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BARCELONA

The Immigrants and Refugees' Right to Family Life: Legal Development and Implementation from a Comparative Perspective

Georgios Milios

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The Immigrants and Refugees' Right to Family Life: Legal
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ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples’ Rights
ACHR	American Convention on Human Rights
AG	Advocate General
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
EC	European Community
ECFR	European Union Charter of Fundamental Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
ESC	European Social Charter
ECSR	European Committee of Social Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IPREM	Indicador Público de Renta de Efectos Múltiples
LGBT	Lesbian, Gay, Bisexual, Transgender
Luxembourg Court	Court of Justice of the European Union
MIPEX	Migrant Integration Policy Index
RD	Real Decreto (Royal Decree)
Strasbourg Court	European Court of Human Rights
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee

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ABSTRACTS

Abstract

The present thesis deals with the immigrants, refugees and asylum seekers’ right to family life. It approaches the right to family life as a right that is wider than family reunification and includes cases of expulsion of foreigners who have family ties in the host country, as well as regularisation issues. The present dissertation examines the foreigners’ right to family life from an international human rights law perspective, from an EU law perspective but also includes a comparative study of the legislation of three EU Member States, namely Spain, Greece and Germany. The main research question concerns the impact that the adoption of the Lisbon Treaty and the enhancement of fundamental right in Europe should have on family life related legislation at EU and national level. Not least, the present study aims at assessing the effect and effectiveness of the EU Directives approximately ten years after the deadline for their implementation and focuses on the case law of International, EU and national courts. It concludes that the adoption of the Lisbon Treaty and the fact that the ECHR has gained the same legal values as the Treaty directly affects the Directives which relate to family life and, consequently, the domestic legislations of the Member States which participate in the present study. That being said, the dissertation reaches the conclusion that the applicable family reunification regimes follow a strictly ‘formal’ model which is not compatible with the new fundamental rights scene, as it is formed at EU level. It proposes a new reunification model which will be more ‘substantial’ and will be based on an individual assessment of each application both as regards the family members who may qualify as such, and with respect to the requirements that are imposed for the exercise of the right to family reunification.

Resumen

La presente tesis trata sobre el derecho a la vida familiar de los inmigrantes, refugiados y solicitantes de asilo. El derecho a la vida familiar se aborda como un derecho más amplio que la reagrupación familiar e incluye casos de expulsión de extranjeros que tienen vínculos familiares en el país de acogida, así como casos de regularización. La tesis analiza el derecho a la vida familiar de los extranjeros desde la perspectiva del derecho internacional de derechos humanos y la legislación comunitaria, pero también incluye un estudio comparativo de la legislación nacional de tres Estados miembros de la UE, España, Grecia y Alemania. La principal pregunta de investigación de la tesis se refiere al impacto que la adopción del Tratado de Lisboa y la ampliación de los derechos fundamentales en Europa deben tener en la legislación relacionada con la vida familiar a nivel comunitario y nacional. Además, la tesis tiene como objetivo evaluar el efecto y la eficacia de las directivas de la UE aproximadamente diez años después de la fecha límite para su transposición y se centra en la jurisprudencia de los tribunales internacionales, comunitarios y nacionales. La presente tesis concluye que la adopción del Tratado de Lisboa y el hecho de que la Carta Europea de los Derechos Fundamentales haya ganado el mismo valor jurídico que el Tratado afecta directamente a las directivas que se refieren a la vida familiar y, en consecuencia, a las legislaciones nacionales de los Estados miembros que participan en el estudio. Dicho esto, la

tesis llega a la conclusión de que los regímenes aplicables de reagrupación familiar siguen un modelo estrictamente "formal" que no es compatible con la nueva escena de los derechos fundamentales a nivel comunitario. Se propone un nuevo modelo de reagrupación familiar que será más "sustancial" y se basará en una evaluación individual de cada solicitud, tanto respecto a los miembros de la familia que pueden calificar como tal, como a los requisitos que se imponen para el ejercicio del derecho a reagrupación familiar.

Resum

La present tesi tracta sobre el dret a la vida familiar dels immigrants, refugiats i sol·licitants d'asil. El dret a la vida familiar s'aborda com un dret més ampli que el reagrupament familiar i inclou casos d'expulsió d'estrangers que tenen vincles familiars al país d'acollida, així com casos de regularització. La tesi analitza el dret a la vida familiar dels estrangers des de la perspectiva del dret internacional de drets humans, i de la perspectiva de la legislació comunitària, però també inclou un estudi comparatiu de la legislació nacional de tres estats membres de la UE, Espanya, Grècia i Alemanya. La principal pregunta de recerca de la tesi es refereix a l'impacte que l'adopció del Tractat de Lisboa i l'ampliació dels drets fonamentals a Europa han de tenir en la legislació relacionada amb la vida familiar a nivell comunitari i nacional. A més a més, la tesi té com a objectiu avaluar l'efecte i l'eficàcia de les directives de la UE aproximadament deu anys després de la data límit per a la seva transposició i es centra en la jurisprudència dels tribunals internacionals, comunitaris i nacionals. La present tesi conclou que l'adopció del Tractat de Lisboa i el fet que la Carta Europea dels Drets Fonamentals hagi guanyat el mateix valor jurídic que el Tractat afecta directament a les directives que es refereixen a la vida familiar i, en conseqüència, a les legislacions nacionals dels Estats membres que participen a l'estudi. Dit això, la tesi arriba a la conclusió que els règims aplicables de reagrupament familiar segueixen un model estrictament "formal" que no és compatible amb la nova escena dels drets fonamentals a nivell comunitari. Es proposa un nou model de reagrupació familiar que serà més "substancial" i es basarà en una avaluació individual de cada sol·licitud, tant pel que fa als membres de la família que poden qualificar com a tal, com pel que fa als requisits que s'imposen per a l'exercici del dret al reagrupament familiar.

INTRODUCTION

This thesis will deal with the immigrants, asylum seekers and refugees’ right to family life, a right which is for various reasons particularly important in the field of immigration, asylum and refugee law. On one side, it constitutes the ECHR right that attracts the greater number of immigration cases. Not least, in many European countries the residence permits on family grounds have recently gained importance primarily due to the decline in the issue of permits for employment reasons. On the other side, the right to family life is particularly important for the foreigners. Indeed, it is not under dispute that family is significant for the immigrant and refugee’s integration in the host Member State and has wider implications on the entire way that the foreigner behaves in the host country. Immigrants and refugees often feel lonely and despair in the host state without their families whereas asylum seekers and refugees in particular may in addition feel anxious about the physical integrity of the family members who have been left behind in difficult situations.

Even though we consider the right to family life to be in any event important for the foreigner, the need for a new study in this field derives from several circumstances which have recently changed both at international and national level. Some of them triggered our research, whereas others emerged in the course of it. First, the adoption of the Lisbon Treaty in 2009 and the changes that it brought to the field of fundamental rights creates the circumstances for further research in the field of the right to family life. As the right to family life constitutes a fundamental right, the need for research on the possible impacts of the adoption of the Lisbon Treaty on this area became imperative. Second, the financial crisis that Europe is facing in combination with the rise of the xenophobic and ‘anti-migrant’ parties in the EU has put pressure on the EU and national parliaments to adopt more restrictive legislations in the field of family migration. In short, the right to family life is trying to balance between the protection of human rights and the host countries’ concern to control every time more migration. To all the above it should be added that Europe is currently facing an important challenge due to the huge humanitarian crisis in Syria which has forced thousands of people to seek asylum, among other places, in Europe.

In this ambiguous environment, we are convinced that further research on the right to family life of the immigrants and refugees appears necessary in order to find out to what extent the Directives and the national legislations on family migration may remain unchanged after the adoption of the Lisbon Treaty and what the most adequate ‘response’ at national and

international level to the above mentioned challenges and evolutions should be. Is the current approach on family migration compatible with ‘post-Lisbon’ fundamental rights? In case of a negative answer, what kind of changes should a different approach entail? The dissertation further aims at examining the effect and effectiveness of the Directives at national level approximately 10 years after the deadline for their implementation and making suggestions for their improvement. The comparative perspective to the issue which derives from the examination of the legislation of three EU Member States, namely Spain, Greece and Germany, will highlight the deficiencies and the strong points both of the domestic laws but of the relevant EU legislation as well. Lastly, this dissertation will study the numerous judgments of the ECtHR, the CJEU and national courts that have interpreted various concepts related to family migration.

In this study the concept of the right to family life is not limited, nor is it considered identical, to the right to family reunification. Quite on the contrary, we argue that the right to family life is in principle a broader concept than the right to family reunification. This being said, the dissertation will follow three main lines of research which constitute three different aspects of the right to family life. First, we will deal with the entrance of family members which is performed through the procedure of family reunification. Second, we will consider the possibility of migrants to regularise their stay relying on family relations. Third, we will examine expulsion cases of migrants who have family ties in the host country. As regards the first of the three points, the research will focus on international, EU and national legislation. The second point constitutes exclusive competence of the Member States and therefore the research will focus on the national legislation of the three EU Member States which are included in the study. Lastly, as far as the third point is concerned, the research will focus mostly on international human rights law but also to the EU and national legislation.

The fact that immigration, asylum and refugee issues constitute shared competence between the EU and its Member States, as well as the fact that international human rights law plays an important role in the field give the chance for a multileveled study which will begin with the analysis of the right to family life as a human and fundamental right protected at international and EU level and will continue with the examination of the actual instruments that give effect to this right. These instruments are the EU Directives and the domestic legislations of Spain, Greece and Germany. Especially as regards the third-country nationals’ right to family reunification, due to the complexity and the pluralism which has been detected in the national

legislations, we have considered it beneficial to enrich the study with information regarding the legislation of other EU Member States.

As regards the exact structure of the thesis, it should be noted that this will be divided into three main Parts which contain several Chapters. The first Part constitutes an introduction to the main legal and sociological concepts that are dealt with in this thesis. The second Part focuses on the right to family life in international human rights law. The first Chapter of the second Part will deal with the right to family life under international conventions of human rights, whereas the second Chapter of the second Part will focus on Article 8 of the ECHR and the corresponding case law of the ECtHR. The third and more extensive Part of the thesis will analyse the right to family life under EU law and domestic legislation of the three EU Member States. First and foremost, this Part will look into the relevant Directives of the EU on the field of migration and in particular those relating to the right to family life. Not least, this Part will analyse both the implementation of these Directives in domestic legislation but also parts of the domestic legislation that constitute exclusive competence of the Member States.

As regards the methodology, the main method of material collection has been the archive and library research, but also the internet research through electronic data and scientific journals. Initially, I conducted the research by legal systems and after the entire research had been done, I organised the information thematically in order to facilitate the comparative perspective that this study has adopted. In addition, throughout the research period, I have participated in the two law modules of the Master in Migration Studies (Autonomous University of Barcelona and University of Barcelona) and the Summer School on Migration organised by the Migration Policy Centre (European University Institute in Florence). The research of the domestic laws of Greece has been benefitted by a study visit that I made in Greece (Aristotle University of Thessaloniki). Throughout the entire research period, I have worked in close cooperation with the Institute of Public Law (IDP) of the University of Barcelona. I would like to express my sincere gratitude to the professors and researchers of the above mentioned institutions for their advice and for their help.

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PART I: Introduction to the legal and sociological concepts in the field of family life

At the first part of the present dissertation, we consider it essential to quote the legal and sociological definitions of the main concepts that are dealt with in this study. As regards the legal definitions, these have been in principle extracted from the EU Directives, without prejudice to the fact that some of these concepts may have a different definition under domestic or international law:

“‘Union citizen’ means any person having the nationality of a Member State”¹

“‘third-country national’ means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty”²

“‘family reunification’ means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident’s entry”³

“‘sponsor’ means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her”⁴

“‘refugee’ means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply”⁵

¹ Article 2 (1) 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. Hereinafter, ‘the Citizenship Directive’.

² Article 2 (a) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Hereinafter, ‘the Family Reunification Directive’.

³ Article 2 (d) of the Family Reunification Directive

⁴ Article 2 (c) of the Family Reunification Directive

⁵ Article 2 (d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. Hereinafter, ‘the Qualification Directive’.

‘nuclear family’ means the spouse and the minor children’⁶

‘residence permit’ means any authorisation issued by the authorities of a Member State allowing a third country national to stay legally in its territory, in accordance with the provisions of Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third country national’⁷

‘illegal stay’ means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State’⁸

Given that the family reunification regimes constitute an important part of this thesis, it should be clarified that family reunification is conceived in a broad sense, including situations that the family relation preexisted the entry of the third-country national into the host country (‘family reunification’) as well as situations where the family relationship arose after the third-country national had regularly settled in the host state (‘family formation’). This interpretation is in line with the definition adopted by the Family Reunification Directive which is quoted above. As regards the corresponding regime for EU citizens, we will rather use the term ‘family members who join or accompany’ the EU citizen in the host Member State.

Furthermore, in the present dissertation the terms ‘immigrant’, ‘migrant’ and ‘third-country national’ will be used in order to refer to persons of foreign origins who are not citizens of one of the EU Member States and who have migrated for the so-called economic reasons. Not least the terms ‘refugee’, ‘beneficiary of subsidiary protection’ and ‘asylum seeker’ will be used in order to define persons who migrate for the so-called political reasons. ‘EU citizens’ are persons who have the nationality of one of the EU Member States and reside in another EU Member State. Finally, the term ‘aliens’ or ‘foreigners’ will be used to refer to all persons of foreign origins who reside in a particular state, regardless of their nationality or reasons that led to mobility.

As regards the sociological definitions, these in principal concern the concept of family. In that respect, it should be noted that the question of what constitutes family has received

⁶ See recital No. 9 of the Family Reunification Directive according to which ‘[f]amily reunification should apply in any case to members of the nuclear family, that is to say the spouse and the minor children’

⁷ Article 2 (e) of the Family Reunification Directive

⁸ Article 3 (2) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Hereinafter, ‘the Returns Directive’.

different answers over the time⁹. One of the most notable changes with regards to what constitutes family occurred during the industrialisation period. This period marks the transition from an extended family model to a ‘nuclear’ one which was better adaptable to the needs of the industrial society¹⁰. The ‘nuclear model’ has been the predominant model up until the last decades of the 20th century when new family models emerged. Indeed, it is now common knowledge that although the ‘nuclear family’ model continues to exist, new family models are increasingly gaining ground in the European societies. These family models include, although they are not limited to, the relationships that are described right below¹¹. Special reference should be made to the fact that, as B. Adams mentions, the knowledge regarding different family types worldwide is incomplete¹².

The first ‘diverse family model’ concerns relationships outside marriage. These are partners who decide to cohabite freely without having concluded marriage and are divided into registered and unregistered partners. It should be noticed that the transition from marriage to cohabitation occurs largely in Scandinavian societies¹³ but is nowadays rather common in other countries as well. In many cases, the couple chooses to cohabite outside marriage not as refusal of the marriage but pursuing a different and more substantial relationship. In some other cases, couples decide to not get married for economic reasons. The number of couples that have decided to maintain a relationship outside marriage, concluding registered partnerships or freely cohabiting has risen due to the current financial crisis (Table No. 1 and 2). It may also be common among poor people who might see no obvious economic benefits by concluding a marriage¹⁴. Whatever the reason why couples decide every time more to conclude non marital relationships, the fact that family is no longer based solely on marriage is not under dispute. The decrease in the marriages becomes evident if we have a look at the following tables:

⁹ On the change of families over time see, M. Baca Zinn, D. S. Eitzen and B. Wells, *Diversity in Families* (10th edn, Upper Saddle River, Pearson, 2015)

¹⁰ For a historical overview on family studies see, S. Coontz, ‘Historical Perspectives on Family Studies’ (2000) 62(2) *Journal of Marriage and Family* 283-297

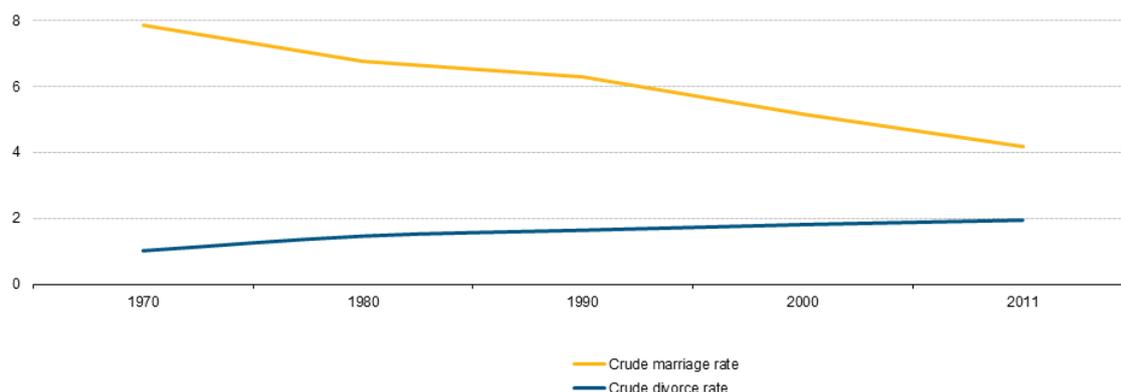
¹¹ For a more extended analysis of the modern family models see D. Chambers, *A Sociology of Family Life* (Cambridge/Malden, Polity Press, 2012)

¹² B. N. Adams, ‘Families and Family Study in International Perspective’ (2004) 66(5) *Journal of Marriage and Family* 1076-1088

¹³ See J. Trost and I. Levin, ‘Scandinavian Families’ in B. N. Adams and J. Trost, *Handbook of World Families* (Thousand Oaks SA, Sage, 2004)

¹⁴ B. N. Adams, ‘Families and Family Study in International Perspective’ (2004) 66(5) *Journal of Marriage and Family* 1076-1088

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(*) Note the change in time interval on the x-axis. Excluding French overseas departments for 1970 to 1990.
Source: Eurostat (online data codes: demo_nind and demo_ndivind)

Table No. 1: Crude marriage and divorce rates, EU-28, 1970–2011 (per 1 000 inhabitants) (source <http://ec.europa.eu/eurostat>)

	1960	1970	1980	1990	2000	2010	2011	2012	2013
EU-28 (*)	-	7.9	6.8	6.3	5.2	4.4	4.2	-	-
Belgium (*)	7.1	7.6	6.7	6.5	4.4	3.9	3.7	3.8	-
Bulgaria	8.8	8.6	7.9	6.9	4.3	3.3	2.9	2.9	3.0
Czech Republic	7.7	9.2	7.6	8.8	5.4	4.5	4.3	4.3	4.1
Denmark	7.8	7.4	5.2	6.1	7.2	5.6	4.9	5.1	4.9
Germany	9.5	7.4	6.3	6.5	5.1	4.7	4.6	4.8	4.6
Estonia	10.0	9.1	8.8	7.5	3.9	3.8	4.1	4.5	4.3
Ireland	5.5	7.0	6.4	5.1	5.0	4.5	4.3	4.5	-
Greece	7.0	7.7	6.5	5.8	4.5	5.1	5.0	4.5	4.7
Spain	7.8	7.3	5.9	5.7	5.4	3.6	3.4	3.5	3.3
France (*)	7.0	7.8	6.2	5.1	5.0	3.9	3.6	3.7	-
Croatia	8.9	8.5	7.2	5.8	4.9	5.0	4.7	4.8	4.5
Italy	7.7	7.3	5.7	5.6	5.0	3.7	3.4	3.5	3.2
Cyprus (*)	-	8.6	7.7	9.7	13.4	7.3	7.3	6.7	6.4
Latvia	11.0	10.2	9.8	8.9	3.9	4.4	5.2	5.5	5.7
Lithuania	10.1	9.5	9.2	9.8	4.8	6.0	6.3	6.9	6.9
Luxembourg (*)	7.1	6.4	5.9	6.1	4.9	3.5	3.3	3.4	3.2
Hungary (*)	8.9	9.3	7.5	6.4	4.7	3.6	3.6	3.6	3.7
Malta	6.0	7.9	8.8	7.1	6.7	6.3	6.2	6.7	6.1
Netherlands	7.7	9.5	6.4	6.5	5.5	4.5	4.3	4.2	3.8
Austria	8.3	7.1	6.2	5.9	4.9	4.5	4.3	4.6	4.3
Poland	8.2	8.6	8.6	6.7	5.5	6.0	5.4	5.4	4.7
Portugal	7.8	9.4	7.4	7.2	6.2	3.8	3.4	3.3	3.1
Romania	10.7	7.2	8.2	8.3	6.1	5.7	5.2	5.4	5.4
Slovenia	8.8	8.3	6.5	4.3	3.6	3.2	3.2	3.4	3.0
Slovakia	7.9	7.9	7.9	7.6	4.8	4.7	4.7	4.8	4.7
Finland	7.4	8.8	6.1	5.0	5.1	5.6	5.3	5.3	4.6
Sweden	6.7	5.4	4.5	4.7	4.5	5.3	5.0	5.3	5.4
United Kingdom	7.5	8.5	7.4	6.6	5.2	4.5	4.5	-	-
Iceland	7.5	7.8	5.7	4.5	6.3	4.9	4.6	-	-
Liechtenstein	5.7	5.9	7.1	5.6	7.2	5.0	4.5	5.0	-
Norway	6.6	7.6	5.4	5.2	5.0	4.8	4.6	4.8	4.7
Switzerland (*)	7.8	7.6	5.7	6.9	5.5	5.5	5.3	5.3	4.9
Montenegro	-	-	-	-	-	5.9	-	5.3	6.2
FYR of Macedonia	8.6	9.0	8.5	8.3	7.0	6.9	7.2	6.8	6.8
Albania	7.8	6.8	8.1	8.9	8.4	-	-	-	8.2
Serbia	-	-	-	-	5.7	4.9	4.9	4.8	5.1
Turkey	-	-	8.2	-	-	8.0	8.0	8.0	7.9
Bosnia and Herzegovina	10.1	9.3	8.5	6.7	5.6	5.1	-	4.8	-
Kosovo (*)	-	-	-	-	-	-	9.3	9.5	-

(*) Excluding French overseas departments for 1970 to 1990.

(*) 2011: break in series.

(*) Excluding French overseas departments for 1960 to 1990.

(*) Up to and including 2002: data refer to total marriages contracted in the country, including marriages between non-residents. From 2003 onwards: data refer to marriages in which at least one spouse was resident in the country. 1980: break in series.

