virtue of Article 4(5) of the Directive corresponds with the age at which, according to the Member State concerned, a person is presumed to have acquired sufficient maturity not only to refuse to enter into a forced marriage but also to choose voluntarily to move to a different country with his or her spouse, in order to lead a family life with him or her there and to become integrated. It is, therefore, a measure that can be adopted by Member States to ensure a greater degree of integration of applicants for residence permits, as well as to avoid forced marriages.

In Case Marjan Noorzia[55], the Court considers that *"by not specifying whether national authorities*

[55] Case C-338/13, *Marjan Noorzia v Bundesministerin für Inneres*, (2014), ECLI:EU:C:2014:2092, request for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria). Marjan Noorzia, born on 1 January 1989, was an Afghan national who, on 3 September 2010, applied for a residence permit for the purpose of family reunification with her spouse, born on 1 January 1990, who was also an Afghan national and who resides in Austria. By decision dated 9 March 2011, the Bundesministerin (Austria) rejected this application on the ground that, even though Mrs Noorzia's spouse had reached the age of 21 on 1 January 2011, he had not yet reached that age by the date when the application was lodged with the Austrian Embassy in Islamabad (Pakistan) and that, consequently, a specific condition for reunification was not satisfied.

*must, in order to determine whether the minimum age condition is satisfied, consider the matter by reference to the date when the application seeking family reunification is lodged or the date when the application is ruled upon, the EU legislature intended to leave to the Member States a margin of discretion, subject to the requirement not to impair the effectiveness of EU law"* [56].

In this regard, the Court rules:

> *"Article 4(5) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as meaning that that provision does not preclude a rule of national law requiring that spouses and registered partners must have reached the age of 21 by the date when the application seeking to be considered family members entitled to reunification is lodged."*

This minimum age is supposed to provide sufficient maturity not only to refuse to enter into a forced marriage, but also to choose voluntarily to move to a different country with his/her spouse and lead with her/him a family life.

[56] Consideration of the question referred (14), JUDGMENT OF THE COURT (Second Chamber), 17 July 2014