

Recent Developments in EU Immigration Law - Family Reunification Directive: Achievement or Failure of the EU Immigration Policy?

Nataliya Oliynik

Nataliya Oliynik is Master of International Law, Institute for International Relation, Kiev, Ukraine; LLM in Human Rights, Central European University, Budapest, Hungary.

Introduction

Immigration and regulation of the legal status of third country nationals in the European Union was given particular emphasis at the Tampere Council in 1999. During 2003-2004, these issues gained increased attention from the EU law-making institutions in the light of the May 2004 deadline set in the Treaty of Amsterdam for creating an “area of freedom, security and justice.”[1] In 2003, as a result of the Union institutions and member states’ political and legislative zeal to achieve the Tampere goals, a significant and long-awaited EU document in the sphere of immigration finally saw the light of day, the *Directive on Family Reunification of Third-Country Nationals*.

According to its Preamble, the aim is to safeguard and protect the fundamental right to family life at the Union level. In addition, the Directive is aimed at the harmonisation of national legislation on the conditions for admission and residence of third-country nationals. This article will analyse the Directive, comparing it to the 1999 Commission Proposal for the Directive for Family Reunification and try to assess whether this document has reached the aims set and whether it is an achievement or a failure of EU immigration policy.

Background

The European Union’s work in the sphere of immigration in general is characterised by two trends. The first is the *formal willingness* of member states to shift immigration issues to the Union level with the view towards their better management. Ambitious Tampere goals, together with powers given to the EU institutions in the sphere of immigration by the Treaty of Amsterdam and the shift of immigration issues to the first supranational pillar in the Treaty offer proof of this shift.[2] The second trend is the *actual reluctance* of most member states to cede too much power in the most sensitive immigration policy areas, which remain the core of national sovereignty. Thus, the fact that immigration is placed under the supranational pillar in the Treaty of Amsterdam becomes much less significant when the unanimous decision-making rule is applied, and member states often refuse to compromise and defend their own interests instead of working towards the Tampere goals.

As for the institutional context, in the five years since Tampere the European Parliament has been restricted in its role as a co-legislator in this sphere, which did not add transparency to the process.[3] In particular case of the Directive considered, when the political decision was reached by the Council the Parliament was not even consulted, in violation of Article 67.[4] Such a distribution of powers gave the last word to the Council, that is, to the member states, where the unanimity rule of Article 67 of the Treaty of Amsterdam complicated the decision-making process and led to bargaining and lowered standards.

Nevertheless, despite all legislative and institutional constraints, in September 2003 the Council of Ministers adopted the Directive on the right of family reunification.[5] The text of the Directive was negotiated for several years, since 1999 when the European Commission first submitted its proposal.[6] Let us look at the results of this work.

Extension of Waiting Periods

Analysis of the provisions of the Directive and of the Proposal indicates that the Directive practically introduces no progressive provisions compared to the 1999 Proposal. Instead, it toughens many of them. It should be noted as well that in many instances the Directive refers to “national law” (Articles 7(2), 15(4)) and allows “derogations” (Articles 4(1), 4(6), 8), which demonstrates the inability of member states to set a common standard on some issues at all, and which leads to significantly weaker harmonisation in the entire sphere.

One can conditionally divide the limitations set out in adopted Directive to three main groups. The first group concerns extension of waiting periods, that is, the length of time that a sponsor, i.e. a person with whom family members are reuniting, must have been lawfully staying within the territory of relevant member state (Articles 8, 13 and 15 of the Directive). The initial proposed period was one year. However, Article 8 sets the waiting period for a sponsor at a maximum of two years. Moreover, the Directive allows a *derogation* under which member states that

had family reunification legislation in force on the date of the Directive's adoption may provide for a waiting period of up to three years (!) between submission of the application for family reunification and the issuance of a residence permit to the family members. Such a provision casts a shadow of doubt on the member states' intention to protect the right to family life for third-country nationals.

Further, Article 13 grants an initial residence permit to family members for a period of not less than one year; the initial Proposal by contrast provided for the period **equal** to that of the sponsor. Once the waiting period (from one to two years) expired, a sponsor would receive a residence permit for more than one year (as a renewal in many cases, which is granted for more than one year). A family member should in many instances also obtain a longer residence permit, if not for this provision.

Article 15 enables family members to obtain *independent* residence status after *five* years of residence in the territory of a member state, provided the relations lasted for that time. Meanwhile, the Proposal required *four* years of residence for acquiring an autonomous status (Article 13).

Possibilities for Discrimination

The second group consists of provisions that may become a ground for discrimination. Article 4(3) and 4(5) and Article 7 (2) may be regarded as posing such a threat. According to Article 5 of the Proposal, the state *shall* authorise the entry and residence of unmarried couples if the legislation of the state concerned treats the situation of unmarried couples as corresponding to that of married couples. The Directive, with its "*may*" wording in Article 4(3), creates a possibility for discrimination when it does not in clear terms oblige those member states that recognise unmarried partnerships of their nationals to grant the right to family reunification to unmarried third-country nationals. Not a word in the Directive is said about same-sex partners, even though in its Preamble the Directive undertakes to observe the principles recognised in the Charter of Fundamental Rights of the European Union, which in Article 21 prohibits discrimination on the grounds of sexual orientation.

Article 4(5) fixes a minimum age for partners who wish to reunite. This age is set by the member states and may be as high as 21. This provision was not in the Proposal, and no member state has a provision that prohibits their own nationals to marry until they are 21. The reason for such a limitation given in the article, to ensure better integration and to prevent forced marriages, seems rather far-fetched and not sufficient to limit the right to family reunification. Article 7(2) is also a new provision, first provided for in the Directive. It enables member states to require third-country nationals to comply with integration measures set by national law. Such formulation of an article is rather loose and allows broad interpretation and imposition of discriminatory tests or tests breaching the rights of family members.