(*) 2012: break in series.

(*) Under United Nations Security Council Resolution 1244/99.

Source: Eurostat (online data code: demo_nind)

Table No. 2: Crude marriage rate, selected years, 1960–2013 (per 1 000 inhabitants) (source <http://ec.europa.eu/eurostat>)

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The above mentioned findings are tightly linked to the fact that every time more children are born outside marriage as becomes evident from the following table:

	1960	1970	1980	1990	2000	2010	2011	2012	2013
EU-28	:	:	:	:	27.3	38.6	39.3	40.0	:
Belgium	2.1	2.8	4.1	11.6	28.0	45.7	50.0	52.3	:
Bulgaria	8.0	8.5	10.9	12.4	38.4	54.1	56.1	57.4	59.1
Czech Republic	4.9	5.4	5.6	8.6	21.8	40.3	41.8	43.4	45.0
Denmark	7.8	11.0	33.2	46.4	44.6	47.3	49.0	50.6	51.5
Germany	7.6	7.2	11.9	15.3	23.4	33.3	33.9	34.5	34.8
Estonia	:	:	:	27.2	54.5	59.1	59.7	58.4	:
Ireland	1.6	2.7	5.9	14.6	31.5	33.8	33.9	35.1	:
Greece	1.2	1.1	1.5	2.2	4.0	7.3	7.4	7.6	7.0
Spain	2.3	1.4	3.9	9.6	17.7	35.5	37.4	39.0	40.9
France	:	:	:	:	43.6	55.0	55.8	56.7	:
Croatia	7.4	5.4	5.1	7.0	9.0	13.3	14.0	15.4	16.1
Italy	2.4	2.2	4.3	6.5	9.7	21.5	23.4	24.5	26.9
Cyprus	:	0.2	0.6	0.7	2.3	15.2	16.9	18.6	:
Latvia	11.9	11.4	12.5	16.9	40.4	44.4	44.6	45.0	44.6
Lithuania	:	3.7	6.3	7.0	22.6	25.7	27.7	28.8	29.5
Luxembourg	3.2	4.0	6.0	12.8	21.9	34.0	34.1	37.1	37.8
Hungary	5.5	5.4	7.1	13.1	29.0	40.8	42.3	44.5	45.6
Malta	0.7	1.5	1.1	1.8	10.6	25.3	23.0	25.7	25.9
Netherlands	1.4	2.1	4.1	11.4	24.9	44.3	45.3	46.6	47.4
Austria	13.0	12.8	17.8	23.6	31.3	40.1	40.4	41.5	:
Poland	:	5.0	4.8	6.2	12.1	20.6	21.2	22.3	23.4
Portugal	9.5	7.3	9.2	14.7	22.2	41.3	42.8	45.6	47.6
Romania	:	:	:	:	25.5	27.7	30.0	31.0	30.5
Slovenia	9.1	8.5	13.1	24.5	37.1	55.7	56.8	57.6	58.0
Slovakia	4.7	6.2	5.7	7.6	18.3	33.0	34.0	35.4	37.0
Finland	4.0	5.8	13.1	25.2	39.2	41.1	40.9	41.5	42.1
Sweden	11.3	18.6	39.7	47.0	55.3	54.2	54.3	54.5	54.4
United Kingdom	5.2	8.0	11.5	27.9	39.5	46.9	47.3	47.6	:
Iceland	25.3	29.9	39.7	55.2	65.2	64.3	65.0	66.9	:
Liechtenstein	3.7	4.5	5.3	6.9	15.7	21.3	23.5	19.9	15.9
Norway	3.7	6.9	14.5	38.6	49.6	54.8	55.0	54.9	55.2
Switzerland	3.8	3.8	4.7	6.1	10.7	18.6	19.3	20.2	21.1
FYR of Macedonia	5.1	6.2	6.1	7.1	9.8	12.2	11.6	11.6	11.3
Serbia	:	:	:	:	20.7	24.0	23.9	24.7	25.1
Turkey	:	:	:	:	:	2.6	2.7	2.6	2.7
Bosnia and Herzegovina	:	:	:	:	:	10.8	:	10.7	:
Kosovo (*)	:	:	:	:	:	40.3	46.7	46.1	:

(*) Under United Nations Security Council Resolution 1244/99.
Source: Eurostat (online data code: demo_find)

Table No. 3: Live births outside marriage, selected years, 1960–2013 (share of total live births, %)
(source <http://ec.europa.eu/eurostat>)

Next, cohabitation does not appear to be an essential element for the finding that a relationship constitutes ‘family’ as it becomes apparent from another new family model which is the so-called ‘living apart but together’ (LAT). In this case, the married or unmarried couple has an intimate relationship but has decided for economic, social or other reasons to live in different homes. The amount of couples who decide to live in separate homes might be rather small but is definitely increasing¹⁵. Pursuant to Levin, there are three conditions that the definition of this family model entails. The couple should agree that they are a couple, they should be regarded as such by others and they should live in separate homes¹⁶. It should be noted that partners may be of the same or different sex. It should also be underlined that the

¹⁵ See B. N. Adams, ‘Families and Family Study in International Perspective’ (2004) 66(5) *Journal of Marriage and Family* 1076-1088

¹⁶ I. Levin, ‘Living Apart Together: A New Family Form’ (2004) 52(2) *Current Sociology* 223-240

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situation described in this paragraph should be distinguished from the separated or divorced or pre divorced couples¹⁷.

It should be noted that while marriages decrease, divorces increase at least in the European continent. This being said, new family models have emerged due to the increase of divorces which becomes more noticeable after the 1970s. These are the so-called ‘post-divorce’ families which constitute one of the most commonplace ‘modern family models’. In that respect, there are different combinations which may result in varying family situations. Some of them concern spouses, who have children from previous marriages, or one of them has and the other no, whereas possible common from the new marriage children make the family relationships even more diverse. ‘Post-divorce families’ should be distinguished from ‘single parent families’ which constitute another diverse family model. The latter term refers to families with one parent and at least one child, situation which may arise either following a divorce or by choice. This family model may also include families which are forced to live separately for work reasons or migration. The increase in divorces, at least at EU level, is best summarised in the table that follows.

	1960	1970	1980	1990	2000	2010	2011	2012	2013
EU-28 (*)	0.9	0.9	1.5	1.6	1.8	2.0	2.0	2.0	2.0
Belgium	0.5	0.7	1.5	2.0	2.6	2.7	2.5	2.3	..
Bulgaria	..	1.2	1.5	1.3	1.3	1.5	1.4	1.6	1.5
Czech Republic	1.4	2.2	2.6	3.1	2.9	2.9	2.7	2.5	2.7
Denmark	1.5	1.9	2.7	2.7	2.7	2.6	2.6	2.8	3.4
Germany	1.0	1.3	1.8	1.9	2.4	2.3	2.3	2.2	2.1
Estonia	2.1	3.2	4.1	3.7	3.0	2.2	2.3	2.4	2.5
Ireland	..	..	..	..	0.7	0.7	0.6	0.6	..
Greece	0.3	0.4	0.7	0.6	1.0	1.2	1.1	1.3	..
Spain	..	..	..	0.6	0.9	2.2	2.2	2.2	2.0
France (*)	0.7	0.8	1.5	1.9	1.9	2.1	2.0	..	..
Croatia	1.2	1.2	1.2	1.1	1.0	1.2	1.3	1.3	1.4
Italy	..	..	0.2	0.5	0.7	0.9	0.9	0.9	..
Cyprus	..	0.2	0.3	0.6	1.7	2.3	2.3	2.4	..
Latvia	2.4	4.6	5.0	4.0	2.6	2.4	4.0	3.6	3.5
Lithuania	0.9	2.2	3.2	3.4	3.1	3.2	3.4	3.5	3.4
Luxembourg	0.5	0.6	1.6	2.0	2.4	2.1	2.3	2.0	2.1
Hungary (*)	1.7	2.2	2.6	2.4	2.3	2.4	2.3	2.2	2.0
Malta	..	..	..	..	..	..	0.1	1.1	0.8
Netherlands	0.5	0.8	1.8	1.9	2.2	2.0	2.0	2.1	2.0
Austria	1.1	1.4	1.8	2.1	2.4	2.1	2.1	2.0	..
Poland (*)	0.5	1.1	1.1	1.1	1.1	1.6	1.7	1.7	1.7
Portugal	0.1	0.1	0.6	0.9	1.9	2.6	2.5	2.4	2.2
Romania	2.0	0.4	1.5	1.4	1.4	1.6	1.8	1.6	1.4
Slovenia	1.0	1.1	1.2	0.9	1.1	1.2	1.1	1.2	1.1
Slovakia	0.6	0.8	1.3	1.7	1.7	2.2	2.1	2.0	2.0
Finland	0.8	1.3	2.0	2.6	2.7	2.5	2.5	2.4	2.5
Sweden	1.2	1.6	2.4	2.3	2.4	2.5	2.5	2.5	2.8
United Kingdom	..	1.0	2.6	2.7	2.6	2.1	2.1	2.0	..
Iceland	0.7	1.2	1.9	1.9	1.9	1.8	1.6	..	..
Liechtenstein	..	..	..	..	3.9	2.4	2.5	2.4	..
Norway	0.7	0.9	1.6	2.4	2.2	2.1	2.1	2.0	2.0
Switzerland (*)	0.9	1.0	1.7	2.0	1.5	2.8	2.2	2.2	2.1
Montenegro	..	..	..	..	..	..	0.8	0.8	0.8
FYR of Macedonia	0.7	0.3	0.5	0.4	0.7	0.8	0.9	0.9	1.0
Albania	0.5	0.8	0.8	0.8	0.7	..	..	..	..
Serbia (*)	..	..	..	..	..	0.9	1.1	1.0	1.1
Turkey	..	..	..	..	..	1.6	1.6	1.6	1.6
Bosnia and Herzegovina	..	..	..	..	..	0.4	..	0.6	..
Kosovo (*)	..	..	..	..	..	..	0.8	0.7	..

(*) Divorce was not possible by law in Italy until 1970, in Spain until 1981, in Ireland until 1995 and in Malta until 2011.

(*) 1970 to 1990: excluding French overseas departments.

(*) 1960 to 1990: excluding French overseas departments.

(*) 2012: break in series.

(*) 2011: break in series.

(*) Under United Nations Security Council Resolution 1244/99.

Source: Eurostat (online data code: demo_ndivind)

Table No. 4: Crude divorce rate, selected years, 1960–2013 (per 1 000 inhabitants) (source <http://ec.europa.eu/eurostat>)

¹⁷ For more information about ‘LAT’ families see also, I. Levin and J. Trost, ‘Living Apart Together’ (1999) 3 *Community, Work and Family* 279-294

Next, another diverse family model concerns the ‘LGBT’ families. These include in principle same-sex marriages, partnerships or relationships or analogous situations where at least one of the two partners is transgender¹⁸. It should be noted that ‘LGBT’ families may include children as well through adoption or through other means. Not least, the list with the most common diverse family models includes the so-called ‘families of choice’, which refer to ‘commitment of chosen, rather than fixed, relationships and ties of intimacy, care and support’¹⁹.

The above mentioned family situations constitute only some of the most striking examples that prove that in addition to the ‘nuclear family’ model there exists a variety of different other relationships that constitute ‘family’ and which for different reasons become more and more common in European societies. Nonetheless, the diversity in the conception of family is better understood if we look at the different family types that exist around the world with a special focus on the countries of origin of the major part of migration in the European continent. In that respect, it should be noticed that there are several relationships that are considered to be ‘family’ around the world. In general terms, this diversity does not always derive from choice as often cultural factors play an important role in the people’s decisions regarding family. In the present section we will briefly refer to the two situations that we consider more relevant in the field of migration.

To start with, in several countries of origin of migration, polygamy is a situation which is both permitted and commonly practiced. The term ‘polygamy’ includes ‘polyandry’, the situation in which a woman is married to various husbands and ‘polygyny’, the situation under which a man is married to various women²⁰. Nevertheless, the term ‘polygamy’ is often used as identical to ‘polygyny’ due to the fact that this type of family is a lot more common around the world in comparison to ‘polyandry’ which constitutes a very rare phenomenon. Polygamy is in principle permitted in Hinduism and Islam. Although in most Muslim countries it does not constitute the norm, there are states that not only allow but also encourage polygamy. It should be noted that with the rise of the religious fundamentalism this practice becomes more

¹⁸ For the issue of ‘LGBT’ families see indicatively, M. Swainson and F. Tasker, ‘Genograms Redrawn: Lesbian Couples Define Their Families’ (2005) 1(2) *Journal of GLBT Family Studies* 3-27 and K. Bergman, R. J. Rubio, R. J. Green and H. Padron, ‘Gay Men Who Become Fathers via Surrogacy: The Transition to Parenthood’ (2010) 6(2) *Journal of GLBT Family Studies* 111-141

¹⁹ See J. R. McCarthy and R. Edwards, *Key Concepts in Family Studies* (London, SAGE publications Ltd, 2011) p. 56

²⁰ ‘Polygyny’ and ‘polyandry’ present significant difference. See in that respect M. Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (New York/Oxford, Oxford International Publishers Ltd, 2008)

and more common among Muslim states. It should be noted that for the purposes of the present section of the thesis, polygamy is merely picked as an example that demonstrates that the definition of family may differ considerably worldwide. This being said, we will not elaborate on polygamy related issues, such as public policy issues and/or issues of conflict of laws²¹ that may arise in cases of family reunification.

Next, in several countries around the world, family is formed through ‘arranged marriages’. This practice is mostly common in Asian countries. The creation of these families has economic, political and social causes. In these marriages, both spouses consent to the marriage but another person, more often the couple’s parents, chooses the partner. These marriages should be distinguished from the so-called ‘forced marriages’ or marriages that relate to human trafficking²². In any event, it should not escape our attention that even within the same country, marriage practices may vary in different regions and/or religious, as well as the fact that recent studies have shown that although ‘arranged marriages’ still constitute commonplace in several Asian countries, recently more young people take a decisive role in choosing their partner²³. It should be highlighted that in case of ‘arranged marriages’, we rather speak about diversity in the way the family is formed and not in the family model as such, as regardless of the fact that the spouses are chosen by a third person, family is eventually based on marriage.

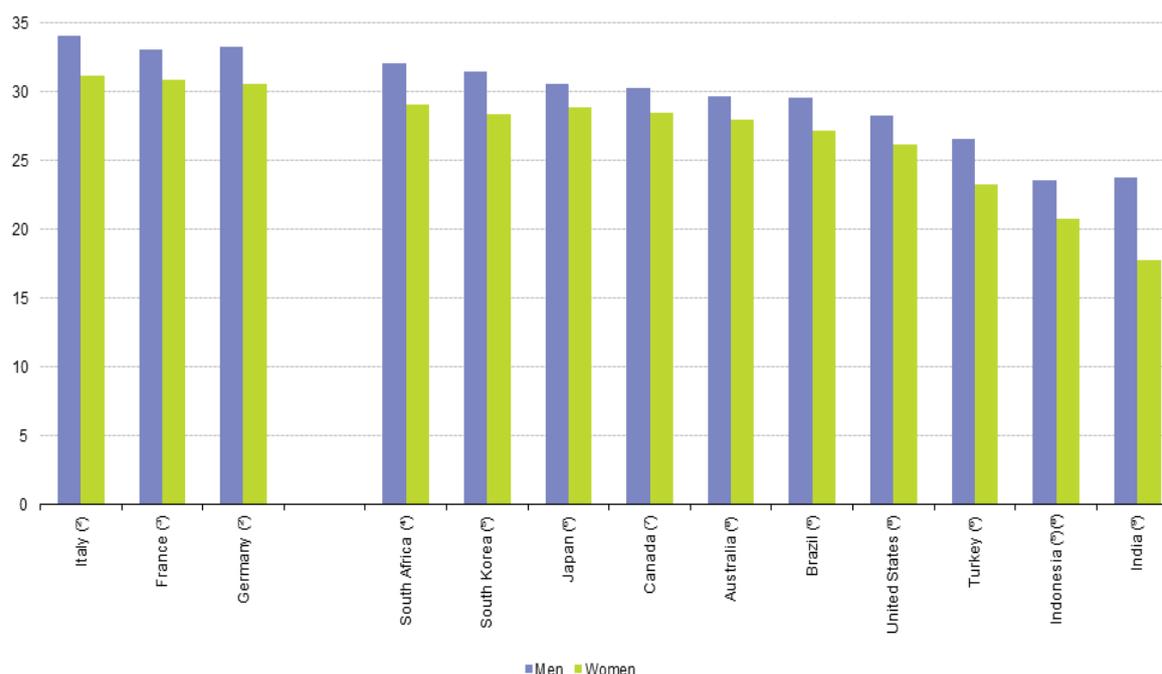
Lastly, it should not escape our attention the fact that in several cultures and/or countries around the world, the family ties between family members in the horizontal line are stronger than they normally are in European countries, the fact that children often conceive as a moral duty the care of their sick or old parents, as well as the fact that in many countries of origin of migration, spouses are getting married at a younger age in comparison to the couples in the European countries. The differences in the ages of family formation become evident from the following table:

²¹ For further information on these issues see, C. M. W. Clarkson and J. Hill, *The Conflict of Laws* (4th edn, New York, Oxford University Press, 2011)

²² The European Commission has published a Handbook on marriages of convenience which provides all relevant definitions of marriages. See Communication from the Commission to the European Parliament and the Council. Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens published on 26 September 2014, COM(2014) 604 final, accompanied by the Commission Staff Working Document Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens published on 26 September 2014, SWD(2014) 284 final.

²³ See K. Allendorf, ‘Schemas of Marital Change: From Arranged Marriages to Eloping for Love’ (2013) 75(2) *Journal of Marriage and Family* 453-469

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(*) EU-28, the United Kingdom, Argentina, China, Mexico, Russia and Saudi Arabia: not available. Ranked on an average of the values for men and women.

(†) 2013.

(‡) 2011.

(§) Median age. 2008.

(¶) 2007.

(#) 2010.

(*) 2004.

(†) Median age.

(‡) Median age. 2005–06.

Source: Eurostat (online data code: demo_nind) and the United Nations Department of Economic and Social Affairs (World Fertility Repc

Table No. 5: Average age at first marriage (years) (source <http://ec.europa.eu/eurostat>)

In conclusion, the brief sociological approach to the concept of family reveals that family is not a static concept, nor a concept susceptible to a single definition. It has repeatedly changed over time and is likely to change even further in the future. Not least, nowadays the ‘nuclear family’ model constitutes only one among different family models and is by no means capable of defining in its total the concept of family. It coexists along with other type family models that have emerged in Europe but also with different other situations which constitute family in other parts of the world. The present section of the thesis also demonstrates that although we usually refer to these family models with the adjective ‘modern’, in fact the changes in what constitutes family already started some decades ago.

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PART II: The protection of the immigrants and refugees’ family in international law

Chapter 1: The protection of family in the UN human rights instruments and the European Social Charter

1.1 Overview of the International Human Rights instruments that protect the immigrant and refugee’s family

The present Chapter will deal with the issue of the protection of the immigrants and refugees’ family in international human rights law. In principal, this Chapter will analyse the core UN human rights instruments, as well as with the ESC which is a Council of Europe treaty. Article 8 of the ECHR and the corresponding case law of the ECtHR will be dealt with in a separate Chapter due to its special value in this field.

To begin with, it should be noted that there are various provisions in the international human rights instruments that recognise family as the natural and fundamental group unit which is entitled to protection and/or assistance by society and the state. Some others speak about ‘the right to found a family’ or ‘family reunification’. The mere fact that the protection of family is included in so many international conventions is in itself indicative of the importance of the right²⁴. The most significant of the instruments that protect the above mentioned rights are:

The Universal Declaration of Human Rights:

‘Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution’²⁵.

‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’²⁶.

‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks’²⁷.

²⁴ In that respect, it should be mentioned that the right to family life is the only right, along with the right to self-determination, equality and non-discrimination that is codified both in the ICCPR and in the ICESCR.

²⁵ Article 16 (1) of the UDHR

²⁶ Article 16 (3) of the UDHR

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The International Covenant on Economic, Social and Cultural Rights:

‘The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses’²⁸.

The International Covenant on Civil and Political Rights:

‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’²⁹.

‘The right of men and women of marriageable age to marry and to found a family shall be recognized’³⁰.

‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation’³¹.

The Convention on the Rights of the Child:

‘Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community’³².

‘In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family’³³.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families:

‘States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers’³⁴.

²⁷ Article 12 of the UDHR

²⁸ Article 10 (1) of the ICESCR

²⁹ Article 23 (1) of the ICCPR

³⁰ Article 23 (2) of the ICCPR

³¹ Article 17 (1) of the ICCPR

³² Preamble of the CRC

³³ Article 10 (1) of the CRC

³⁴ Article 44 (1) of the ICMW

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‘States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children’,³⁵.

The European Social Charter³⁶:

‘With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means’,³⁷.

‘With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory’,³⁸.

For each of the above mentioned conventions there is a committee which is entrusted with different tasks. The competent committee for the ICESCR is the Committee on Economic, Social and Cultural Rights, for the ICCPR the Human Rights Committee, for the CRC the Committee on the Rights of the Child, for the ICMW, the Committee on Migrant Workers and for the ESC the European Committee of Social Rights.

Before proceeding to analyse the rights which address issues that relate to the immigrant or refugee’s family in each of the core international human rights conventions, it is worth making a brief introduction to the right to leave a country and the right to enter a country and the way these rights are recognised, if so, in international human rights law. The right to leave a country is a right recognised under various international human rights conventions. In particular, Article 12 (2) of the ICCPR provides that ‘[e]veryone shall be free to leave any country, including his own’ whereas the same right is recognised by the ACHPR³⁹ and the ACHR⁴⁰, as well as by the ECHR⁴¹. The same is true for the right to enter one’s own country

³⁵ Article 44 (2) of the ICMW

³⁶ In a regional level see also Article 8 of the ECHR (analysed more in detail in Chapter 2, PART II), Article 17 (1) of the ACHR and Article 18 (1) of the ACHPR

³⁷ Article 16 of the ESC

³⁸ Article 19 (6) of the ESC

³⁹ Article 12 (2) of the ACHPR

⁴⁰ Article 22 (2) of the ACHR

⁴¹ Article 2 (2) of Protocol No. 4 of the ECHR

which is protected by the relevant provisions⁴² of the above mentioned conventions. On the contrary, the right to enter a country other than one’s own is not an internationally protected right. There is no provision which provides an obligation for Party States to admit an immigrant to their territory and the issue is under the competence of each state. All the above become particularly relevant to family life related issues especially when it comes to family reunification cases. In that respect, it should be noted that even in case a convention explicitly refers to the right to family reunification, it does not entail an obligation for a state to unconditionally accept a family member for family reunification. The provisions that are discussed, at least in the present Chapter, should in principle be understood as containing some ‘binding guidelines’ with regards to family reunification issues.

1.2 The International Covenant on Civil and Political Rights

1.2.1 Introductory remarks

The ICCPR attracts a significant number of cases which concern family life and violations of Articles 17 and 23. Having said that, it is important to elaborate on the way these provisions have been interpreted by the UNHRC even though, as it will become evident below, in general terms its case law follows the lines drawn by the ECtHR as regards immigration cases under Article 8 of the ECHR. To start with, it should be mentioned that the UNHRC is empowered to carry out two main functions. The first one is to transmit General Comments which interpret the provisions of the Covenant. The second function is to receive and consider communications concerning different state parties and communications concerning individuals and the states⁴³.

As regards the applicability of the ICCPR to aliens, pursuant to General Comment No. 15 the rights set out in the Covenant apply to everyone irrespective of his or her nationality or statelessness. Therefore, the ICCPR applies both to nationals of a State Party and to foreigners. More importantly, according to paragraph 5 of General Comment No. 15, although Party States enjoy a wide margin of appreciation with regards to admission of aliens, ‘an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family

⁴² Article 12 (4) of the ICCPR, Article 12 (2) of the ACHPR, Article 22 (5) of the ACHR and Article 3 (2) of Protocol 4 of the ECHR

⁴³ For the powers and functions of the UNHRC see H.J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, Oxford, Oxford University Press, 2008)

life arise’. Consequently, not only do aliens enjoy the right to family life when they are present in the territory of a state party, but they can rely on this right in order to avoid deportation or achieve entry to the territory of a State Party for the purposes of family reunification. The margin of appreciation afforded to State Parties in the field of immigration does exist but it may in certain cases be restricted when the immigrant’s right to family life is violated.

1.2.2 The legal concept of family

There is no single definition of what constitutes ‘family’ in the ICCPR. In its General Comment No. 19, the UNHRC notes that it is not possible to give the concept of family of Article 23 of the ICCPR a standard definition, as family may differ from state to state and even from region to region within a state. In that respect, when a group of persons is regarded as a family under the national legislation and practice, it should be given the protection of Article 23 of the ICCPR. Furthermore, according to General Comment No. 16, the term ‘family’ should ‘be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned’. It becomes evident that the broad definition of ‘family’ is necessary mainly due to the cultural differences among the State Parties and developments in societies with regards to that issue. This finding is further confirmed in several communications considered by the UNHRC. In *Ngambi v. France*⁴⁴, for instance, the UNHRC stated that ‘(...) the term ‘family’, for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned’⁴⁵.

Given that the term ‘family’ has no concrete definition it is worth examining the UNHRC’s approach with regard to different family models. To begin with, it should be noticed that certain relationships are more likely to constitute ‘family’ in the sense of Articles 17 and 23 of the ICCPR. Not surprisingly, these are the relationship between spouses and that of parents and their minor children. Separation of the family does not necessarily break the family bond in case there are efforts to maintain personal relations. In *Byahuranga v. Denmark*⁴⁶, for instance, the UNHRC found that there was ‘family life’ between the author and his wife and

⁴⁴ *Benjamin Ngambi v. France*, Communication No. 1179/2003, U.N. Doc. CCPR/C/81/D/1179/2003 (2004)

⁴⁵ §6.4

⁴⁶ *Jonny Rubin Byahuranga v. Denmark*, Communication No. 1222/2003, U.N. Doc. CCPR/C/82/D/1222/2003 (2004)

two children as although family unity had been interrupted ‘(...) for a considerable period of time because of his incarceration and subsequent custody on remand pending deportation, he received regular visits from his wife during that period and was able to visit his children several times during prison leave’⁴⁷.

The rule that separation or divorce of the parents do not necessarily break the family bond between parents and children is further confirmed in *Hendriks v. the Netherlands*⁴⁸ where the UNHRC stated that:

‘[t]he words ‘the family’ in article 23, paragraph 1, do not refer solely to the family home as it exists during the marriage. The idea of the family must necessarily embrace the relations between parents and child. Although divorce legally ends a marriage, it cannot dissolve the bond uniting father - or mother - and child; this bond does not depend on the continuation of the parents’ marriage’⁴⁹.

Moreover, in *Santacana v. Spain*⁵⁰, the UNHRC confirmed the above mentioned finding stating that:

‘(...) the term ‘family’ must be understood broadly; it reaffirms that the concept refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and child. Some minimal requirements for the existence of a family are however necessary, such as life together, economic ties, a regular and intense relationship etc.’⁵¹

Next, the requirement for a prior life together appears to be a particularly significant factor for the finding of existence of ‘family life’. The most striking case with regard to this requirement is by all means *A.S. v. Canada*⁵². In the present case, a Canadian citizen of Polish origin claimed that the refusal of the Canadian authorities to admit her daughter and grandson to Canada violated her right to family life under Articles 17 and 23 ICCPR. The UNHRC found that the above mentioned provisions were not applicable since except for a short period of 2 years some 17 years ago, A.S. and her adopted daughter had never lived together as a family⁵³.

⁴⁷ §11.6

⁴⁸ *Wim Hendriks, Sr. v. The Netherlands*, Communication No. 201/1985, U.N. Doc. CCPR/C/33/D/201/1985 (1988)

⁴⁹ §10.3

⁵⁰ *Balaguer Santacana v. Spain*, Communication No. 417/1990, U.N. Doc. CCPR/C/51/D/417/1990 (1994)

⁵¹ §10.2

⁵² *A. S. v. Canada*, Communication No. 68/1980, U.N. Doc. CCPR/C/OP/1 at 27 (1984)

⁵³ For the life together requirement see also H. Hung, ‘Discussions on Rights to Family: Analysis of the Lo-Sheng Case’ (2012) 7 (2) *National Taiwan University Law Review* 535-554

The rather broad conception of ‘family’ adopted by the UNHRC is reaffirmed in *Hopu v. France*⁵⁴. In the present case, the authors claimed that the destruction of the burial ground where their ancestors were buried for the purposes of a hotel construction would violate Articles 17 and 23 ICCPR. In its consideration, the UNHRC repeated that the term ‘family’ should be given a broad interpretation in order to include all relationships which are regarded as family in the society concerned and that in determining the concept of ‘family’, cultural traditions should be taken into account. Furthermore, the UNHRC found that:

‘[i]t transpires from the authors’ claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors’ history, culture and life’⁵⁵.

It concluded that the construction of the hotel on the authors’ ancestral burial grounds did interfere with their right to family life.

The UNHRC’s approach with regards to the concept of ‘family’ in the case at hand is definitely remarkable and has been criticised by members of the UNHRC. In their dissenting opinion, some members of the UNHRC claimed that Articles 17 and 23 are not applicable to this case. In their view, a broader definition of ‘family’ in the framework of Articles 17 and 23 ICCPR is welcomed but could not in the case at hand include all members of one’s ethnic or cultural group or all of one’s ancestors. Since the authors did not provide evidence as to the nature of the relationship with the people who were buried in the area and merely claimed that they were members of their family, Articles 17 and 23 could not, according to their opinion, be applicable. It is noteworthy that even though the dissenting members of the UNHRC found excessively enhanced the concept of ‘family’ adopted in the present case, they still underlined the importance of a broad definition of ‘family’. They added: ‘Thus, the term ‘family’, when applied to the local population in French Polynesia, might well include relatives, who would not be included in a family, as this term is understood in other societies, including metropolitan France’⁵⁶.

⁵⁴ *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997)

⁵⁵ §10.3

⁵⁶ §4

In summary, in the UNHRC’s view the concept of family should be broadly interpreted in order to encompass a variety of formal or informal relations⁵⁷. In this regard, as mentioned above the traditional relationships between spouses and parents and children are still more likely to fall within the concept of ‘family’ but the formal element is not in itself sufficient for that finding. Having said that, formal relationships based on marriage or relations between children and parent would fall outside the concept of family in case no evidence is provided with regards to their prior life in common, economic dependence, regular and intense contacts etc. On the contrary, informal relationships such as extra-marital relationships, same-sex relationships outside marriage⁵⁸ and relationships between children and relatives outside the notion of ‘core family’ can constitute ‘family’ in the sense of Article 23 (1) ICCPR provided that certain requirements are fulfilled.

1.2.3 Family reunification cases

Migrants or refugees seeking to reunify with their families may base their arguments on Article 23 (1) and (2) of the ICCPR rather than Article 17 of the same Covenant. Pursuant to the General Comment No. 19 of the UNHRC, the right to found a family of Article 23 (2) of the ICCPR implies the ‘adoption of appropriate measures’ to ensure the ‘unity’ or ‘reunification’ of families. In particular, paragraph 5 of the said General Comment reads as follows:

‘The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons’.

It could be argued that Article 23 (2) provides less protection in comparison to Article 17 of the ICCPR as it explicitly refers to a right of ‘men’ and ‘women’ to ‘marry’ and ‘found a family’ and therefore a literal interpretation would suggest that the rest of the family relationships fall outside the scope of the provision. Nonetheless, as Hathaway thinks this interpretation is ungrounded. ‘As the drafting history of the clause makes clear, actual

⁵⁷ In that regard see also S.N. Carlson and G. Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (New York, Transnational Publishers, 2003)

⁵⁸ On that issue see M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (2nd edn, Kehl, Engel. N.P. Verlag, 2005)

marriage is not required to invoke the right to found a family’⁵⁹. In any event, the circumstances under which a Party State shall act positively under Article 23 (2) in order to make family unity possible remain unclear. The UNHRC has not so far dealt with family reunification cases but rather with family unity in deportation cases which are examined in the following section. It would be interesting to monitor the UNHRC’s possible future communications in the issue of family reunification and see to what extent it adopts the ‘elsewhere approach’ which is applied by the Strasbourg Court in family reunification cases. This approach is examined extensively in Chapter 2 of Part II of this study.

1.2.4 Expulsion cases

Expulsion cases brought before the UNHRC are in principal discussed under Article 17 of the ICCPR which clearly entails a negative obligation for Party States to not interfere with family life. Nonetheless, Article 17 is normally read in conjunction with Article 23. In order for Article 17 to be violated there should be an interference with ‘family life’ and such interference should be ‘unlawful’ or ‘arbitrary’. That being said, it is worth analysing what the UNHRC has so far said regarding the terms ‘interference’, ‘unlawful’ and ‘arbitrary’. In *Winata v. Australia*⁶⁰, the UNHRC hold that the mere fact that one member of the family is entitled to stay in the territory of a State Party does not mean that requiring other members of the family to leave constitutes ‘interference’⁶¹. This approach suggests that whether the family members who are entitled to stay in the State Party decide to follow the person who is deported is a decision concerning the family and is not related to the state’s decision to expel one of the family members. However, the UNHRC added that a deportation is to be considered ‘interference’ in circumstances where substantial changes to long-settled family life would follow either of the family’s decisions⁶².

Next, pursuant to General Comment No. 16, ‘[t]he term ‘unlawful’ means that no interference can take place except in cases envisaged by the law. Interference authorized by States can

⁵⁹ J.C. Hathaway, *The Rights of Refugees Under International Law* (New York, Cambridge University Press, 2005) p. 552

⁶⁰ *Hendrick Winata and So Lan Li v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001)

⁶¹ §7.1

⁶² §7.2

only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant’⁶³. Furthermore, according to the same General Comment:

‘[t]he expression ‘arbitrary interference’ is also relevant to the protection of the right provided for in article 17. In the Committee’s view the expression ‘arbitrary interference’ can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’⁶⁴.

Therefore, it is not sufficient that the interference, once established, has been in accordance with the law. The lawful ‘interference’ should also not be ‘arbitrary’. According to the UNHRC’s case law, arbitrariness primarily refers to procedural arbitrariness ‘(...) but extends to the reasonableness of the interference with the person’s rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant’⁶⁵. That being said, it can be concluded that ‘arbitrary’ is not only an ‘interference’ which is based on a law that does not provide the person concerned with procedural safeguards but also an ‘interference’ which is regarded as disproportionate to the legitimate objectives pursued. The above mentioned finding becomes apparent in *Canepa v. Canada* (cited above):

‘The separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal’⁶⁶.

The UNHRC takes into consideration various factors in order to find out whether the removal order is proportionate to the objectives pursued. The most important of them seem to be the cultural and linguistic ties that the family has with the country of origin, as well as the country which issues the deportation order⁶⁷. It should be noted that the cultural and linguistic ties with the country which issues the expulsion order may count in favour of the person who is being deported, in case they exist or they may count against him/her, in case they do not exist. Moreover, the UNHRC takes into account other factors such as the nationalities of the persons concerned, the duration of the residence in the host State Party and the best interest of

⁶³ §3

⁶⁴ §4

⁶⁵ See *Giosue Canepa v. Canada*, Communication No. 558/1993, U.N. Doc. CCPR/C/59/D/558/1993 (1997) §11.4

⁶⁶ §11.4

⁶⁷ For an analysis of the cultural and linguistic ties see also R. Mrazik and A.I. Schoenholtz, ‘Protecting and Promoting the Human Right to Respect for Family Life: Treaty-Based Reform and Domestic Advocacy’ (2010) 24 *Georgetown Immigration Law Journal* 651-684

the child. The case law analysed right below will shed more light on how the UNHRC applies the proportionality test in order to find out whether the interference is ‘arbitrary’ and what the exact factors that are taken into consideration are.

1.2.5 The UNHRC’s case law

Among all cases brought before the UNHRC, we consider that the ones discussed in this section constitute representative examples of the line of reasoning that the UNHRC follows when dealing with possible violations of Article 17 and 23 of the ICCPR. In *Winata* (cited above), Mr. Hendrik Winata and Mrs. So Lan Li arrived in Australia on a visitor’s and student’s visa respectively and remained there unlawfully after the expiry of their visas. They commenced a *de facto* relationship equivalent to marriage and had a son, Barry, who having been born in Australia and after ten years of residence there acquired the Australian nationality. Subsequently, Mr. Winata and Mrs. Li attempted to regularise their stay in Australia but did not succeed and were faced with a deportation order.

Appealing before the UNHRC, Barry’s parents argued that their removal would result in Barry having to follow them to Indonesia, which would cause him difficulties given that he was fully integrated into Australian society, he did not speak Indonesian or Chinese and had no cultural ties to Indonesia since he had always lived in Australia. The authors further argued that even if Barry was left alone to Australia, the break of family unity would cause him considerable problems. Either way the removal would be arbitrary and unreasonable. From its side, the Australian government argued that except for his parents, Barry had no relatives in Australia whereas significant number of his relatives lived in Indonesia. Therefore, if he had to follow his parents to Indonesia, he would enjoy an enhanced family life. According to the government’s submissions, even in case Barry was left behind in Australia, his parents would have the right to visit him and would stay in contact with him and therefore family life would continue to exist. Lastly, the State Party argued that the unlawful establishment of the family in Australia counted heavily against them and the authors had no legitimate expectation to continue family life in Australia.

The UNHRC first analysed the notion of ‘interference’, introducing as mentioned above the criterion of ‘substantial changes to family life’. In its view:

‘(...) a decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents is to be considered ‘interference’ with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case’⁶⁸.

After finding that the removal would constitute an ‘interference’ with the right to ‘family life’, the UNHRC held that the interference would be ‘arbitrary’ and ‘unreasonable’. In that respect, the UNHRC noted that both authors had been living in Australia for over 14 years, Barry had lived there since he was born, he attended school and had developed all social relationships in Australia. In these circumstances and in view of this duration of time, ‘(...) it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness’⁶⁹.

In *Madafferri v. Australia*⁷⁰, Mr. Madafferri arrived in Australia on a tourist visa, after the expiry of which he remained unlawfully there and married an Australian national with whom he had four children. Subsequently, he attempted to regularise his status in Australia but his application was rejected as the Australian immigration authorities considered him to be of a ‘bad character’. In fact, he had disclosed in his application past convictions and sentences handed down in Italy. Appealing to the UNHRC, the authors claimed that Mr. Madafferri’s wife had no intention to follow him to Italy and therefore family unity would be threatened in case of deportation. In their view, separation would cause significant problems to all persons involved and especially to the children given their young age. The State Party argued that the deportation order merely concerned Mr. Madafferri and that the children could stay in Australia with Mrs. Madafferri. Furthermore, the State Party argued that even if the whole family decides to follow Mr. Madafferri to Italy, the children would manage to integrate into the society given their young age and the parents’ connection to Italy.

The UNHRC first considered the issue of ‘interference’ applying the ‘substantial changes’ criterion described above in *Winata* (cited above). After finding that the removal order would cause substantial changes to long-settled family life independently of whether Mr. Madafferri’s family remains in Australia or decides to follow him to Italy, the UNHRC went

⁶⁸ §7.2

⁶⁹ §7.3

⁷⁰ *Francesco Madafferri v. Australia*, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 (2004)

on to consider whether this ‘interference’ would be ‘arbitrary’. In that respect, the UNHRC stated that:

‘(...) the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal’⁷¹.

In that respect, the UNHRC noted that the Australian government based the author’s removal on his ‘bad character’ and crimes committed some twenty years ago. Not least, the UNHRC noted that the authors’ family had been in existence for 14 years, the children did not speak Italian and if Mrs. Madafferi decided to follow Mr. Madafferi to Italy, she would have to take care of a husband and a father who were mentally ill in an environment totally alien for her. Following the above mentioned considerations, the UNHRC decided that the expulsion, in case materialised, would constitute an ‘arbitrary interference’ with the authors’ rights under Articles 17 and 23.

In *Stewart v. Canada*⁷², Mr. Stewart was a British national who immigrated to Canada at the age of seven and lived there since then along with his mother and his brother who both suffered health problems. The author claimed that he always considered himself to be a Canadian citizen and only found out that he had no right of permanent residence in Canada when he was contacted by immigration officials because of a criminal conviction. Following some 42 convictions between 1978 and 1991, the Canadian authorities issued a deportation order. The author appealed to the UNHRC claiming that his deportation would violate, among others, Articles 17 and 23 of the ICCPR. The UNHRC found that the deportation would constitute ‘interference’ with the author’s family relations in Canada and went on to consider whether this ‘interference’ could be considered either ‘unlawful’ or ‘arbitrary’. In that respect, the UNHRC held that the interference with the author’s family relations could not be regarded as ‘unlawful’ or ‘arbitrary’ as ‘(...) the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee’s family connections’⁷³. Therefore, the UNHRC found no violation of Articles 17 and 23 of the ICCPR.

⁷¹ §9.8

⁷² *Charles E. Stewart v. Canada*, Communication No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996)

⁷³ §12.10

In *Canepa* (cited above), the author, an Italian citizen, arrived in Canada at the age of 5 along with his family and lived there since then, considering himself to be a Canadian citizen. The author had extended family in Italy, spoke some Italian but did not feel any meaningful connection with this country. Following a great number of criminal convictions, mostly related to breaking and entering, theft and possession of narcotics, the author was confronted with a deportation order. In these circumstances, the UNHRC was asked to consider whether the deportation order would violate Articles 17 and 23 of the ICCPR.

The UNHRC followed the following reasoning:

‘(...) has had an almost continuous record of convictions (except for a period in 1987-88), from age 17 to his removal from Canada at age 31. The author, who has neither spouse nor children in Canada, has extended family in Italy. He has not shown how his deportation to Italy would irreparably sever his ties with his remaining family in Canada. His family were able to provide little help or guidance to him in overcoming his criminal tendencies and his drug-addiction. He has not shown that the support and encouragement of his family is likely to be helpful to him in the future in this regard, or that his separation from his family is likely to lead to a deterioration in his situation. There is no financial dependence involved in his family ties. There appear to be no circumstances particular to the author or to his family which would lead the Committee to conclude that his removal from Canada was an arbitrary interference with his family, nor with his privacy or home’⁷⁴.

Lastly, given that the scope of the present dissertation is not limited to immigration cases but also includes refugee cases it is worth discussing how the UNHRC deals with the issue of ‘arbitrary interference’ in cases involving a refugee. In *Bakhtiyari v. Australia*⁷⁵, the UNHRC was asked to consider whether the wife and children’s removal of a recognised refugee would violate Articles 17 and 23 of the ICCPR. Other notable circumstances of the present case are the fact that the wife and children had been detained for three years and that the refugee status of Mr. Bakhtiyari was under review. The UNHRC found a violation of the ICCPR, stating the following:

‘Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs Bakhtiyari and her children would face if returned to Pakistan without Mr Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs Bakhtiyari and her children without awaiting the final determination of Mr Bakhtiyari’s proceedings would

⁷⁴ §11.5

⁷⁵ *Bakhtiyari v. Australia*, Communication No. 1069/2002 U.N. Doc. CCPR/C/79/D/1069/2002 (2003)

constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant⁷⁶.

1.3 The Convention on the Rights of the Child

The CRC constitutes the only of the UN core human rights conventions that explicitly refers to family reunification. The said right is guaranteed, as it will be seen below, by the ICMW as well, though with a more limited applicable scope. This finding becomes particularly interesting if we consider that the CRC constitutes the most widely ratified human rights convention⁷⁷. Nevertheless, it is noteworthy that under the scope of the CRC fall only reunifications between parents and minor children and not with other family members. In any event, the provision of Article 10 (1) is suitable for various comments.

First, it becomes obvious that the said provision makes a reference to Article 9 of the CRC. According to this provision:

‘States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence’.

Therefore, the right to family reunification provided for in Article 10 (1) should be read in light of Article 9 (1) which provides that children should not be separated from their parents unless this is for their best interest.