Children's Rights

The third group contains provisions that provoked most criticism. They concern derogations in Article 4(1) and 4(6), which limit the age of children eligible for family reunification and impose additional requirements for reunification. Article 4(1) provides for a possibility for member states to "derogate" from the right to family reunification of minor children above the age of 12 by requesting "integration tests" and imposing other requirements. Article 4(6) allows another derogation according to which member states may request that the applications concerning family reunification of minor children must be submitted before the child reaches age 15. Otherwise, the state shall authorise the entry and residence of such children on grounds other than family reunification. "Derogations" by member states concerning the age of a child are allowed only if such provisions existed in national legislation before the Directive came into effect. In fact, only Germany, which had a provision subjecting children over 12 to special conditions in terms of family reunification, and Austria (children over 15) are allowed to use these clauses. Therefore this derogation may not appear to have an effect other than in rare occasions, but still it remains a prominent example member states' abilities to compromise at the expense of human rights, particularly the rights of the child.

Leading European human rights NGOs have criticised these derogations and some other provisions as breaching the International Convention on the Rights of the Child (CRC)[6] and the European Convention on Human Rights (ECHR).[7] A European NGO Platform[8] has also expressed its negative position concerning long waiting periods (up to three years), which member states can invoke under Article 8.

At the meeting of the Citizens' Rights Committee of the European Parliament (LIBE) on 21 October 2003, the majority of the Committee members spoke out in favour of initiating proceedings before the European Court of Justice to annul the Directive on the grounds that some of its provisions may constitute a breach of the right to respect for family life.[9] On 16 December 2003, the European Parliament initiated an action on the Directive at the

Court of Justice under Article 230 of the Amsterdam Treaty, for the failure of the Council to consult it when taking a decision on the Directive.[10] At the same time, the Parliament supported the argument that at least one of the clauses did not comply with international human rights law (the requirement that children of over 12 years should take a test before being able to join their parents in Europe).[11]

Conclusions

Analysis of the 2003 Council Directive on the Right to Family Reunification shows several main trends in the member states' approach to family reunification in particular, and in this light, to the EU regulation of immigration in general.

First of all, the Directive shows lowering of common standards in the sphere of family reunification comparing to the standards proposed by the Commission. It hints at an unwillingness of member states to accept family members who are immigrants of no direct benefit for the states, and toughening of the restrictive measures for their entry even though this entails limitations of their fundamental rights.

Secondly, the Directive shows how decisions in the spheres that remain important element of national sovereignty may be taken at the Community level: through bargaining and concessions. The Directive is an obvious example of reaching the lowest common denominator rather than a decent standard of human rights protection. In its present formulation it may lead to a general decline in family reunification standards throughout the Union. Hardly any member state will apply more generous provisions, out of fears that more immigrants will choose to enter this state and not one with more harsh conditions.

Finally, though the very fact of adoption of the Directive is very important in terms of progress towards building a common EU immigration policy, achieving a satisfactory result from the point of view of respect for the rights of immigrants has proven difficult. Some provisions of the Directive indicate that member states must have been rushed to meet the Tampere deadline rather than mindful of the need for real protection of the right to family reunification.

Therefore, answering the initial question of whether the Directive meets the goals set before it, we may say that it did not fully achieve its aims. It neither duly protects the human rights of third-country nationals, nor creates a decent standard for harmonising member states' national provisions, given the number of derogations and poorly worded provisions. It may not be the final stage in forming the common European Family Reunification policy, but only the initial part of it.

Footnotes

[1] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, *Official Journal* C 340, 10 November 1997, Art. 1.

[2] Treaty of Amsterdam, Title IV "Visas, Asylum, Immigration and Other policies Related to Free Movement of Persons", Art. 61-64.

[3] Under Art. 67 of the Treaty of Amsterdam, the European Parliament should only be *consulted* before the Council adopts a decision in the sphere of immigration.

[4] *Appeal to annul the directive concerning family reunification*, The text prepared jointly by a group of legal experts of the European Coordination for Foreigners' Right to Family Life (Brussels) and the Group for Information and Support of Immigrant Workers (GISTI), Paris, available at:

<http://www.gisti.org/doc/actions/2003/regroupement/arg-eng.pdf>.

[5] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification *Official Journal* L 251, 03/10/2003 P. 0012 – 0018. Directive must be transposed into national legislation of member states no later than by 3 October 2005.

[6] Among these NGOs were six Christian organisations, namely Caritas Europe, the Commission of the Bishops' Conferences of the EC, the Churches' Commission for Migrants in Europe, Jesuit Refugee Service-Europe, the International Catholic Migration Commission and the Quaker Council for European Affairs, *Summary of Proposals*, European Council on Refugees and Exiles, 28 March 2003.

[7] Opinion expressed by the "Save the Children" organisation, *Summary of Proposals*, European Council on Refugees and Exiles, 28 March 2003.

[8] The European NGO Platform is a group of human rights advocacy organizations based in Brussels. It unites such pan-European and international organizations as European Council on Refugees and Exiles, Save the Children, Amnesty International, the Churches' Commission for Migrants in Europe and others.

[9] M. T. Gil-Bazo, ed., *ECRAN Weekly Update*, Weekly News Bulletin of European Council on Refugees and Exiles, 22 October 2003.

[10] Joanna Apap and Sergio Carrera, *Family Reunification – A case for annulment before the ECJ?* January, 2004, Online here: http://www.ceps.be/Article.php?article_id=256&.

[11] Gil-Bazo, *ECRAN Weekly Update*, 1 January 2004.