Second, it is noticeable that Article 10 (1) speaks about applications which are made by the child *or* his/her parents. This part of the provision at hand provoke a rather intense debate during the drafting of the CRC⁷⁸ as it appears to protect the rights of the parents as well whereas the entire CRC deals only with the rights of the child. Third, it should definitely not escape out attention that the language used is rather intense as Article 10 (1) provides that the applications for family reunification shall be dealt with in a *positive, humane and expeditious manner*. This wording does not leave much space for doubt that the obligation deriving from that provision interferes more than in other cases with the discretion normally left to Party

⁷⁶ §9.6

⁷⁷ Information available online at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en

⁷⁸ For an analysis of the debate on this issue see S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague/Boston/London, Martinus Nijhoff Publishers, 1999)

States on the issues of acceptances of migrants⁷⁹. It has rightly been argued that even though the provision ‘does not expressly mandate approval of a reunification application, it clearly contemplates that there is at least a presumption in favour of approval’⁸⁰.

Nevertheless, the above discussed provision is not the only one of the CRC which refers to reunification. Article 22 deals with the same issue as regards the refugee child:

‘1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention’.

It should be noticed that although the above mentioned provision does not specifically provide that family reunification should take place in the country of asylum, this will in most cases be the obvious place given that the circumstances in the country of origin are not likely to allow for family reunification to take place there.

1.4 The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The ICMW constitutes the only UN international convention which is exclusively applicable to immigrants. That being said, a reference to its scope and content appears necessary at this point. It should be noted that the said convention takes rights guaranteed by the UDHR, the ICCPR and the ICESCR and applies them to migrant workers and the members of their families. It constitutes a particularly lengthy human rights convention and the only one of the core international human rights instruments which has not been ratified by any of the EU

⁷⁹ See E.F. Abram, ‘The Child’s Right to Family Unity in International Immigration Law’ (1995) 17 (4) *Law and Policy* 421-425

⁸⁰ E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law* (Cambridge/New York/Geneva, Cambridge University Press, 2003)

Member States⁸¹. On the contrary it has been ratified by some important countries of origin of international migration located in the Southern America or Africa⁸².

Regardless of the fact that the ICMW has not been ratified by any of the EU countries, it constitutes an important legal document as it explicitly refers to the right to family reunification. However, this fact should not be overestimated, as the drafters of the ICMW appeared rather modest and reluctant regarding this issue. This becomes evident first, by the wording of Article 79 of the ICMW which provides that ‘[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families’ and second, by Article 44 pursuant to which Party States shall merely *take measures that they deem appropriate* and that *they fall within their competence* as regards family reunification of migrant workers. It becomes evident that the standards of protection as regards admission of migrant workers and their family members are particularly low⁸³. The ICMW is mostly concerned with migrant workers and their family members who are already admitted to a Party State.

1.5 The 1951 Geneva Convention on the status of refugees

The 1951 Geneva Convention, which constitutes by far the most significant international convention regarding refugees, does not make an explicit reference to the right to family reunification or family unity. Nevertheless, scholars generally agree that this right derives from the interaction of the Geneva Convention with other human rights instruments and that if reunification was not allowed under the Geneva Convention this would be a violation of Article 12 of the same⁸⁴. In any event, the Geneva Convention contains several provisions

⁸¹ See information available online at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en

⁸² For a fuller discussion on the ICMW, see A. Desmond, ‘The Triangle that Could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review’ (2015) 17 *European Journal of Migration and Law* 39-69

⁸³ Regardless of this finding, Article 4 of the ICMW gives an important definition of the migrant worker’s family: ‘For the purposes of the present Convention the term ‘members of the family’ refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned’

⁸⁴ E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law* (Cambridge/New York/Geneva, Cambridge University Press, 2003)

which aim at protecting the refugee’s family⁸⁵. Special reference should be made to Article 12 which provides that:

‘[r]ights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by the Contracting State, subject to compliance, if this be necessary, with the formalities required by the laws of that State, provided that the right in question is one which would have been recognized by the law of that State had he [or she] not become a refugee’.

The provision does not provide with a right to family unity, and less with a right to family reunification. It is apparently also limited to the national legislation of the Party States. Nonetheless, according to Edwards, the particular reference to *rights attaching to marriage* ‘may be a helpful, albeit not incontestable tool to reinforce arguments in favour of family unity’⁸⁶.

Whatever the extent of the protection of the right to family unity or right to family reunification in the Geneva Convention, there is no doubt that refugees are protected by the rest of the conventions which are mentioned in this Chapter as the latter apply to all persons regardless of their status. This is further clarified by the UNHRC in its General Comment No. 19 which as mentioned above speaks about the duty of states, ‘to ensure the unity or reunification of families, particularly when their members are separated for *political, economic or similar reasons*’. That being said, since refugees are separated from their families for political reasons, the applicability of Article 23 the ICCPR is not at doubt.

Lastly, it should be underlined that the absence of a concrete reference to the right to family reunification in the Geneva Convention does by no means imply that family unity or reunification is not significant for the refugee or equally protected as it is for migrants. On the contrary, refugees constitute particularly vulnerable groups of people who cannot enjoy family life in their country of origin due to the persecution that they face there and the conditions that make them flee comprise the risk of separating from their families and never manage to reunify with them again. As it will be seen below, the fact that refugees are objectively unable to enjoy family life in the country of origin may make their protection under the ECHR stronger.

⁸⁵ The two more notable provisions are Article 4 which speaks about ‘freedom as regards the religious education of their children’ and Article 22 which concerns the public education of children in elementary school and beyond.

⁸⁶ A. Edwards, ‘Human Rights, Refugees, and the Right ‘to Enjoy’ Asylum’ (2005) 17 (2) *International Journal of Refugee Law* 293-330 p. 310

1.6 The European Social Charter

The provision of Article 19 (6) of the ESC which, as seen above, provides for a right to family reunion should be read in conjunction with the relevant appendix of the revised version of the ESC⁸⁷ which reads as follows: ‘For the purpose of applying this provision, the term ‘family of a foreign worker’ is understood to mean at least the worker’s spouse and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker’⁸⁸. It should be emphasised that these provisions apply only to immigrants who are nationals of another Contracting State, as well as to refugees and stateless people⁸⁹. Therefore, all that is being discussed in the present section becomes particularly important as regards European nationals, especially non-EEA ones, who reside in the territory of another Contracting State and does not cover foreigners coming from other continents, such as Asia or Africa.

The provision of Article 19 (6) and the above cited appendix contain various elements that are worthy of note. First, one can easily understand that the language used by the drafters of the ESC is not that strong as Contracting States should facilitate *as far as possible* the reunion of the families. Second, the concept of family adopted by the ESC is narrow, calling for reunification only with the spouse and the worker’s minor children who in addition should be unmarried and dependants. The rest of the family members are left to the discretion of the Contracting States. Nonetheless, the wording of the appendix seems to encourage Contracting States to adopt a broader definition of family members as becomes apparent from the use of the words *at least*. Third, the notion of ‘dependants’ is to be understood under this provision of the ESC as persons who depend on the sponsor economically, or due to their state of health or who are pursuing unremunerated studies⁹⁰.

At this point it is worth underlying that the basic role of the European Committee of Social Rights is to examine the conformity of Contracting States’ national legislation and practice

⁸⁷ It should be noted that the European Social Charter was first adopted in 1961 whereas the revised version was adopted in 1996.

⁸⁸ It should be underlined that the Article 19 (6) Appendix of the 1961 ESC reads as follows: ‘For the purpose of this provision, the term ‘family of a foreign worker’ is understood to mean at least his wife and dependent children under the age of twenty-one years’.

⁸⁹ See Appendix titled ‘Scope of the Revised European Social Charter in terms of persons protected’, at 1.

⁹⁰ See Conclusions VIII, 212 and L. Samuel, *Fundamental Social Rights. Case Law of the European Social Charter* (2nd edn, Strasbourg, Council of Europe Publishing, 2002) p. 422

with the different provisions of the ESC⁹¹, without prejudice to the fact that since 1995 a system of collective complaints was introduced through a protocol adopted by the Council of Europe⁹². That being said, at the present section we will primarily focus on the conformity of the requirements for family reunion which are imposed in different Contracting States with Article 19 (6) of the ESC. It should be noted that Contracting States are in principle obliged to accept the findings of the ECSR and make the corresponding changes in order to achieve compliance with the ESC. It should also be noticed that in general terms, the ECSR adopts a rather favourable towards the immigrant approach as regards the conditions for the exercise of the right to family reunification, finding several of the conditions otherwise imposed under national legislation incompatible with the ESC.

As a general rule, Contracting States are let under ESC law to impose some conditions before family reunification may take place. Nonetheless, the Committee has stated that these conditions should not be so restrictive as to make family reunion impossible. That being said, Contracting States may impose a requirement for a prior residence which however should not exceed one year⁹³. The ECSR has stated that prior residence of more than one year is excessive and not in conformity with the ESC⁹⁴. In the case of the Greek legislation, for example, the Committee found that the two years of prior lawful residence is not in conformity with the ESC⁹⁵. The same was true as regards the two years of prior lawful residence provided for by the Estonian legislation⁹⁶. It is worth highlighting that the Committee has also found excessive the three-year ‘waiting period’ imposed on migrant workers under the Austria quota system⁹⁷.

Not least, as regards the material conditions, the same ECSR has stated that legislations that do not take into account the income that derives from the welfare system of the host state violate Article 19 (6) of the ESC. In particular, in the case of the Dutch law, the ECSR stated that:

⁹¹ For more details on the functions of the European Committee of Social Rights see G. de Burca and B. de Witte, *Social Rights in Europe* (Oxford/ New York, Oxford University Press, 2005)

⁹² On the Collective Complaints System see, R. Churchill and U. Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004) 15 (3) *European Journal of International Law* 417-456 and H. Cullen, ‘The Collective Complaints Mechanism of the European Social Charter’ (2000) 25 *European Law Review-Supplement (Human Rights Survey)* 18-30

⁹³ Conclusions VI, 125 (Germany)

⁹⁴ See also, C. Costello and M. Freedland, *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford, Oxford University Press, 2014)

⁹⁵ Conclusions XVI -1, 316 (Greece)

⁹⁶ Conclusions 2015 (Estonia)

⁹⁷ Conclusions 2015 (Austria)

‘(...) the level of means required to bring in the family should not be so restrictive as to prevent any family reunion. It can be concluded from Dutch legislation and practice, that a migrant worker who receives welfare support is prevented from exercising the right to family reunion. The Committee observes that this restriction could have the effect of discouraging applications for family reunion in respect of dependents rather than facilitating the process as required by Article 19§6’⁹⁸.

Next, the ECSR makes a special reference to the requirement for adequate housing imposed on migrant workers and their family members. In particular, the Committee has held that the said requirement ‘should not be so restrictive as to prevent any family reunion’⁹⁹. Not least, the Committee considers that ‘states are entitled to impose such accommodation requirements in a proportionate manner so as to protect the interests of the family’¹⁰⁰. It is interesting to note that the ECSR has also underlined that the housing requirement should not be applied in a ‘blanket manner’ which would not take into consideration individual circumstances¹⁰¹.

In addition, the ECSR has also expressed its view on the issue of integration measures which in some Contracting States are imposed on family members. In that respect, the Committee accepts that Contracting States may wish to encourage integration of migrant workers and their family members. Nevertheless, these measures, independently of whether they are imposed before or after admission, are not in conformity with Article 19 (6) of the ESC in case they:

a) have the potential effect of denying entry or the right to remain to family members of a migrant worker, or

b) otherwise deprive the right guaranteed under Article 19§6 of its substance, for example by imposing prohibitive fees, or by failing to consider specific individual circumstances such as age, level of education or family or work commitments’¹⁰².

Not least, the same Committee has stated that the integration condition of the German law imposed on the children aged over 16 is also not in conformity with Article 19 (6) of the ESC¹⁰³.

As regards the minimum age requirement for spouses, the ECSR has found that the minimum age requirement of 21 years constitutes an ‘undue restriction’ to family reunion and therefore

⁹⁸ Conclusions XVII-1, 209 (Netherlands)

⁹⁹ Conclusions IV, (Norway)

¹⁰⁰ Conclusions XX-4, (Poland)

¹⁰¹ Conclusions 2015 (Armenia)

¹⁰² Conclusions 2015- Statement of interpretation

¹⁰³ Conclusions XX-4 (Germany)

it is not in conformity with Article 19 (6) of the ESC. In that respect, the Committee has stated that raising the minimum age requirement for spouses above the age limit at which marriage is legally recognised in the host state is not permitted under Article 19 (6) of the ESC. Therefore, in its latest Conclusions of 2015, the ECSR has found that the legislations of countries such as Austria, Greece and Cyprus violate Article 19 (6) of the ESC¹⁰⁴.

Furthermore, Contracting States may refuse reunification for reasons of public health. Nonetheless, this refusal cannot be based on any kind of disease as ‘(...) only contagious diseases listed in the World Health Organisation’s health regulations can be an obstacle to the granting of an application for family reunification’¹⁰⁵. These specific illnesses should be so serious as to endanger public health¹⁰⁶. Not least, the Committee has also stated that particularly serious drug addictions may justify a denial to family reunion, though merely in case public authorities establish on a case-by-case basis that they may cause a serious threat on public security or public order¹⁰⁷.

Furthermore, as regards the procedural aspects of the family reunion, the Committee has expressed the view that the Contracting States’ legislations that do not provide for an independent mechanism for review are not in conformity with Article 19 (6) of the ESC, stating that:

‘[t]he Committee considers that restrictions on the exercise of the right to family reunion should be subject to an effective mechanism of appeal or review, which provides an opportunity for consideration of the individual merits of the case consistent with the principles of proportionality and reasonableness. It considers that the lack of an independent mechanism for review of decisions on family reunion applications is not in conformity with the Charter’¹⁰⁸.

Lastly, as regards expulsions, the Committee has noticed the following:

‘The Committee considers that upon a proper construction of the text of the Charter, the possibility of the expulsion of the family members of a migrant worker is more properly dealt with under Article 19§6 on the facilitation of family reunion, rather than under Article 19§8 which concerns only the expulsion of a migrant worker. It therefore decides henceforth to assess whether the expulsion of family members of a migrant worker is in conformity with the Charter under Article 19§6’¹⁰⁹.

¹⁰⁴ Conclusions 2015 (Austria), Conclusions 2015 (Greece) and Conclusions 2015 (Cyprus)

¹⁰⁵ Conclusions XVI -1, 316 (Greece)

¹⁰⁶ Conclusions XVI-1, (Greece)

¹⁰⁷ Conclusions XVI-1, 227-8 (Finland)

¹⁰⁸ Conclusions 2015 (Armenia)

¹⁰⁹ Conclusions 2015- Statement of interpretation

As far as the collective complaints system is concerned, it should be noted that so far there is no collective complaint invoking Article 19 (6) of the ESC. On the contrary, some collective complaints have invoked Article 19 (8) which concerns expulsions of migrant workers¹¹⁰. Even though the Committee has stated that expulsions of family members of migrant workers are dealt with under Article 19 (6), a brief reference to the collective complaints that have invoked Article 19 (8) deems necessary as the expulsion of a migrant worker may often raise family life related issues. It should be noted that in principle these collective complaints concern expulsions of Roma communities.

In particular, in *Médecins du Monde - International v. France*¹¹¹, the ECSR made clear that Article 19 (8) becomes applicable only to immigrants who reside lawfully in a Contracting State and not to those being in an irregular situation. This constitutes a literal interpretation of Article 19 (8) which clearly speaks about migrant workers who are lawful residents in the territory of the host state. These immigrants may only be expelled in case they ‘endanger national security or offend against public interest or morality’¹¹². Next, the ECSR added that an expulsion ‘may be made only on the basis of a reasonable and objective examination of the particular situation of each individual’¹¹³ and that the mere possibility of appealing against the expulsion decision is not sufficient. In the present case, the ECSR noted that there had been no examination of the expulsion of the applicants on an individual basis which would take into account the particular circumstances of each applicant but, in fact, collective expulsions that are not permitted under Article 19 (8) of the ESC. Therefore, the ECSR found a violation of Article 19 (8). These findings were in principle confirmed in the rest of the collective complaints that were brought before the Committee invoking Article 19 (8)¹¹⁴.

Finally, it should be noticed that the Committee has in certain cases referred to the family members of the migrant worker who faces an expulsion and invokes Article 19 (8) establishing the following principal: ‘(...) [M]igrant worker’s family members, who have

¹¹⁰ Article 19 (8) provides that: The Parties undertake ‘to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality’.

¹¹¹ *Médecins du Monde - International v. France*, Collective Complaint No. 67/2011

¹¹² § 111. See also the wording of Article 19 (8) of the ESC. It should be noticed that the Committee has also stated on that respect that ‘expulsion for offences against public order or morality shall only be in conformity with the Revised Charter if they constitute a penalty for a criminal act, imposed by a court or a judicial authority, and are not solely based on the existence of a criminal conviction but on all aspects of the non-nationals’ behaviour, as well as the circumstances and the length of time of their presence in the territory of the State’. See, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Collective Complaint No. 58/2009, §151

¹¹³ § 112

¹¹⁴ See, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Collective Complaint No. 58/2009, *Centre on Housing Rights and Evictions (COHRE) v. France*, Collective Complaint No. 63/2010 and *European Roma and Travellers Forum (ERTF) v. France*, Collective Complaint No. 64/2011

joined him or her through family reunion, may not be expelled as a consequence of his or her own expulsion, since these family members have an independent right to stay in the territory,¹¹⁵.

¹¹⁵ See, Centre on Housing Rights and Evictions (COHRE) v. Italy, Collective Complaint No. 58/2009, § 152

Chapter 2: Article 8 of the European Convention on Human Rights

2.1 Introduction

The rights guaranteed by the ECHR do not aim at protecting merely the nationals of the Contracting States but the people that reside in their territory, regardless of whether they have the nationality of that state, they are nationals of another state or they are stateless. According to Article 1 of the ECHR, the Contracting States shall secure to everyone within their jurisdiction the rights defined in the ECHR. In addition, those rights must be free of discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status¹¹⁶. It becomes evident that immigrants, residing regularly or irregularly in a Contracting State are protected by the provisions of the ECHR and can rely among others, on Article 8 which guarantees the right to respect for ‘family life’. It should be underlined that Article 8 of the ECHR constitutes a ‘qualified right’ and not an ‘absolute right’¹¹⁷ which means that public authorities may under certain circumstances interfere with this right.

Article 8 of the ECHR reads as follows:

- ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

Discussing an immigration case under the ECHR has always been a controversial issue as it involves the interference of an international convention to a field which in principle remains to the competence of national legislators and public authorities. Generally speaking, the view of the ECtHR is that in immigration cases, the Contracting States enjoy a certain margin of appreciation. Having said that, the ECtHR in the majority of the cases uses as a starting point the following principles:

‘(...) the Court cannot ignore that the present case is concerned not only with ‘family life’ but also with immigration and that, as a matter of well-established international law and

¹¹⁶ Article 14 of the ECHR

¹¹⁷ On the issue of categorisation of human or fundamental rights see the discussion in Chapter 1.1.2 of Part III

subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory’¹¹⁸.

‘The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country’¹¹⁹.

‘The corollary of a State’s right to control immigration is the duty of aliens (...) to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence’¹²⁰.

‘Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple’s choice of country for their matrimonial residence or to authorise family reunification on its territory’¹²¹.

The ECtHR however will disregard these principles in case the refusal to admit or the expulsion of an immigrant breaches one of the rights guaranteed by the ECHR. Thus, as it was the case with the rest of the international conventions that have been examined above, aliens have no autonomous rights concerning their admission to a Contracting State under the ECHR but they can rely on certain provisions of the latter in order to oblige the states to provide them with a legal status which would allow residence in their territory¹²². Among the different provisions of the ECHR, Article 8 is, as already mentioned in the introduction of this dissertation, the one which attracts the majority of the cases which contain an element of immigration. Nevertheless, immigration and asylum cases often raise issues under Articles 3¹²³, 5¹²⁴, 13, Article 4 of Protocol 4 and Article 1 of Protocol 7 as well.

In an Article 8 case, the ECtHR applies the following unofficial test in order to find if there has been a violation of the ECHR. The test has two phases. The first one concerns Article 8 (1) and the second one, the justifications of Article 8 (2):

Under 8 (1):

- a) Does the applicant enjoy ‘family life’?
- b) Is there a situation which requires ‘respect’ from the immigration authorities?

¹¹⁸ See, among others, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, §67, Series A no. 94

¹¹⁹ See, among others, *Nunez v. Norway*, no. 55597/09, §66, 28 June 2011

¹²⁰ See, among others, *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 100, 3 October 2014

¹²¹ See, among others, *Jeunesse v. the Netherlands* (cited above) § 107

¹²² The only provisions that directly refer to immigration are Protocol 4 Article 4 that prohibits the collective expulsions of aliens and Protocol 7 Article 1 that refers to the procedural safeguards related to the expulsion of immigrants

¹²³ Prohibition of torture

¹²⁴ Right to liberty and security

Under 8 (2):

- c) Has there been an ‘interference’?
- d) If so, is the ‘interference’ constituted by the immigration decision justified:
 - (i) is it ‘in accordance with the law’,
 - (ii) in pursuit of a legitimate aim,
 - (iii) is it ‘necessary in a democratic society’?

2.2 Definition and scope of ‘family life’

2.2.1 The main relationships that are considered as ‘family life’

The ECtHR has adopted a substance oriented approach regarding the notion of ‘family life’ of Article 8. The formal element may also be important in some cases but in general, the family protected by Article 8 of the ECHR is a *de facto* rather than a *de jure* family. The main relationships that form ‘family life’ within the case law of the ECtHR are those of parent and minor child and husband and wife (‘core family’)¹²⁵. In the present section, we will briefly analyse the ECtHR’s approach towards ‘core family’.

According to the *Berrehab v. the Netherlands*¹²⁶ judgment, the relationship created between the spouses by a lawful and genuine marriage is regarded as ‘family life’. In addition, ‘(...) a child born of such a union is *ipso jure* part of that relationship; hence, from the moment of the child’s birth and by the very fact of it, there exists between him and his parents a bond amounting to ‘family life’¹²⁷. Those main relationships might not however constitute ‘family life’ in the view of the ECtHR in cases of separation where the parent has lost contact with his or her child. In the above mentioned case, the ECtHR accepted the existence of a ‘family life’ between Mr. Berrehab and his daughter not unconditionally but only after finding that the family ties had not been broken after the divorce of Mr. Berrehab with his wife. The fact that he was seeing his daughter four times a week for several hours at a time convinced the

¹²⁵ For the definition and the scope of ‘family life’ under the ECHR see also: D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (2nd edn, Oxford, Oxford University Press, 2009), F.G. Jacobs, R. White and C. Ovey, *The European Convention on Human Rights* (5th edn, Oxford, Oxford University Press, 2010) and F. Van Hoof, P. Van Dijk, A. Van Rijn and L. Zwaak, *Theory and Practice of the European Convention on Human Rights* (4th edn, Antwerpen, Intersentia, 2006)

¹²⁶ *Berrehab v. the Netherlands*, 21 June 1988, Series A no. 138

¹²⁷ §21

ECtHR that they had maintained the ties of ‘family life’. However, certain situations may break those ties.

The *Berrehab* case (cited above) indicates that cohabitation is not an essential element for the existence of ‘family life’ in a relationship between a parent and his or her minor child. In paragraph 21, the ECtHR clearly states that ‘family life’ between a child and a parent exists even if the parents are not living together. This would be the case when the divorce terminates the cohabitation of the spouses. In these cases, family ties between the minor child and the parent who in an immigration case might deport, do not necessarily break. Attempts to keep the contact and regular visits would be sufficient for the ECtHR to accept that ‘family life’ continues¹²⁸. Respectively, cohabitation is not a condition for the ECtHR to accept ‘family life’ in the case of spouses. In *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (cited above), the ECtHR stated that the concept of ‘family’ could include the relationship arising from a lawful and genuine marriage even if ‘family life’ has not been fully established¹²⁹. Indeed, the ECtHR found that there was a ‘family life’ between the applicants and their husbands even though they were not living together.

2.2.2 ‘Family life’ outside the notion of ‘core family’ in non-migration cases

Some family relationships have so far been discussed by the ECtHR solely in non-migration cases. In particular, the ECtHR has accepted the existence of family ties even in cases of a relationship outside marriage. In the *Keegan v. Ireland*¹³⁰, the ECtHR found that ‘the notion of the family in this provision is not confined solely to marriage-based relationships and may encompass other *de facto* family ties where the parties are living together outside of marriage’¹³¹. It becomes apparent that the substance oriented approach is followed in that issue as well. Consequently, a marriage of form only, is likely to fall outside the scope of Article 8 (1) when informal relationships of certain stability may constitute ‘family life’. Similar concerns bring the issue of single mothers and their children. The ECtHR has found in *Marckx v. Belgium*¹³² that a relationship between an unmarried mother and her child constitutes ‘family life’. In the same circumstances, the ECtHR appears more reluctant to automatically accept family ties between the father and the child although even in that case,

¹²⁸ As those of Mr. Berrehab which were described right above

¹²⁹ §62

¹³⁰ *Keegan v. Ireland*, 26 May 1994, Series A no. 290

¹³¹ §44

¹³² *Marckx v. Belgium*, 13 June 1979, §21, Series A no. 31

the central approach is to accept that there is a ‘family life’ unless exceptional circumstances have occurred which resulted in the break of the family bond¹³³.

As regards same-sex relationships, the ECtHR’s initial approach was to consider them as part of the individual’s ‘private life’¹³⁴. The ECtHR in several cases seemed to be reluctant in broadening the scope of ‘family life’ as to cover same-sex relationships, possibly considering it a particularly sensitive topic. It should be mentioned that the ECtHR had also stated that national legislations which treat differently heterosexual spouses or cohabiting partners and same-sex partners are not contrary to Article 14 of the ECHR¹³⁵. However, in *Schalk and Kopf v. Austria*¹³⁶, the ECtHR’s approach on that issue changed significantly¹³⁷. In the present case, the ECtHR took into consideration that many Contracting States have adapted their legislation in order to afford legal recognition to same-sex couples and therefore considered it:

‘(...) artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would’¹³⁸.

This approach is progressive and definitely more coherent with the ECtHR’s focus on substance and not on form. It is also more compatible with Article 14 and the principle of non-discrimination. It should be highlighted that in February 2016 the ECtHR ruled on same-sex partners in a family reunification context as well, finding that a legislation which allows for family reunification for different-sex but not for same-sex *de facto* partners infringes Articles 8 and 14 of the ECHR¹³⁹. It is possible that this issue will concern the ECtHR again in the future, as the regulation of same-sex relationships is under political consideration in many of the Contracting States.

¹³³ For the ‘exceptional circumstances’ see *Gül v. Switzerland*, 19 February 1996, §32, *Reports of Judgments and Decisions* 1996-I

¹³⁴ See *Kerkhoven v. the Netherlands*, no. 15666/89; *Norris v. Ireland*, 26 October 1988, Series A no. 142; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45

¹³⁵ For the relation between the homosexuals’ right to ‘private life’ and the principle of non-discrimination see N.A. Moreham, ‘The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination’ (2008) 1 *European Human Rights Law Review* 44-79

¹³⁶ *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010

¹³⁷ It should also be mentioned that in case *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013 (extracts), the ECtHR held that Contracting States which provide a registered partnership for different-sex partners, without giving the same option to same-sex partners violate Article 8 of the ECHR.

¹³⁸ §94

¹³⁹ *Pajić v. Croatia*, no. 68453/13, 23 February 2016

Furthermore, the ECtHR determined the existence of ‘family life’ between a female to male transsexual and the child of his partner in the *X, Y and Z v. the United Kingdom*¹⁴⁰ case. In the present case, X had undergone gender reassignment surgery but was still regarded as a female according to domestic law, as a complete change of sex was not medically possible. The government argued that there were no family ties between X and his female partner and that they should be treated as a same-sex couple. They also stated that such ties did not exist between X and the child of his partner either, since he was not related to the child by blood, marriage or adoption. The ECtHR recalled that the notion ‘family life’ does not only refer to families based on marriage but also to *de facto* relationships and that when deciding whether a relationship can be said to amount to ‘family life’, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means¹⁴¹. It concluded that there were family ties between the three applicants as the couple applied jointly for treatment by artificial insemination by donor (AID) to allow Y to have a child and X was involved throughout that process and had acted as a ‘father’ in every respect since Z’s birth¹⁴².

On the contrary, there is no ‘family life’ between a sperm donor for artificial insemination and the recipient mother or child¹⁴³ in case the mother intends to rear the child with someone else, neither between the child and the partner of the recipient mother in a lesbian relationship¹⁴⁴:

‘(...) [T]he relevant legislation in itself does not prevent the three applicants from living together as a family. The only problem in the present case is the impossibility for the first applicant to establish legal ties with the third applicant (the child) which may become of practical importance should the natural mother die or should the relationship between the two adults end otherwise. However, the Commission is of the opinion that the above described positive obligations of a State under Article 8 (Art. 8) do not go so far as to require that a woman such as the first applicant, living together with the mother and the child itself, should be entitled to get parental rights over the child. The Commission therefore considers that there has been no interference with the applicants’ right to respect for their ‘family life’.

The notion of ‘family life’ covers adopted children as well, as adoptive parents are treated as biological parents. An undoubtedly outstanding case regarding adoption is the *Emonet and*

¹⁴⁰ *X, Y and Z v. the United Kingdom*, 22 April 1997, *Reports of Judgments and Decisions* 1997-II

¹⁴¹ §36

¹⁴² §37

¹⁴³ See J. Liddy, ‘The Concept of Family Life Under the ECHR’ (1998) 1 *European Human Rights Law Review* 15-25

¹⁴⁴ *Kerkhoven v. the Netherlands* (cited above)

*others v. Switzerland*¹⁴⁵ case which concerns a biological mother, her daughter and the cohabitee of the mother who wished to adopt the daughter of his partner. The facts of the case can be resumed as follows: The mother, Mrs. Faucherre and her partner, Mr. Emonet were not married but were cohabitating together. Mr. Emonet decided to adopt Mrs. Faucherre’s daughter, Isabelle as the latter considered him as her father and they all wished to become a family according to the Swiss law. However, Mr. Emonet’s decision to adopt Isabelle ended the parental relationship between Isabelle and her biological mother for reasons related to the domestic legislation of the Contracting State concerned. The ECtHR found a violation of Article 8 as it considered that:

‘(...) ‘respect’ for the applicants’ ‘family life’ required that biological and social reality be taken into account to avoid the blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended. Failure to take such considerations into account flew in the face of the wishes of the persons concerned, without actually benefiting anybody’¹⁴⁶.

In conclusion, it should be mentioned that the notion of ‘family life’ has covered relationships between grandparents and grandchildren¹⁴⁷ and between uncles and nephews¹⁴⁸ in cases that the parents of the child were not alive or they had been banned parental rights over the child.

2.2.3 ‘Family life’ outside the notion of ‘core family’ in migration cases

The issue of the existence of ‘family life’ outside the limits of ‘core family’ is detected in immigration cases as well. In addition to the recently decided case on family reunification between same-sex partners that have been analysed above, the ECtHR has in several occasions taken into consideration the relationship of adult immigrants with their parents or siblings.

The ECtHR was then criticised¹⁴⁹ for having adopted a ‘hidden agenda’ for treating integrated immigrants who had not created their own family in the host state as *de facto* citizens, which means that their deportation could hardly ever be justified. This approach reflected the intention of the ECtHR to protect the immigrants who had been residing for a very long time

¹⁴⁵ *Emonet and Others v. Switzerland*, no. 39051/03, 13 December 2007

¹⁴⁶ §86

¹⁴⁷ See *Vermeire v. Belgium*, 29 November 1991, Series A no. 214-C and *Marckx v. Belgium* (cited above)

¹⁴⁸ See *Boyle v. the United Kingdom*, 28 February 1994, Series A no. 282-B

¹⁴⁹ See R. Cholewinski, ‘Strasbourg’s ‘Hidden Agenda’: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights’ (1994) 12 *Netherlands Quarterly of Human Rights* 287-306

or had been born in the Contracting State and were undoubtedly enjoying a high level of integration there. Therefore, many integrated immigrants were granted the protection of ‘family life’ of Article 8, even though they did not have any family ties with members of the ‘core family’ and in many cases with arguments that, according to some scholars, had little to do with the notion of ‘family life’¹⁵⁰.

In *Moustaquim v. Belgium*¹⁵¹, the applicant arrived in Belgium at the age of one, he committed theft and robbery as a minor and was deported from Belgium after he had reached the age of adulthood. The ECtHR considered the relationship that Moustaquim had with his parents and siblings, three of which had been born in Belgium and one had also acquired the nationality of the host country and found that there was a violation of the applicant’s right to respect for ‘private’ and ‘family life’. It becomes obvious from the circumstances of this case that the ECtHR attached great importance to the fact that Moustaquim had spent all of his life in Belgium¹⁵² and protected him from deportation but with a reasoning that causes controversy on whether it is relevant with the concept of ‘family life’ (except for his relationship with his parents and siblings, the ECtHR considered his strong social ties with the Contracting State, as well as the fact that he had received his schooling there).

This approach was criticised by members of the ECtHR for expanding excessively the notion of ‘family life’. In his concurring opinion in *Beldjoudi v. France*¹⁵³, Judge Martens stated that the ECtHR should focus more on the notion of ‘private’ than ‘family life’ in cases that the immigrant does not have his or her own family in the Contracting State. The Judge considers that although not all of the settled immigrants are married, they all have a private life and therefore their case should be discussed under ‘private life’ of Article 8. He added: ‘Expulsion severs irrevocably all social ties between the deportee and the community he is living in and I think that the totality of those ties may be said to be part of the concept of ‘private life’, within the meaning of Article 8 (art. 8)’. This view implies a stricter conception of ‘family life’ than the one adopted by the ECtHR at that period in several immigration cases and suggests that the notion of ‘family life’ should include only the ‘core family’ while the rest of the

¹⁵⁰ R. Cholewinski, ‘Strasbourg’s ‘Hidden Agenda’: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights’ (1994) 12 *Netherlands Quarterly of Human Rights* 287-306

¹⁵¹ *Moustaquim v. Belgium*, 18 February 1991, Series A no. 193

¹⁵² For the adoption of a ‘connections approach’ see H. Storey, ‘The Right to Family Life and Immigration Case Law at Strasbourg’ (1990) 39(2) *International and Comparative Law Quarterly* 328-344

¹⁵³ *Beldjoudi v. France*, 26 March 1992, Series A no. 234-A

relationships should form part of the immigrant’s ‘private life’. However, according to the same opinion, as both ‘family’ and ‘private life’ are equally protected by Article 8, the adoption of this view does not lower the threshold of protection of settled immigrants.

In its subsequent case law, the ECtHR slightly modified its view focusing again on the ‘core family’. In *Slivenko v. Latvia*¹⁵⁴, where a family was expelled collectively from Latvia, the ECtHR considered the issue of whether the deportation measure interfered with the applicants’ ‘family’ or ‘private life’. In paragraph 96, the ECtHR notices that ‘[t]hey were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being’, adding that:

‘(...) the existence of ‘family life’ could not be relied on by the applicants in relation to the first applicant’s elderly parents, adults who did not belong to the ‘core family’ and who have not been shown to have been dependent members of the applicants’ family, the applicants’ arguments in this respect not having been sufficiently substantiated’¹⁵⁵.

The ECtHR could arguably have examined the present case under the notion of ‘family life’, as it did with the *Moustaquim* case (cited above) which was discussed above. Instead, it focused on the ‘private life’ that the family had in Latvia¹⁵⁶, explaining that in order for ‘family life’ to be established outside the limits of the ‘core family’, an additional element of ‘dependence’ is required.

This reasoning has been followed in a number of even more recent cases as well. In *Onur v. the United Kingdom*¹⁵⁷, ‘[t]he Court does not find, however, that the applicant enjoyed ‘family life’ with his mother and siblings as he has not demonstrated the additional element of ‘dependence’ normally required to establish ‘family life’ between adult parents and adult children’¹⁵⁸. In addition, in the same case the ECtHR observed that despite the fact that a settled immigrant enjoy or not ‘family life’ in the Contracting State, an expulsion order

¹⁵⁴ *Slivenko v. Latvia* [GC], no. 48321/99, ECHR 2003-X

¹⁵⁵ §97

¹⁵⁶ Part of the doctrine has expressed the view that the concept of ‘private life’ is broad enough to cover situations related to family but not solely concerned with the family unity. See Y. Ronen, ‘The Ties that Bind: Family and Private Life as Bars to the Deportation of Immigrants’ (2012) 8(2) *International Journal of Law in Context* 283-296

¹⁵⁷ *Onur v. the United Kingdom*, no. 27319/07, 17 February 2009

¹⁵⁸ §45

constitutes an interference with his or her right to respect for ‘private life’¹⁵⁹. ‘It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the ‘family life’ rather than the ‘private life’ aspect’¹⁶⁰. Furthermore, in *A.W. Khan v. the United Kingdom*¹⁶¹, the ECtHR found that the relationship between the 34-year old applicant and his mother and siblings did not constitute ‘family life’, although he was living with them and they suffered from different health problems¹⁶². Therefore, it can be concluded that the prevailing approach of the ECtHR in its recent case law is to discuss the issue of adult settled immigrants under ‘private life’ except if there is an element of ‘dependence’¹⁶³ other than normal emotional ties on some of the members of their family.

Regardless of this turn, the ECtHR has in some cases appeared somewhat more flexible accepting the existence of ‘family life’ between young adults who do not have their own family and their parents. In *Maslov v. Austria*¹⁶⁴, the ECtHR stated that the relationship between a young adult who has not founded his/her own family with his parents constitutes ‘family life’ in the sense of Article 8¹⁶⁵. A similar approach, although probably not expressed that unconditionally, has been adopted in *A.A. v. the United Kingdom* (cited above), where the ECtHR stated that ‘[a]n examination of the Court’s case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having ‘family life’’. Lastly, the same finding is confirmed in *Bousarra v. France*¹⁶⁶, where the ECtHR found ‘family life’ to exist in a case of a single adult who had no children, recalling that in the case of young adults who had not yet founded their own families, their ties with their parents and other close family members could constitute ‘family life’.

It should be noted that the existence or not of the adult immigrant’s own family may either be seen as an element which is inconsistent with the ‘dependence’ approach (as it recognises ‘family life’ to adult immigrants with their adult parents without demonstrating a ‘dependence’ element) or on the contrary, it can be perceived as a factor which actually proves the existence

¹⁵⁹ In the present case however the ECtHR found that there was ‘family life’ between the applicant and his current partner and child.

¹⁶⁰ §46; See also *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII

¹⁶¹ *A.W. Khan v. the United Kingdom*, no. 47486/06, 12 January 2010

¹⁶² See also *A.A. v. the United Kingdom*, no. 8000/08, 20 September 2011

¹⁶³ See also *Balogun v. the United Kingdom*, no. 60286/09, 10 April 2012

¹⁶⁴ *Maslov v. Austria*, no. 1638/03, 22 March 2007

¹⁶⁵ See §62 and §64

¹⁶⁶ *Bousarra v. France*, no. 25672/07, 23 September 2010

of the dependence (in case we accept that the mere fact that the young adult does not have his or her own family implies a certain level of dependence on his or her parents). In any of the above cases, it seems rational to accept a broader definition either of the element of ‘dependence’ or of the notion of ‘family life’ in order to afford ‘family life’ protection to young adults who do not have their own family in the Contracting State.

It can be argued that as long as both ‘family’ and ‘private life’ are equally protected under Article 8, the discussion concerning the limits between them is merely academic, if not immaterial. The ECtHR itself has in some cases adopted an approach which seems to leave ‘open’ the issue of whether the applicant enjoys ‘family’ or ‘private life’ in the Contracting State. In *A.A. v United Kingdom* (cited above), for instance, although as mentioned above the ECtHR accepted that the relationship between an adult child who has not created his/her own family may constitute ‘family life’, it, finally, decided to leave the issue somewhat ‘open’ stating that:

‘(...) it is not necessary to decide the question there (of whether the applicant enjoys ‘family life’) given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of ‘private life’ within the meaning of Article 8. Thus, regardless of the existence or otherwise of a ‘family life’, the expulsion of a settled migrant constitutes an interference with his right to respect for ‘private life’¹⁶⁷.

Nonetheless, according to Thym¹⁶⁸, ‘family life’ is protected by Article 8 independent of the length of its existence while ‘private life’ is protected only after a certain period passes and gains weight the longer a person has lived in a country. Thym’s argument is based on the broad definition of ‘private life’ given by the ECtHR in *Slivenko*, (cited above; see para. 96, ‘the network of personal, social and economic relations that make up the private life of every human being’). He considers that:

‘[t]his general definition of the private life ‘of every human being’ suggests that the Court will not embark upon a substantive analysis of the quality of the personal relations of a

¹⁶⁷ §49

¹⁶⁸ D. Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57(1) *International and Comparative Law Quarterly* 87-112

given individual and instead primarily rely upon the time criterion to determine the material reach of private life under Article 8 ECHR¹⁶⁹.

Next, dependency is not only a necessary element in case adult children invoke their relationship with their parents but also when parents wish to rely on their relationship with their adult children in order to be afforded protection under Article 8. This becomes evident in the recently decided *Senchishak v. Finland*¹⁷⁰, where the ECtHR reaffirmed that in relationships that fall outside the ‘core family’ additional factors of dependence other than normal emotional ties should be proven to exist. In the present case the applicant was a Russian national who had suffered a stroke which resulted in her right side being paralysed. The applicant’s husband died and one of her two daughters went missing and is probably dead. The ECtHR found that the relationship between the applicant and her daughter did not constitute ‘family life’ in the sense of Article 8 as although the applicant suffered health problems, she was not necessarily dependent on her daughter nor was her care only possible in Finland. In the ECtHR’s view, the applicant could be cared in a private or public hospital in Russia being financially supported by her daughter. It should be noted that in addition to these arguments, the ECtHR based its finding on the fact that the applicant and her daughter had only lived together for the last five years, after an interruption in their family life of at least twenty years.

In their dissenting opinion, two of the judges criticised the majority for not treating with the issue of dependency in the same way as regards parents who claim to be dependent on their adult children and adult children who claim to be dependent on their parents. In their view, in particularly similar factual circumstances, the ECtHR found that there existed family life between adult children who suffered health problems with their parents even though the family life had also been interrupted for several years¹⁷¹. The dissenting judges further criticised the judgment of the majority for not taking into consideration moral or cultural elements stating that:

‘[t]he notion of ‘core family’ and the level of preserved emotional ties between parents and separated adult children vary across the cultures and traditions of Europe as well as among individuals living in various countries. (...) A time comes when elderly parents do need the loving care of their adult children and actually receive it as a matter of moral duty and

¹⁶⁹ D. Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57(1) *International and Comparative Law Quarterly* 87-112

¹⁷⁰ *Senchishak v. Finland*, no. 5049/12, 18 November 2014

¹⁷¹ The Judges refer to the case *Emonet and others v. Switzerland* (cited above)

preserved feelings of affection. To deny this is to hold that once an individual comes of age, the emotional ties with his or her parents are to be considered once and for all de facto and de jure severed and that for this reason neither a moral nor a legal duty to provide care may be said to exist between them. In our understanding this is incorrect in both legal and moral terms¹⁷².

2.3 ‘Respect’ for family life

2.3.1 Positive vs. negative obligations

The states have argued that the notion of ‘respect’ implies a merely negative obligation which means that the public authorities should not interfere arbitrarily with the right to respect for ‘family life’ of the individuals. The ECtHR has stated that this is a narrow reading of Article 8 and that the Contracting States are also obliged to adopt measures in order to guarantee respect for family life (positive obligation). In *Marckx v. Belgium* (cited above), the ECtHR noticed: ‘Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective ‘respect’ for ‘family life’¹⁷³.

The states have further argued that Article 8 refers to interference from the public authorities to an individual’s right and that it does not apply if the interference has been caused by another individual. The ECtHR disagreed as well. There is a positive obligation of the state to respect ‘family life’ in cases where the interference has been caused by an individual and not by the state¹⁷⁴. In *X and Y v. the Netherlands*¹⁷⁵, the ECtHR stated clearly that in addition to negative undertaking that there shall be no arbitrary interference by the public authorities, positive obligations may exist which may involve the adoption of measures concerning the relations of individuals between themselves.

2.3.2 The ECtHR’s conception of the notion of ‘respect’ in admission cases

The ECtHR’s conception of the notion ‘respect’ in a case of admission of a non-national is the most complex of the issues concerning Article 8 (1). The leading case in the field of admission for the purposes of family reunification is the *Abdulaziz, Cabales and Balkandali v.*

¹⁷² See last paragraph of the dissenting opinion of Judges Bianku and Kalaydjieva

¹⁷³ §31

¹⁷⁴ For example in cases that an individual has separated members of the family and does not allow the contact between them

¹⁷⁵ *X and Y v. the Netherlands*, 26 March 1985, §23, Series A no. 91

the United Kingdom (cited above). It constitutes as well the first of the Article 8 cases which was also concerned with immigration. In *Abdulaziz*, the applicants were lawfully settled in the United Kingdom and they were denied reunification with their husbands. They challenged Article 8 and claimed as well that they had been victims of discrimination on grounds of sex, race and birth (Article 14). At first, the ECtHR decided to determine whether there is a violation of Article 8 taken alone. In its view: ‘The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country’,¹⁷⁶.

The statement implies the application of the so-called ‘elsewhere test’. If there is no obligation of a state to respect the choice of country of the matrimonial residence of a couple and in case ‘family life’ can be enjoyed somewhere else, a refusal to accept a non-national in the Contracting State does not constitute a failure to ‘respect’ for ‘family life’. In the present case, the applicants had not shown that there was any special reason why they would not be able to join their husbands in their husbands’ home countries or that there was any reason why this could not be expected from them. In addition, the ECtHR found that they were all three of them, aware of their husbands’ unstable legal position and therefore concluded that there was no violation of Article 8 taken alone. However, it did find a violation of Article 8 taken together with Article 14 which the applicants also challenged. Discussing the issue of discrimination, the ECtHR noticed that it would have been easier for the applicants to achieve reunification with their partners if they had been males and therefore found that there was a violation of Article 8 taken together with Article 14.

The *Abdulaziz* judgment reflects the ECtHR’s traditional view towards ‘respect’ in admission cases. According to this, a wide margin of appreciation is given to the states when determining the steps to be taken to ensure compliance with the ECHR as far as a positive obligation is concerned. In paragraph 67, the ECtHR mentions that especially in a positive obligation case, the notion of ‘respect’ is not clear-cut and that the notion’s requirements will vary considerably from case to case. It should be underlined that Judge Martens in his *Gül* (cited above) dissenting opinion¹⁷⁷ criticised this approach claiming that one of the main objections on the aforementioned doctrine is that in the context of positive obligations, the

¹⁷⁶ §68

¹⁷⁷ Judge Marten’s dissenting opinion in *Gül v. Switzerland* (cited above) §8

margin of appreciation might already come into play at the stage of determining the existence of the obligation, while in the context of negative obligations it only plays a role, if at all, at the stage of determining whether a breach of the obligation is justified.

The ECtHR was concerned with the issue of the positive obligation which derives from the notion of ‘respect’ in three other cases decided after *Abdulaziz*; the *Gül v. Switzerland* (cited above), the *Ahmut v. the Netherlands*¹⁷⁸ and the *Sen v. the Netherlands*¹⁷⁹.

In *Gül*, Mr. and Mrs. Gül, after having established a stable legal status in Switzerland, they tried to reunify with their son left behind in Turkey. It is noteworthy that the applicants did not have a permanent right of residence but simply a residence permit on humanitarian grounds, which did not give them a right to family reunification. The ECtHR accepted that in view of the length of time Mr. and Mrs. Gül had lived in Switzerland, it would definitely not be easy for them to return to Turkey, but there were, strictly speaking, no real obstacles preventing them from developing ‘family life’ there. The ECtHR found no violation of Article 8 as family reunification could have taken place in the country of origin. However, the ECtHR seems to adopt, at least on a theoretical level, a different approach as far as the margin of appreciation is concerned comparing to the *Abdulaziz* judgment as it states:

‘There may in addition be positive obligations inherent in effective ‘respect’ for family life. However, the boundaries between the State’s positive and negative obligations under this provision (Art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation’¹⁸⁰.

In his dissenting opinion¹⁸¹, Judge Martens mentioned that the approach of the ECtHR should be exactly the same both in a positive and in a negative obligation case and highlighted the difficulty in distinguishing between the two types of obligation. In his view, in a family reunification case, the refusal of the public authorities to let spouses or parents and children be reunified might be seen as an action which they should have avoided or it could be viewed as a failure to take an action to make family reunification possible. For this reason he concluded that: ‘[t]hese and other difficulties in distinguishing between cases where positive and cases where negative obligations are at stake would be immaterial if both kinds of

¹⁷⁸ *Ahmut v. the Netherlands*, 28 November 1996, *Reports of Judgments and Decisions* 1996-VI

¹⁷⁹ *Sen v. the Netherlands*, no. 31465/96, 21 December 2001

¹⁸⁰ §38

¹⁸¹ The dissenting opinion was approved by Judge Russo

obligation were treated alike’¹⁸². He found that the refusal to accept the son in Switzerland not only constituted an interference with the right to family life but this interference could not be justified under Article 8 (2) and therefore constituted a violation of Article 8. For justifying his view, he referred to the daughter of the couple who lived in Switzerland and remarked that it was for her best interest to remain in the place where she was already receiving her education.

The *Ahmut v. the Netherlands* (cited above) case concerns a Moroccan minor who was refused a residence permit which would have allowed him to reunify with his father, who had dual Moroccan and Dutch nationality and was living in the Netherlands. As regards the issue of ‘positive obligations’, the ECtHR recalled that Article 8 protects the individual against arbitrary action by the public authorities but there may in addition be positive obligations arising for the notion of ‘respect’ for family life. ‘However, the boundaries between the State’s positive and negative obligations under Article 8 do not lend themselves to precise definition’¹⁸³. It becomes evident that the ECtHR repeats the ‘*Gül* reasoning’ on this issue. The outcome of the present case is also similar to that of the *Gül* case, as the ECtHR applied the ‘elsewhere test’ and concluded that there was no obstacle for the father to return to Morocco and that by sending his son to boarding-school, Mr. Ahmut had arranged for him to be cared for in Morocco. The ECtHR concluded that the Dutch authorities had not failed to strike a fair balance between the interests of the applicants and the interest of the community in controlling immigration and therefore there was no violation of Article 8.

The dissenting Judges¹⁸⁴ argued that the refusal of the Dutch authorities to allow reunification between the applicant and his son constituted an interference with the right to respect for ‘family life’ and that the interference could not even be justified under Article 8 (2)¹⁸⁵. Some of them criticised the ECtHR’s judgment severely. Judge Valticos stated:

‘Few human rights are as important as a father’s right to have his son by him, to guide him, to supervise his education and training and to help him choose and begin a career and as it were to prepare the projection of his own life into the future by contributing to a happy and productive life for his child’.

¹⁸² §8

¹⁸³ §63

¹⁸⁴ See Judge Valticos’ dissenting opinion, Judge Martens’ dissenting opinion joined by Judge Lohmus and Judge Morenilla’s dissenting opinion in *Ahmut v. Netherlands* (cited above)

¹⁸⁵ See Judge’s Martens dissenting opinion

He then focused on the fact that the applicant had acquired the Dutch nationality and as a national was entitled to have his son join him even if the son did not have the nationality of that Contracting State. He added: ‘How does it come about that in the present case this right was refused him? I cannot think that it is because the Dutch father was called ‘Ahmut’. However, the suspicion of discrimination must inevitably lurk in people’s minds’. Judge Martens noted that if a father who has the Dutch nationality wants to live with and care for his minor child in the Netherlands both father and child are entitled to have that decision respected¹⁸⁶. It is apparent that even though the majority of the Judges voted against a violation of Article 8, there was an influential minority which adopted a more expanding approach towards the notion ‘respect’ in admission cases.

The approach of the dissenting Judges in *Ahmut* reflects to a certain extent on *Sen v. the Netherlands* (cited above). In *Sen*, the applicants complained that the refusal of the Dutch authorities to accept their daughter in the Netherlands constituted an infringement of their right to respect for ‘family life’ of Article 8 of the ECHR. The ECtHR considered the strong linguistic and cultural ties that the daughter had with Turkey but found that in the present case, there was a major obstacle for the rest of the family to relocate to Turkey. It is worth mentioning that the ECtHR found a violation of Article 8 even though the legal status that *Sen* hold in the Netherlands was not better than the one *Ahmut* enjoyed in Switzerland (that of the nationality of the state). This may be seen as an evolution with regard to the ECtHR’s position that the same principles should apply in the two types of obligation but even in *Sen*, the threshold of ‘respect’ for the admission cases is still set very high and leaves little space to the second paragraph to apply¹⁸⁷.

Similar approach has been adopted by the ECtHR in *Tuquabo-Tekle and others v. Netherlands*¹⁸⁸. In the present case, the ECtHR considered whether the Dutch authorities were under a duty to allow a daughter to reside in the Netherlands in order to reunify with her mother, stepfather and siblings. In doing so, the ECtHR had to examine whether ‘(...) the Government can be said to have struck a fair balance between the applicants’ interests on the one hand and its own interest in controlling immigration on the other’¹⁸⁹. The ECtHR took into consideration factors such as the ties that the daughter had with the country of origin, as

¹⁸⁶ See §7 of dissenting opinion of Judge Martens in *Ahmut v. Netherlands* (cited above)

¹⁸⁷ N. Blake and R. Husain, *Immigration, Asylum and Human Rights* (Oxford, Oxford University Press, 2003)

¹⁸⁸ *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, 1 December 2005

¹⁸⁹ §44

well as the existence of ‘dependence’ between the daughter and the mother. It concluded that unlike in usual cases, her age made her even more dependent on her mother, as she had reached marriageable age and the grandmother had taken her out of school and wanted to marry her off so that she would no longer be responsible for taking care of her. Having regard to the above, the ECtHR found that there was a positive obligation from the Dutch authorities to allow ‘family life’ to be established in the Netherlands and their refusal constituted a violation of Article 8.

The two above discussed cases could be conceived as a slight turn in the ECtHR’s case law on family reunification cases as the ECtHR seems to depart from the application of a strict ‘elsewhere test’ and rather intends to consider what would ‘the most adequate means for the applicants to develop family life together’¹⁹⁰ be. In the recently decided *Berisha v. Switzerland*¹⁹¹, the ECtHR adopts the *Sen and Tuquabo-Tekle* wording¹⁹² but given that it eventually finds no violation of Article 8 it is hard to conclude whether one can speak about a real turn in the ECtHR’s case law on family reunification. The ECtHR’s future case law is expected to shed light in relation to this issue.

2.3.3 Comments on the ECtHR’s conception of the notion of ‘respect’ in admission cases

We believe that there would be no obstacle for the states to invoke one of the justifications of Article 8 (2) for their refusal to admit a third-country national in their territory in case the ECtHR decided to discuss admission cases under Article 8 (2). The protection of the rights and freedoms of others, as well as the economic well-being of the country could admittedly apply to a situation where the public authorities have denied the entrance to a third-country national. The ECtHR however does not seem to intend to lower the threshold of ‘respect’ in the admission cases as for the justifications of the second paragraph to become applicable.

One explanation could be that the ECtHR presumes that there is a classification among the justification grounds of Article 8 (2) and undoubtedly the ‘public security’ which applies to a ‘regular’ deportation case would appear as more considerable in comparison to any of the applicable justification grounds of an admission case. Thus, if the ECtHR adopts the same

¹⁹⁰ See *Tuquabo-Tekle and Others v. the Netherlands* (cited above) §47

¹⁹¹ *Berisha v. Switzerland*, no. 948/12, 30 July 2013

¹⁹² §55

approach towards an admission and a deportation case with regards to ‘respect’ (Article 8 (1)), it will be harder to accept a justification in an admission rather than in a deportation case (Article 8 (2)). Observing this argument in reverse, we could assume that the ECtHR intends to be more protective towards ‘family life’ in a case of a deportation rather than in a case of an admission, implying the existence of a ‘formal’ family and the existence of a ‘substantial’ family which is attached with greater importance.

An additional argument in favour of the aforementioned opinion is that even though in both paragraphs the ECtHR has to strike a fair balance between the interests of the individual and the public interests in order to find whether there is a violation of Article 8 or not, Article 8 (1) is more favourable for the states than Article 8 (2)¹⁹³. In the second paragraph, the ECtHR has to apply a proportionality test between the individual’s right, on the one hand, and the interests of the community explicitly referred to in the same paragraph, on the other. On the contrary, in the first paragraph there is no such restriction and the ECtHR can invoke any interest of the state and in particular the control of immigration which does not appear to be one of the legitimate aims of the second paragraph. Therefore, by keeping a strict view, the ECtHR gives states the possibility to invoke any interest and makes the notion of ‘respect’ in admission cases more difficult to achieve.

It can be assumed that the ECtHR tends to be more protective towards ‘family life’ in an expulsion case taking into account that the third-country national who is deported has spent a longer period in the territory of the Contracting State at issue and enjoys therefore a higher level of integration than a person who intends to enter a Contracting State for the first time. For this reason, the wide margin of appreciation and the ‘elsewhere’ test in an admission case come into play already in the framework of Article 8 (1), as analysed above. However, such an approach is erroneous as it takes into account elements which fall outside the scope of ‘family life’ such as the possibility of a person to move and establish ‘family life’ in another country, which in addition is incompatible with the freedom of residence of a lawful citizen guaranteed by several Constitutions of the Contracting States, as well as international conventions.

Blake suggests that the ECtHR should accept that the mere fact that a settled immigrant is denied reunification with his or her child would interfere of itself with the duty to respect for

¹⁹³ See C. Warbrick, ‘The Structure of Article 8’ (1998) 1 *European Human Rights Law Review* 32-44

family life owed by the state to the parent¹⁹⁴. This view seems reasonable but unjustifiably limited to the relationship between parents and children. It seems more coherent to suggest that the ECtHR should adopt the aforementioned approach with regards to all relationships that constitute ‘family’ in the sense of Article 8 (1). This approach will allow the justifications to find their proper place in Article 8 (2)¹⁹⁵.

The adoption of the above mentioned view will inevitably be combined with what several commentators have already named ‘connections approach’, as opposed to the ‘elsewhere approach’ which is currently followed by the ECtHR. In particular, part of the doctrine¹⁹⁶ has long ago proposed that the ECtHR should consider the ties that the family has developed with the host country and allow reunification in case the family’s connections are so strong that they cannot be expected to move to the country of origin in order to reunify with the persons left behind. This approach is likely to promote family reunification of migrants who normally do not have real obstacles in returning to the country of origin and in the vast majority of the cases are likely to fail the ‘elsewhere test’. On the contrary, the ‘connections approach’ is likely to harm refugees and persons in need of protection who might fail to prove that they have developed strong ties in the host country and who are the only ones ‘benefiting’ from the ‘elsewhere approach’ due to the circumstance that have urged them to flee from their host country that do not allow for family life to be enjoyed there. Therefore, we suggest that the ECtHR should discuss admission cases under Article 8 (2) applying both an ‘elsewhere’ and a ‘connections approach’¹⁹⁷ depending on the circumstances of each case.

2.3.4 The ECtHR’s conception of the notion of ‘respect’ in expulsion cases

The issue of ‘respect’ in a deportation case appears less thorny than in an admission case as the position of the ECtHR is to accept that a deportation measure constitutes an interference with the right to respect for ‘family life’. In *Berrehab v. the Netherlands* (cited above), the ECtHR found that the circumstances of the case required ‘respect’ from the immigration

¹⁹⁴ N. Blake and R. Husain, *Immigration, Asylum and Human Rights* (Oxford, Oxford University Press, 2003) p.186

¹⁹⁵ See also N. Rogers, ‘Immigration and the European Convention on Human Rights: Are New Principles Emerging?’ (2003) 1 *European Human Rights Law Review* 53-64

¹⁹⁶ See, for example, H. Lambert, ‘The European Court of Human Rights and the Rights of Refugees and Other Persons in Need of Protection to Family Reunion’ (1999) 11(3) *International Journal of Refugee Law* 427-450 and C. Anderfuhner-Wayne, ‘Family Unity in Immigration and Refugee Matters: United States and European Approaches’ (1996) 8(3) *International Journal of Refugee Law* 347-382

¹⁹⁷ See also A. Edwards, ‘Human Rights, Refugees, and the Right ‘to Enjoy’ Asylum’ (2005) 17(2) *International Journal of Refugee Law* 293-330 p.315

authorities and that the deportation measure constituted an interference with his right to respect for ‘family life’, as it did not accept that he could travel from Morocco with a temporary visa nor could the daughter follow him to his country of origin¹⁹⁸. In the majority of the deportation cases, the ECtHR deals with the issue of ‘respect’ swiftly. The approach in a usual deportation case would be that the removal of a person from a country where close family members live is a situation that requires ‘respect’ from public authorities. The issue of whether ‘family life’ can be enjoyed ‘elsewhere’ does exist but it is considered under the proportionality test that the ECtHR applies to eventually find if there is a violation of Article 8.

2.4 ‘In accordance with the law’

In order for an interference to be justified and therefore in accordance with Article 8, it has to fulfil the requirements referred to in Article 8 (2). Above all, the interference should be ‘in accordance with the law’. Even though this has appeared to be an easy consideration in most of the immigration cases, there are cases which have caught the ECtHR’s attention regarding this issue. In *C.G. v. Bulgaria*¹⁹⁹, a Turkish national was deported from Bulgaria where he had been living with his wife and daughter, both Bulgarian nationals. The ECtHR found that the interference was not in ‘accordance with the law’ and therefore violated Article 8, as the decision to expel the applicant did not indicate the factual grounds on which it was made but simply mentioned that he ‘presented a serious threat to national security’ and therefore he should be deported. Lacking particular information of the facts which constituted a basis for this decision, the applicant could not present his case adequately in the judicial review proceedings. It should be noted that the ECtHR did not consider the rest of the requirements referred to in Article 8 (2) after finding that the first one was not fulfilled and concluded that the interference was not justified.

In addition, according to the same case, ‘in accordance with the law’ does not merely mean that the interference should have a basis in domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law. Therefore, the law should be accessible and foreseeable, in the sense of being sufficiently clear in its terms to give individuals an

¹⁹⁸ However, in cases that the other members of the family have no independent right of residence, respect for ‘family life’ may be a reason for deporting the whole family, at least if the children are old enough to adapt to the new environment. See D. Feldman, ‘The Developing Scope of Article 8 of the European Convention on Human Rights’ (1997) 3 *European Human Rights Law Review* 265-274

¹⁹⁹ *C.G. and Others v. Bulgaria*, no. 1365/07, 24 April 2008

adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the ECHR. There should also be a certain degree of legal protection against arbitrary interference²⁰⁰ by the authorities so that the legal discretion is not being expressed in terms of unfettered power²⁰¹. This was discussed in the *Liu v. Russia*²⁰² where the ECtHR found that the law did not comply with the requirement of being ‘in accordance with the law’, as it was giving to the authorities the choice between a deportation procedure which involved procedural safeguards and another one which did not.

2.5 In pursuit of a legitimate aim

After finding that the interference with the right to respect for ‘family life’ is ‘in accordance with the law’, the ECtHR examines whether it pursues one of the legitimate aims mentioned in the second paragraph of Article 8. Those are the national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. In any case, it is for the government to convince the ECtHR that the interference had one of the above mentioned legitimate aims and so far this has not caused significant problems. The states have relied on different legitimate aims for justifying an interference with the protected rights of Article 8 (1), depending on the particular circumstances of each case.

As far as the immigration cases are concerned, the governments tend to apply similar reasoning in order to convince the ECtHR that the interference has been in pursuit of a legitimate aim. In a typical deportation case, the legitimate aim will be the prevention of disorder or crime as in the majority of those cases, the deportation of an immigrant has been a result of a criminal conviction. In cases that the third-country national was deported for reasons other than criminal behaviour, the states have relied on other legitimate aims such as the economic well-being of the country or the interests of the others. This would be the case when the applicant automatically loses the right to reside in the territory of the Contracting State after his or her divorce with the spouse who is settled in that country. In *Berrehab* (cited above), the ECtHR accepted that the deportation of Mr. Berrehab pursued the legitimate aim

²⁰⁰ See also *Al-Nashif v. Bulgaria*, no. 50963/99, 20 June 2002

²⁰¹ See *C.G. v. Bulgaria* (cited above) §39

²⁰² *Liu v. Russia*, no. 42086/05, 6 December 2007

of the preservation of the country’s economic well-being within the meaning of Article 8 (2) rather than the prevention of disorder as the government was in fact concerned to regulate the labour market²⁰³. In *Ciliz v. the Netherlands*²⁰⁴, after the applicant separated from his wife, he was given one year to find employment and since after that year, he had not managed to find a job, the Dutch authorities refused renewal of his residence permit. The ECtHR accepted that the government interfered with the applicant’s right to respect for ‘family life’ aiming at preserving the economic well-being of the country.

2.6 ‘Necessary in a democratic society’

2.6.1 Introduction to the application of the proportionality test

The notion of ‘necessary in a democratic society’ has been dealt with by the ECtHR in the majority of the deportation cases, as it appears to be the crucial factor for deciding whether there exists a violation of Article 8. It constitutes the last of the requirements which should be fulfilled in order for the interference to be justified and therefore in accordance with Article 8 of the ECHR. The ECtHR has given an interpretation of the term, trying to deepen on the rather vague wording of the ECHR. According to the case law, ‘necessary in a democratic society’ means that there is a ‘pressing social need’²⁰⁵ which justifies the interference with the protected right and that the interfering measure is proportionate to the aim of responding to that need. In other words, in order for the ECtHR to decide whether there is a violation of Article 8, it has to apply a proportionality test and strike a fair balance between the interests of the community and in particular those mentioned in Article 8 (2) and the interest of the individual which is the right to respect for his or her ‘family life’.

The ECtHR has applied the proportionality test in various ways throughout its Article 8 case law. For the purposes of this introductory section, reference should be made to *Berrehab* case (cited above) as a representative example of how the proportionality test is being carried out by the ECtHR. In this case, the ECtHR stated that ‘[i]n determining whether an interference was ‘necessary in a democratic society’, the Court makes allowance for the margin of appreciation that is left to the Contracting States’²⁰⁶. However, the ECtHR aimed at

²⁰³ §25-26

²⁰⁴ *Ciliz v. the Netherlands*, no. 29192/95, ECHR 2000-VIII

²⁰⁵ See among others *Nasri v. France*, 13 July 1995, Series A no. 320-B; *Boughanemi v. France*, 24 April 1996, *Reports of Judgments and Decisions* 1996-II; *Balogun v. the United Kingdom* (cited above)

²⁰⁶ §28

examining the present case not solely from an immigration point of view but also taking into consideration the interest of the applicants in continuing their relations. Therefore, the legitimate aim pursued had to be weighed against the seriousness of the interference with the applicants’ right to respect for their ‘family life’. In doing so the ECtHR considered that Mr. Berrehab was not seeking to enter the Netherlands for the first time but had already resided there lawfully for many years and that the Dutch authorities did not claim to have any complaint against him. In addition, the ECtHR found that his daughter needed to stay in contact with him as she was in a very young age and therefore concluded that a proper balance had not been achieved between the interests involved and that there was a disproportion between the means employed and the legitimate aim pursued²⁰⁷.

2.6.2 The ‘second-generation’ migrants

The ECtHR’s case law concerning immigration cases and family life becomes more intense after the *Berrehab* judgment, when the ECtHR considered the issue of deportation of second-generation immigrants. The term second-generation immigrants refers to immigrants who were born in the territory of the Contracting State or arrived there at a very early age and for varying reasons they did not manage to acquire the nationality of the country of their residence. It should be noted that the ECtHR does not consider as second-generation, immigrants that arrived in the Contracting State as kids but at an older age. In *Keles v. Germany*²⁰⁸, the ECtHR stated that ‘(...) the applicant is not a so-called ‘second generation immigrant’ as he first entered Germany at the age of ten’²⁰⁹. However, in those relatively young ages, the ECtHR assesses the necessity of the interference by applying criteria which are similar to those it usually applies to cases of second-generation immigrants. As already analysed above, what makes the cases concerning second-generation immigrants remarkable is that the ECtHR presumes that a certain degree of integration already exists and therefore the application of a deportation measure causes a variety of problems.

In *Moustaquim v. Belgium* (cited above), the ECtHR focused on the fact that Moustaquim had received all his schooling in French, he had returned to his country of origin only twice for holidays, his parents and all of his brothers and sisters lived in Belgium and he had arrived in the host state at the age of one. Taking those factors into consideration, the ECtHR concluded

²⁰⁷ §29

²⁰⁸ *Keles v. Germany*, no. 32231/02, 27 October 2005

²⁰⁹ §56

that there had not been achieved a fair balance and that the deportation was not ‘necessary in a democratic society’, despite the large number of offences of which Moustaquim was accused. In the *Beldjoudi v. France* (cited above) case the ECtHR followed a similar reasoning. Even though Beldjoudi’s criminal record was worse than Moustaquim’s, the ECtHR took into account the fact that he had spent his whole life - over forty years - in France, he was educated in French, he appeared to not know Arabic and he did not seem to have any ties with Algeria apart from that of nationality and concluded that a fair balance had not been achieved and therefore there was a violation of Article 8 of the ECHR.

Nevertheless, the ECtHR has not always applied the proportionality test in favour of a second-generation immigrant. In *Bouchelkia v. France*²¹⁰, even though the applicant arrived to France at the age of two, the ECtHR found no violation of Article 8 as the applicant had committed rape and the ECtHR attached great importance to the seriousness of the criminal offence. Similarly, in *El Boujaïdi v. France*²¹¹, the ECtHR noted that Mr. Boujaïdi did not claim that he did not know Arabic or that he had never returned to Morocco before the exclusion order was enforced and he had never shown any desire to acquire French nationality. Additionally, even though most of his family and social ties were in France, it had not been established that he had lost all links with the country of origin. In *Boujlifa v. France*²¹², the applicant was a Moroccan national who entered France when he was 5, spent all of his life afterwards there and also received his schooling there. He committed robbery at the early adult age of 20. His parents together with his eight brothers and sisters lived lawfully in France. The ECtHR did not find the adopted measure disproportionate and concluded that there was no violation of Article 8 as the criminal offences were counting heavily against the applicant, along with the fact that he had never attempted to acquire the French nationality.

2.6.3 The ‘Boultif criteria’

The ECtHR has been always criticised for being ambiguous in its case law concerning Article 8 and especially with regards to the notion of ‘necessary in a democratic society’ and the application of the proportionality test²¹³. As a response to this criticism, the ECtHR provided

²¹⁰ *Bouchelkia v. France*, 29 January 1997, *Reports of Judgments and Decisions* 1997-I

²¹¹ *El Boujaïdi v. France*, 26 September 1997, *Reports of Judgments and Decisions* 1997-VI

²¹² *Boujlifa v. France*, 21 October 1997, *Reports of Judgments and Decisions* 1997-VI

²¹³ For concerns about uncertainty see A. Sherlock, ‘Deportation of Aliens and Article 8 ECHR’ (1998) 23 *Supp* (Human rights survey) *European Law Review* 62-75. There has been a criticism from members of the ECtHR as well. In his dissenting opinion in *Boughanemi v. France* (cited above), Judge Martens mentions that the case law

in the *Boultif v. Switzerland*²¹⁴ case a set of guiding principles which should be taken into consideration in expulsion cases. It stated:

‘In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant’s stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant’s conduct during that period; the nationalities of the various persons concerned; the applicant’s family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant’s country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion’²¹⁵.

The Boultif criteria were later enriched with two additional principles²¹⁶: 1) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled and 2) the solidity of social, cultural and family ties with the host country and with the country of destination. It should be noted that the ECtHR applies only the first three criteria in the cases that the applicant does not have his or her own family in the Contracting State²¹⁷, as well as the fact that the Boultif principles apply equally to second-generation immigrants and immigrants that have arrived in the host country as adults²¹⁸.

In particular, in *Boultif* (cited above), the ECtHR consider whether by refusing to renew the applicant’s residence permit public authorities had struck a fair balance between the applicant’s right to respect for his ‘family life’, on one hand, and the prevention of disorder or crime, on the other. In doing so, the ECtHR considered if there was a possibility of establishing ‘family life’ elsewhere and in particular in Algeria, the applicant’s country of origin or in Italy, the place where the applicant was unlawfully residing at the time the case was discussed. It concluded that although his wife spoke French, she did not have any ties

of the ECtHR has been so vague concerning Article 8 that it leads to a lack of legal certainty: ‘National administrations and national courts are unable to predict whether expulsion of an integrated alien will be found acceptable or not. The majority’s case-by-case approach is a lottery for national authorities and a source of embarrassment for the Court’.

²¹⁴ *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX

²¹⁵ §48

²¹⁶ See *Onur v. UK* (cited above)

²¹⁷ See *Maslov v. Austria* (cited above)

²¹⁸ See *Balogun v. United Kingdom* (cited above) §45: ‘These criteria are relevant, where applicable, regardless of the age of the person concerned or their length of residence in the expelling State’

with Algeria and therefore she could not be expected to follow her husband in his country of origin, nor could they both obtain authorisation to live in Italy. Therefore, the ECtHR found a violation of Article 8, as it concluded that it was practically impossible for the applicant to live his ‘family life’ outside Switzerland and that when the Swiss authorities decided to refuse his stay in Switzerland, he presented only a comparatively limited danger to public order. The *Boultif* judgment is an example of application of the ‘elsewhere’ test in the framework of ‘necessary in a democratic society’ as opposed to its application to the admission cases which was discussed above.

In its more recent case law, the ECtHR keeps on applying the *Boultif* principles in order to find whether the interference was ‘necessary in a democratic society’. In *Onur v. the United Kingdom* (cited above), a Turkish national of Kurdish origin had been convicted for burglary and robbery and other more minor offences and was therefore deported from the United Kingdom. He complained that the deportation measure constituted a violation of his right to ‘family life’ under Article 8. The ECtHR noted that the applicant had spent a long period in the United Kingdom, he had never returned to Turkey during the nineteen years he lived in the host state and although he spoke Turkish at the time of his expulsion, he no longer had any social, cultural or family ties to Turkey. In addition, his partner and his three children lived in the United Kingdom and they had the British nationality. However, in the present case, the ECtHR focused on the possibility of the family to relocate in Turkey, given that there were no circumstances that would preclude the applicant’s wife from living in Turkey and that the children were in an adaptable age and as British nationals they could return to the United Kingdom on a regular basis in order to visit other family members living there²¹⁹. Therefore, it concluded that a fair balance was struck in this case and that the applicant’s expulsion from the United Kingdom was proportionate to the aims pursued and therefore ‘necessary in a democratic society’²²⁰.

2.6.4 Comments on the ‘*Boultif* criteria’

The positive aspect of the *Boultif* judgment is that it provides a concrete list of relevant principles which should be taken into consideration for the assessment of ‘necessary in a democratic society’, limiting the legal uncertainty that had been arguably caused by the

²¹⁹ §60
²²⁰ §62

ECtHR’s previous case law. It is true that before the *Boultif* case, the judgments of the ECtHR did not seem to follow a concrete line of reasoning and this had often led to contradictory or unexpected decisions. The situation has not changed entirely even after *Boultif* but the ECtHR has surely made a progress as regards the categorisation of the factors which are taken into account in an Article 8 immigration case.

Nevertheless, the established principles can be criticised as having little to do with the actual notion ‘family life’. In particular, the duration of the applicant’s stay in the host country, the nationalities of the various persons concerned, the seriousness of the difficulties which the spouse would be likely to encounter in the applicant’s country of origin (‘elsewhere test’) and the solidity of social and cultural ties with the host country and with the country of destination do not answer to the question whether the third-country national has an effective and genuine ‘family life’ which should be protected under ‘family life’ of Article 8. On the contrary, the majority of those factors and above all, the ECtHR’s persistence in the social, cultural and linguistic ties with both the country of origin and the host country demonstrate the degree of social integration that the immigrant enjoys in the Contracting State.

In several cases the ECtHR attached great importance to the above mentioned factors in order to decide whether there was a breach of the right to respect for ‘family life’. In particular, the context of ‘social and cultural ties’ includes the place where the applicant has received his or her schooling²²¹, whether he or she tried to acquire the nationality of the host state, whether he or she speaks the language of that state²²² and the age in which he or she arrived into it²²³. In *El Boujaïdi v. France* (cited above) for instance, the fact that the applicant had not tried to acquire the French nationality appeared as a crucial factor for the ECtHR to decide that the interference by the national authorities had been justified. Additionally, in a number of cases the ECtHR considered whether the applicants, nationals of French colonies, had made a declaration recognising French nationality following the independence of their country²²⁴. It could be argued that the fact that an immigrant intends to acquire the nationality of a state might imply a desire to obtain a more stable legal status in order to protect his or her ‘family life’ there. However, this is a far-fetched argument and in general the attempt to acquire the

²²¹ See *Radovanovic v. Austria*, no. 42703/98, 22 April 2004

²²² See *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002

²²³ See *A.W. Khan v. United Kingdom* (cited above)

²²⁴ See *Beldjoudi v. France* (cited above)

nationality of a state should fall under a balancing test which ‘measures’ the immigrant’s integration in the hosting country.

Given that the *Boultif* principles are applicable both in ‘family’ and in ‘private life’ cases²²⁵, we suggest that in the cases where the applicant has been found to enjoy ‘family life’, the ECtHR should focus more on the criteria that relate to the immigrant’s family situation, such as the length of the marriage, factors revealing whether the couple lead a real and genuine family life, whether there are children in the marriage and, if so, their age and the best interests and well-being of the children. This approach would be more coherent with the actual content of the protected right as it will involve principles which are more related to the ‘family life’ of the persons involved. On the contrary, it seems reasonable to suggest that the rest of the principles, which have been identified before more as ‘integration principles’ should be more considered in cases where the immigrant enjoys ‘private life’ in the Contracting State. Furthermore, it is proposed that the ECtHR should limit the application of the ‘elsewhere test’, as the criticism on this issue, already made in Chapter 2.3.3 of the present Part, becomes relevant in relation to the proportionality test as well.

2.6.5 The criminal offences

At this point, a further analysis of the *Boultif* criteria and the way they are applied by the ECtHR deems necessary. First, it is worth elaborating on the concept of ‘criminal offence’ which appears to be the factor that weighs more heavily against the applicant in a usual case of deportation. There are three different issues that can be detected with respect to ‘criminal offence’. The first concerns the age at which the applicant committed the crime, the second whether the applicant reoffended after he or she was released from the prison and the third, the seriousness and the nature of the offence.

To begin with, in *Balogun v. the United Kingdom* (cited above), the ECtHR stated that the age of the person is of significant relevance when applying certain of the *Boultif* criteria. For instance, when assessing the nature and seriousness of the offences committed by the applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult²²⁶. This view reflects on a variety of judgments where the ECtHR appeared more favourable in cases that the criminal offence had been committed by a juvenile or an

²²⁵ See, among others, *A.A. v. the United Kingdom* (cited above)

²²⁶ §46

immigrant in the first years of his or her adulthood. However, in *A.A. v. the United Kingdom* (cited above), the ECtHR stated that the fact that the applicant had committed the offences as a minor does not mean that the deportation would by no means be proportionate to the legitimate aim pursued. There are cases where the ECtHR found that there was no violation of Article 8 even if the applicants had committed the crimes as minors, as other factors were counting heavily against them²²⁷.

As regards whether the applicant has committed crimes after he or she was released from the prison, it should be noted that the ECtHR appears more favourable towards a person who has shown the will to re-join society in a regular way. The absence of a re-offence weakens the argument that the applicant constitutes a threat to public order as well. This is the reason why in *A.A. v. the United Kingdom* (cited above) the ECtHR stated that in such circumstances, the governments are required to provide further support for their contention that the applicant can reasonably be expected to cause disorder or to engage in criminal activities such as to render his deportation necessary in a democratic society²²⁸. In the present case for instant, the ECtHR was not convinced that the government provided with additional support for its argument that the applicant could be a threat to public order and concluded that the deportation measure had violated Article 8.

The last of the elements concerns the nature and the seriousness of the criminal offence. It could be assumed that the ECtHR distinguishes among drug offences, other serious offences such as murders or rapes and, finally, minor offences. As for the drug offences, the ECtHR has stated in *Dalia v. France*²²⁹ that ‘[i]n view of the devastating effects of drugs on people’s lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge’²³⁰. In the case at hand, the ECtHR found that the applicant’s contribution to the spread of drugs in France counted so heavily against her that the interference measure was not disproportionate, despite the fact that she had a child who had the French nationality, as well as the fact that she had spent 19 years of her life in France.

²²⁷ See *Boujlifa v. France* (cited above)

²²⁸ §68

²²⁹ *Dalia v. France*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I

²³⁰ §54

In *Baghli v. France*²³¹, the ECtHR concluded that the interference measure was not disproportionate as well, as the applicant was convicted for dealing in heroin, part of which was for his own and his companion’s use and the remainder for sale to finance further purchases, after being adulterated in a way that made it particularly dangerous for buyers. The offence was found to constitute a serious breach of public order and undermined the protection of the health of others. However, it is worth mentioning that the ECtHR has not found the interference proportionate in all cases concerning drug offences²³².

Furthermore, the ECtHR seems to adopt an equally strict approach towards the rest of the serious offences. In *Boughanemi v. France* (cited above), the applicant had been convicted for living on earnings of prostitution and the ECtHR found that the seriousness of such offence counted heavily against him. In *Nasri v. France* (cited above), the applicant was an Algerian national, who was deaf-mute and had committed various serious offences, including gang rape. The ECtHR stated that the perpetrator of such a serious offence may unquestionably represent a grave threat to public order. However, it concluded that the interference measure was not proportionate to the legitimate aim pursued as it took into consideration other relevant factors. Comparing the two present cases, we could note that Mr. Nasri’s criminal record was worse than that of Mr. Boughanemi’s but nevertheless the ECtHR found that his right to ‘family life’ had been infringed. This demonstrates that the seriousness and the nature of the criminal offences committed by the third-country national is solely one of the factors taken into account when applying the proportionality test but in order for the ECtHR to decide whether there was eventually an infringement to the right to respect for ‘family life’, other factors are taken into account.

As far as minor criminal offences are concerned, the ECtHR accepts that they do not count that significantly against the applicant. In *Keles v. Germany* (cited above), the ECtHR stated that the traffic offences that the applicant had committed did not constitute an influential factor for the outcome of the case:

‘The Court also appreciates that the domestic authorities show great firmness against aliens who have committed certain types of offences, for instance actively contributing to the

²³¹ *Baghli v. France*, no. 34374/97, ECHR 1999-VIII

²³² See *A.W. Khan v. the United Kingdom* (cited above), *Sezen v. the Netherlands*, no. 50252/99, 31 January 2006 and *Amrollahi v. Denmark* (cited above)

spreading of drugs. The offences committed by the applicant do not, however, fall within any such category’²³³.

It could be assumed that minor offences would not be taken into serious consideration by the ECtHR especially in a case of a settled immigrant and that in such cases the outcome of the proportionality test will depend on the rest of the circumstances of the particular case²³⁴.

2.6.6 The best interest of the child

Another factor which should be taken into consideration in the applicable test is the ‘best interest of the child’. This principle has its base on Article 3 (1) of the CRC as the ECHR does not make any reference to this principle. In short, it should be mentioned that the principle is regrettably attached with less importance than expected in the application of the proportionality test of Article 8 (2)²³⁵. Several authors argue that Article 8 of the ECHR rather protects parents’ right to ‘family life’ rather than children rights²³⁶. Indeed, in most of the cases which involve a child, the ECtHR considers only secondarily the difficulties that the child would encounter by removing his/her parent or himself/herself from the place where it resides or by not allowing reunification with its parents. Even if it is apparent that the ECHR does not guarantee to any third-country national the right to reside in or enter a territory of a Contracting State as such, we believe that there is undoubtedly more space for an approach which would take more into account the well-being of the child.

Children may be involved in two different kinds of Article 8 expulsion cases. In the first case, the child together with his/her parents is being deported. In the second, the person faced with the deportation order is the parent, whereas the child has the right to remain in the Contracting State.

As regards the first of the above mentioned cases, the most significant of the factors that are taken into consideration for the evaluation of the child’s best interest are his/her age and the existence of ties with both the country of origin and the Contracting State. The main line of reasoning is that the younger the child the more adaptable s/he is considered to be in the

²³³ §59

²³⁴ See also the more recently adopted judgment *M.P.E.V. and Others v. Switzerland*, no. 3910/13, 8 July 2014

²³⁵ For a critical review on the ECtHR’s approach see U. Kil Kelly, *The Child and the European Convention on Human Rights* (Dartmouth, Ashgate, 1999)

²³⁶ See, among other, C. McGlynn, *Families and the European Union: Law, Politics and Pluralism* (New York, Cambridge University Press, 2006) p.76

country of origin²³⁷. On the contrary, older children are normally considered less capable of adapting to the life in the country of origin and the ECtHR is more likely to hold that expulsion would violate Article 8²³⁸. Despite that, in a number of cases the ECtHR has found that older children could still adapt to the life in the country of origin²³⁹. As regards the ties with the country of origin and the host country, it is evident that the stronger the ties with the host country, the more likely the ECtHR would consider that expulsion would harm the well-being of the child and *vice versa*.

As far as the second of the above mentioned cases is concerned, the ECtHR appears to weigh more the best interest of the child in its proportionality test. In these cases, the main applicable principles are that the child needs regular contact with both of his/her parents and that the younger the child the more in need of the presence of both of his/her parents. It should be noted that these cases normally emerge following the couple’s separation or divorce. An example of the ECtHR’s approach in such cases can be found in *Berrehab* (cited above) where, as mentioned above, the ECtHR took into account the daughter’s very young age and the fact that she needed to keep the regular contact with her father and found a violation of Article 8. In addition, in *Mehemi v. France*²⁴⁰, the ECtHR found that there was a violation of Article 8 ‘above all’ in view of the fact that the order for his permanent exclusion from France separated the applicant from his minor children and his wife²⁴¹, even though Mr. Mehemi had been convicted for participating in a conspiracy for importing a large quantity of hashish²⁴².

A similar approach was adopted by Judge Jebens in *Nunez v. Norway* (cited above). In his concurring opinion, he refers to paragraph 18 of the General Comment No. 7 of the UN Committee on the Rights of the Child which states that:

‘[y]oung children are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents/primary

²³⁷ See, among others, *Omoregie and Others v. Norway*, no. 265/07, 31 July 2008 and the judgments referred to therein (in para. 66) and the more recently decided *Bajsultanov v. Austria*, no. 54131/10, 12 June 2012 and *S.J. v. Belgium*, no. 70055/10, 27 February 2014

²³⁸ On the role of child’s age in Article 8 expulsion cases see also C. Smyth, ‘The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled is the Court’s Use of the Principle?’ (2015) 17 *European Journal of Migration and Law* 70-103

²³⁹ See, among others, the recently decided *Palanci v. Switzerland*, no. 2607/08, 25 March 2014

²⁴⁰ *Mehemi v. France*, 26 September 1997, *Reports of Judgments and Decisions* 1997-VI

²⁴¹ §37

²⁴² See also *Nunez v. Norway* (cited above): ‘Having regard to all of the above considerations, notably the children’s long lasting and close bonds to their mother (...) the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention’

caregivers. They are also less able to comprehend the circumstances of any separation. Situations which are most likely to impact negatively on young children include (...) situations where children experience disrupted relationships (including enforced separations) (...)'.

He added:

‘These observations are in my opinion directly relevant for the present case. It is in my view safe to assume that the two children, who are both girls, and at the age of nine and eight years, are particularly dependent on the presence of their mother and therefore in a vulnerable situation with respect to a presumably long-lasting separation from her (...) For these reasons, which refer exclusively to the best interests of the children, I have concluded that, in the exceptional circumstances of the present case, expelling the applicant would constitute a violation of Article 8 of the Convention’.

Concluding the analysis of the impact of the best interest of the child on the ECtHR’s reasoning, reference should be made to the Judges’ Jočienė and Karakaş words in their dissenting opinion in case *Berisha v. Switzerland* (cited above) which perfectly summarise the reasons why a more child-friendly approach deems necessary in the ECtHR’s Article 8 judgments: ‘The children cannot be held responsible or suffer for their parents’ incorrect or even illegal behaviour’,²⁴³.

2.6.7 Article 8 and irregular migration

This study has so far detected two types of cases in the field of ‘family life’, namely family reunification and deportation cases. Nonetheless, part of the doctrine²⁴⁴ refers to a third category which concerns immigrants who may attempt to regularise their irregular stay in the territory of a Contracting State relying on their right to respect for ‘family life’ and Article 8 of the ECHR. In these cases, an immigrant claims that his or her residence in the Contracting State should be regularised in order for his right to ‘family’ or ‘private life’ to be respected. Let us examine the ECtHR’s most relevant case law.

In *Sisojeva and others v. Latvia*²⁴⁵, the applicants, Svetlana Sisojeva, her husband Arkady Sisojev and their daughter Aksana Sisojeva had become stateless after the break-up of the Soviet Union. Latvian authorities had never threatened the applicants with a deportation and

²⁴³ §4 of the dissenting opinion

²⁴⁴ D. Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57(1) *International and Comparative Law Quarterly* 87-112 and D. Thym, ‘Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR’ in R. Rubio-Marin, *Human Rights and Immigration* (Oxford, Oxford University Press, 2014)

²⁴⁵ *Sisojeva and others v. Latvia*, no. 60654/00, 16 June 2005

had offered them temporary renewable residence permits. Nevertheless, the applicants challenged Article 8 on the grounds that they should be granted unconditional right of residence in Latvia in order for their ‘private’ and ‘family life’ to be protected. The ECtHR accepted that irregular immigrants may rely on Article 8 but noted that the Contracting States are not obliged under European Conventional law to grant a specific legal status to the applicants involved in such cases. In its view, this is a matter of domestic law and the ECtHR does not have the competence to oblige the Contracting States to issue a particular residence permit rather than another one²⁴⁶. The judgment does not clearly imply that irregular migrants may rely on Article 8 in order to regularise their stay but according to Thym, it reveals that ‘(...) Article 8 ECHR may require the Contracting Parties to regularize the illegal stay of foreigners without guaranteeing a right to a particular type of residence permit’²⁴⁷.

In *Rodrigues da Silva and Hoogkamer v. the Netherlands*²⁴⁸, the applicant, Mrs. Rodrigues, who was a Brazilian national, entered Netherlands and settled with her partner, Mr. Hoogkamer, who was a Dutch national. Their daughter, who was born a couple of years later, was recognised by Mr. Hoogkamer and acquired therefore the Dutch nationality. Mrs. Rodrigues had been residing and working in the Netherlands irregularly and after her split-up with her partner she lost the custody of the daughter which was given to the father. Subsequently, she tried to obtain a residence permit but she did not succeed as the Deputy Minister of Justice held that the interests of the economic well-being of the country outweighed Mrs. Rodrigues da Silva’s right to reside in the Netherlands.

The ECtHR considered that that the expulsion of Mrs. Rodrigues da Silva would have made it impossible for her and her daughter to keep regular contact. It also noted that although Mrs. Rodrigues da Silva had lost the custody of the daughter, she kept on contributing in her upbringing as she was staying with her during the weekends. The ECtHR concluded that the separation of the mother from the child would constitute a violation of Article 8 as the Dutch authorities had not reached a fair balance between the applicant’s right to respect for ‘family life’, on the one hand, and the interest of the community regarding the economic well-being of the country, on the other. Again, the ECtHR does not explicitly confer a right to regularisation but the relatively little importance that it gives to the irregular situation of the

²⁴⁶ See *Sisojeva v. Latvia* (cited above) §91

²⁴⁷ D. Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57(1) *International and Comparative Law Quarterly* 87-112 p. 99-100

²⁴⁸ *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, §39, ECHR 2006-I

applicant might, according to the same study of Thym²⁴⁹, imply that Article 8 offers a potential for irregular migrants to regularise their stay. The ECtHR’s approach with regards to the issue of regularisation under Article 8 is to be monitored in the future.

Regardless of all that has been discussed right above, it should be mentioned that the ECtHR adopts in principle a strict approach when irregular migration is concerned finding a violation of Article 8 only in ‘exceptional circumstances’²⁵⁰. It appears rather difficult to define what the ECtHR exactly means by ‘exceptional circumstances’. A reference to the *Jeunesse v. the Netherlands* (cited above) case may shed light to this issue. In the present case, although the applicant had never held a residence permit issued by the Dutch authorities and therefore her immigration situation was entirely precarious when she created family relations in the Netherlands, the ECtHR found that the circumstances of the case were ‘exceptional’ and therefore there had been a violation of Article 8. In particular, the ECtHR weighted the fact that all of the applicant’s family members were Dutch nationals, the applicant herself held Dutch nationality at birth but subsequently lost it when Suriname became independent, the applicant has been in the Netherlands for more than sixteen years and had no criminal record, the applicant and her family would experience a certain degree of hardship if they were forced to return to the country of origin and that the applicant’s children had no direct links with Suriname, a country that they had never visited.

²⁴⁹ D. Thym, ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ (2008) 57(1) *International and Comparative Law Quarterly* 87-112 p. 99-100

²⁵⁰ See *Rodrigues da Silva and Hoogkamer v. the Netherlands* (cited above), *Jeunesse v. the Netherlands* (cited above) § 108 and the case law referred to therein

Part III: The EU Legal Framework and the national legislation of the EU Member States

Chapter 1: EU fundamental rights and the Member States’ Constitutions

1.1 Overview of the EU free movement, immigration and refugee law and the emerging role of fundamental rights in the EU

1.1.1 The historical background of the EU free movement, immigration, asylum and refugee law

Before analysing the historical background of the EU free movement, immigration, asylum and refugee law, some terminological clarifications seem necessary. At EU level persons of foreign origins are divided into citizens who hold the nationality of one of the EU Member States and reside in another EU Member State and non-EU nationals, or third-country nationals, who reside in the EU. In fact, the term ‘EU immigration and refugee law’ refers to the latter category of foreigners and does not cover EU citizens who have exercised their free movement right. EU citizens enjoy a rather privileged status which is covered by the ‘EU free movement law’. The present Chapter will examine the EU legal framework concerning family members of both of the above mentioned categories of foreigners, starting up with an analysis of the historical background of the Union competences on immigration, asylum and free movement of EU citizens.

To begin with, the EU citizens’ right to free movement has a rather long history which begins in 1951 and the Treaty of Paris that established a right to free movement for workers in the industry of coal and steel. The same right was provided for by the Treaty of Rome of 1957 which established the European Economic Community²⁵¹. In 1968, the European Community adopted a Regulation²⁵² on the freedom of movement of workers within its territory whereas the signing of the Treaty of Maastricht in 1992 created the EU and the EU citizenship and extended the right to free movement to all nationals of the EU Member States regardless of

²⁵¹ For more details on the Treaty of Paris and the Treaty of Rome see D. Chalmers, G.T. Davies and G. Monti, *European Union Law: Cases and Materials* (2nd edn, Cambridge, Cambridge University Press, 2010)

²⁵² Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. Hereinafter, ‘the Migrant Workers Regulation’.

whether the latter were workers or not²⁵³. Subsequently, in 2004 the EU adopts the Citizenship Directive which is the legal instrument which regulates the free movement right of EU citizens until today. As regards the relevant provisions of the Lisbon Treaty²⁵⁴, which is since 2009 in force, these are Articles 20 and 21 of the TFEU regarding the EU citizenship and the free movement of EU citizens accordingly. Articles 20 and 21 of the TFEU read as follows:

‘Article 20:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship’.

‘Article 21:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’.

The historical background of EU immigration, asylum and refugee law is considerably shorter. It should be noted that regardless of the rather long history that migration has in Europe, immigration policy became an EU competence with the Treaty of Amsterdam in 1999²⁵⁵. Following the entry into force of the Treaty of Amsterdam, the EU legislature adopted a series of binding and non-binding laws in order to regulate at EU level crucial issues of immigration, asylum and refugee law. The most important of them concern family reunion, long-term residents, admission of highly-skilled workers, researchers and students, ‘return’ and rules regarding asylum procedures and the rights of refugees.

The issue of the competence of the EU with regards to legal migration, irregular migration, asylum and other forms of international protection is now regulated by Articles 78 and 79 of the TFEU. It is important to note that the EU does not have exclusive but shared with the

²⁵³ For more details on the Treaty of Maastricht see C. Barnard and S. Peers, *European Union Law* (Oxford, Oxford University Press, 2014)

²⁵⁴ On the Lisbon Treaty see P. Craig, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, Cambridge University Press, 2010) and P. Craig, ‘The Treaty of Lisbon: Process, Architecture and Substance’ (2008) 33 *European Law Review* 137-166

²⁵⁵ Article 63 EC Treaty

Member States competence in the area of freedom, security and justice²⁵⁶. Articles 78 (1) and 79 (1) of the TFEU read as follows:

‘Article 78:

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties’.

‘Article 79:

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings’.

There are two protocols attached to the Lisbon Treaty concerning the United Kingdom and Ireland and one protocol concerning Denmark. These protocols limit the application of EU immigration, asylum and refugee rules to the above mentioned Member States. The first protocol of the United Kingdom and Ireland provides that nothing in the EU law such as Articles 26 and 77 of the TFEU, any other provisions of the Lisbon Treaty or any EU measure or international agreement concluded by the Union with third states, can influence the competence of these Member States to exercise border controls on persons seeking to enter their territories from other Member States²⁵⁷ or from third-countries. Accordingly, the rest of the Member States can impose the same border controls on persons coming from the UK and Ireland. Furthermore, pursuant to the second applicable to them protocol, the UK and Ireland do not participate in the adoption of measures related to the area of freedom, security and justice. The latter is the context of the protocol applying to Denmark as well, with the difference being that the UK and Ireland can participate in the adoption of a certain measure in case they desire whereas no such possibility is provided for in the case of Denmark²⁵⁸.

In any event, it should be emphasised that the adoption of the Lisbon Treaty has brought significant changes to the field of migration. First, the decisions in migration related issues are

²⁵⁶ Article 4 (2) (j) of the TFEU

²⁵⁷ The discretion is limited to border checks on EU citizens and does not confer a right to refuse entry and residence to persons who enjoy rights pursuant to EU free movement law.

²⁵⁸ For example, the UK and Ireland participate in the ‘Dublin system’ whereas Denmark does not.

now taken under the ordinary legislative procedure, which is based on ‘qualified majority’ and not on unanimity. This means that decisions regarding migration may be adopted even if some Member States oppose them. Second, the European Parliament now becomes a co-legislature²⁵⁹. This constitutes a particularly important modification in the decision-making procedure, as the European Parliament is, at least for the time-being, a ‘migration friendly’ institution. Nevertheless, the Lisbon Treaty provides that in the event of one or more Member States being confronted with an emergency situation of sudden inflow of third-country nationals, the EU Council may act alone, after consulting the Parliament²⁶⁰. The effects of the above mentioned changes are expected to be important for the future of the migration, asylum and refugee law in the EU.

1.1.2 The role of fundamental rights in the EU

Speaking about fundamental rights at EU level is a rather complex endeavor. Indeed, although the creation of the EU dates back in 1951, the ECFR, which constitutes the first legal document on fundamental rights, was only signed in 2000. It should be stressed that at the moment it was signed, the ECFR did not have binding legal effect and the CJEU did not refer to it for six years after its adoption²⁶¹. In general terms, in the years before the adoption of the Lisbon Treaty, fundamental rights were guaranteed in the EU by the CJEU through unwritten general principles of EU law²⁶². Nonetheless, Article 6 of the TEU has brought significant changes to the field of fundamental rights in the EU. First, the EU now recognises the ECFR as having the same legal value with the Treaties²⁶³. Second, the EU shall accede to the ECHR²⁶⁴. Third, fundamental rights, as guaranteed by the ECHR and the constitutional traditions of the Member States shall constitute general principles of EU law²⁶⁵. The issues deriving from Article 6 of the TEU will be now considered in greater detail.

²⁵⁹ See Articles 78 (2) and 79 (2) of the TFEU

²⁶⁰ Article 78 (3) of the TFEU

²⁶¹ The CJEU referred to the ECFR for the first time in Case C-540/03 *European Parliament v. Council of the European Union* [2006] ECR I-5769.

²⁶² See F.G. Jacobs, ‘Human Rights in the European Union: The Role of the Court of Justice’ (2001) 26(4) *European Law Review* 331-341

²⁶³ Article 6 (1) of the TEU

²⁶⁴ Article 6 (2) of the TEU

²⁶⁵ Article 6 (3) of the TEU

As regards the accession of the EU to the ECHR, it should be mentioned that Article 6 (2) of the TEU does not automatically make the EU a party to the ECHR²⁶⁶ and that this may happen only through an accession agreement that will be signed by the EU and the Council of Europe. After negotiations, the two parties agreed to an accession treaty²⁶⁷. Nevertheless, the CJEU has already ruled²⁶⁸ that the draft agreement is incompatible with several rules of EU law and therefore the accession treaty needs to be renegotiated. It should be noted that given that any changes in the agreement need to be agreed by all 47 parties to the Council of Europe and by the Council of the EU and the EU parliament, the negotiations for a new agreement may be particularly lengthy. This being said, although the EU has an obligation which derives from the TEU to accede to the ECHR, we are not at the moment able to know when this will eventually happen and more importantly what the accession agreement will exactly look like.

The most noticeable of the changes brought by Article 6 TEU is the fact that the ECFR gains the same legal value as the EU Treaties. This evolution raises questions related to the actual content of the provisions of the ECFR, as well as the relationship between the provisions of the ECFR and those of the ECHR. This being said, it should first be noted that the equivalent to Article 8 of the ECHR, which as analysed above protects the right to respect for private and family life, home and correspondence, is Article 7 of the ECFR. Article 7 reads as follows: ‘Everyone has the right to respect for his or her private and family life, home and communications’. It becomes apparent that the wording of the two provisions is identical with the exception of ‘correspondence’ which is replaced by ‘communications’²⁶⁹ and the fact that Article 7 of the ECFR does not contain the second paragraph of the justification grounds of Article 8 of the ECHR²⁷⁰. However, the question remains whether the protection granted by the two provisions also the same and what in particular the level of protection granted by Article 7 of the ECFR is.

²⁶⁶ For more details on the issue of the accession of the EU to the ECHR see, S. Douglas-Scott, ‘The European Union and Human Rights after the Treaty of Lisbon’ (2011) 11(4) *Human Rights Law Review* 645-682 and P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford/Portland, Oregon, Hart Publishing, 2013)

²⁶⁷ Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights published on 10 June 2013, 47+1(2013) 008 rev2

²⁶⁸ Opinion 2/13 of the Court of 18 December 2014

²⁶⁹ This change probably reflects developments in the field of communications

²⁷⁰ It should be noted that Article 52 (1) of the ECFR contains a general limitation clause which is applicable to Article 7 as well. It reads as follows: ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for 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 recognised by the Union or the need to protect the rights and freedoms of others’.

The answer to this question is given at least to a certain degree by the text of the ECFR. The two relevant provisions are Article 53 and Article 52 (3) of the ECFR. To begin with, Article 53 provides that:

‘[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions’.

Consequently, the protection granted by the ECHR together with other international agreements to which the EU or all the Member States are parties and the Member States’ constitutions constitute a safeguard with regards to the protection of family life, below which the EU cannot go. This provision sets the minimum threshold of protection with regards to the different rights of the ECFR and particularly the right to respect for family life. It should be born in mind that depending on the interpretation of the different rights given by the ECtHR, this provision may only guarantee a particularly minimum level of protection of the rights contained in the ECFR.

In addition, Article 52 (3) reads as follows:

‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’.

This provision suggests that in case the ECFR contains a right that corresponds to a right guaranteed by the ECHR, as in the case of the right to respect for ‘family life’, the interpretation of this right should be the same as the one given to the equivalent right in the ECHR. It should be noted that this principle was applied by the CJEU in a judgment²⁷¹ concerning the Family Reunification Directive which constitutes the first case that the CJEU referred to the ECFR. In this case, the CJEU was asked to rule on whether certain provisions of the Directive violated Article 7 of the ECFR. In doing so, the CJEU referred to the case law of the ECtHR regarding Article 8 ECHR and applied the standards of protections contained in the latter. It should not escape our attention the fact that the judgment was adopted before the entry into force of the Lisbon Treaty.

²⁷¹ Case *European Parliament v. Council of the European Union* (cited above). The case will be analysed more extensively below.

In any event, there are several comments which should be made with regards to the provision of Article 52 (3) of the ECFR. To begin with, the said provision makes a reference to the ECHR and not to the case law of the ECtHR. Having said that, the question that arises is whether this provision obliges the CJEU to interpret the rights with reference to the interpretation that the ECtHR has given to the corresponding rights of the ECHR or merely to the text of the latter. The explanations of the Charter seem to suggest that the provision refers to the case law of the ECtHR as well, stating that: ‘[t]he meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union’²⁷². The same view has been adopted by the CJEU in *J.McB. v. L.E*²⁷³, which was adopted after Lisbon. In the case at hand, the CJEU stated that:

‘[t]he wording of Article 8(1) of the ECHR is identical to that of the said Article 7, except that it uses the expression ‘correspondence’ instead of ‘communications’. That being so, it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights’.

It is interesting to note that the above analysed approach has made some authors express the view that Article 52 (3) of the ECFR actually incorporates European Conventional law into EU law giving the former the same legal value as the EU Treaties²⁷⁴.

It should be noted that at least as far as the right to family life is concerned we are of the opinion that this view is particularly problematic and may promote restrictive decisions. We believe that the real challenge for the EU and the CJEU is to not accept in all cases the case law of the ECtHR but depart from it in case they consider that a more extensive protection is required²⁷⁵. This approach would be in line with Article 52 (3) as the latter explicitly provides that the EU is not prevented from providing more extensive protection. It may also find its base on a teleological interpretation of the provisions of Articles 52 (3) and 53 of the ECFR according to which the intention of the framers of the ECFR was to refer to the ECHR as the

²⁷² Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02

²⁷³ Case C-400/10 *J.McB. v. L.E* [2010] ECR I-08965

²⁷⁴ See W. Weiss, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon’ (2011) 7 *European Constitutional Law Review* 64-95

²⁷⁵ See also E. Drywood, ‘Giving With One Hand, Taking With the Other: Fundamental Rights, Children and the Family Reunification Decision’ (2007) 32(3) *European Law Review* 396-407, S. Greer and A. Williams, ‘Human Rights in the Council of Europe and the EU: Towards ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice?’ (2009) 15 *European Law Journal* 462–481 and S. Peers, T. Hervey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights: A Commentary* (Oxford/Portland, Oregon, Hart Publishing, 2014)

very minimum standard of protection and not as a binding in all circumstances legal document. Our view regarding this issue is presented more extensively in the conclusions of this study.

Regardless of the issue of the relationship between the ECHR and the ECFR, there is no doubt that the application of fundamental rights is particularly important given that the EU has gained competence in the field of migration. The right to respect for family life should be taken into consideration not only when the EU legislature adopts measures in the field of immigration but also when Member States are transposing the legal instruments in their domestic legislation or when the national immigration authorities apply these measures in each case. In particular, as regards the implementation of the legal instruments into domestic legislation, it should be born in mind that the majority of the legal instruments concerning immigration, refugee and asylum law are Directives of ‘minimum harmonisation’. In practice, this means that the relevant Directives merely guarantee a minimum standard of protection, leaving Member States discretion to provide more extended protection with regards to the aliens’ rights. Therefore, although some of the EU legal instruments are criticised in the present Chapter for setting low standards with regards to the immigrants’ right to family life, it should be kept in mind that Member States are left free to afford wider protection in case they so desire.

Before concluding the analysis of fundamental rights in the EU, a reference to some core theories regarding fundamental rights is considered necessary. To begin with, it should be noted that the protection of fundamental rights, either those contained in the ECHR or the ECFR or those that are constitutionally guaranteed, is not equally strong. At first, fundamental rights are divided into absolute rights and qualified rights²⁷⁶. Typical absolute rights are the right to life and the prohibition of torture or slavery, whereas typical qualified rights are the right to family and private life, the freedom of religion and freedom of expression. The main difference between absolute and qualified rights is that absolute rights cannot be limited whereas qualified rights leave room for limitations, which may be broad or narrow. That being said, it should be mentioned that both types of rights certainly raise interpretation questions related to the actual scope of the right. Nevertheless, qualified rights raise additional questions related to whether certain limitations by the state are acceptable or not. Given that

²⁷⁶ Some authors use a more detailed classification of rights into absolute, strong, qualified and weak rights. See A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford, Oxford University Press, 2012)

the right to family life is a qualified right under the ECHR, the ECFR and the Constitutionals, in case it is protected as such, it is worth referring to some of the most important theories which become applicable with respect to qualified fundamental rights.

To start with, every qualified right comprises three different zones: ‘The area that can never be trespassed upon, the area of protection against illegitimate interferences, and the zone of legitimate limitation on rights’²⁷⁷. This definition has its base on one of the most significant theories regarding the limitation of the qualified rights that derives from the German Constitutional law and creates the concept of the minimum ‘core’ or ‘essence’ of a right. In particular, Article 19 (2) of the German Basic Law provides that the essence (‘Wesensgehalt’) of a right may not be affected by any restriction. It should not escape our attention that the same term has been used, even though to a limited extent, by the ECtHR as well²⁷⁸. In any event, the said provision raises the crucial question of what constitutes the core, or essence, of each right. In that respect, it should be noted that several commentators share the view that the said concept is extremely difficult to define²⁷⁹.

There are two main theories that have been developed regarding the minimum core of a right, the absolute theory and the relative theory. The absolute theory of core content of the right suggests that there is a core to a certain right that cannot be limited under any circumstances. On the contrary, according to the relative theory of core content of the right, the essence of the right is ‘whatever is left of the right after the proportionality test has been carried out’²⁸⁰. Pursuant to the latter theory, a limitation does not infringe the core of the right, even if after the application of the proportionality there is nothing left of the right in an individual case. Precisely for this reason, several authors share the view that the idea of the existence of a minimum core of a right is not compatible with the application of balancing test between the individual’s right and public interests²⁸¹. Nonetheless, another part of the doctrine adopts the

²⁷⁷ J. Christoffersen, ‘Human Rights and Balancing: The Principle of Proportionality’ in C. Geiger, *Research Handbook on Human Rights and Intellectual Property* (Northampton, Edward Elgar, 2015)

²⁷⁸ See, for instance, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §44, ECHR 2001-VIII, where the ECtHR stated that ‘[i]t must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired’.

²⁷⁹ See, among others, J. Church, C. Schutze and H. Strydom, *Human Rights from a Comparative and International Law Perspective* (Pretoria, Unisa Press University of South Africa, 2007)

²⁸⁰ R. Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) p. 193

²⁸¹ See S. Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7(3) *International Journal of Constitutional Law* (I-CON) 468-493 where the author claims that: ‘Once we have accepted that this core content cannot be compromised under any circumstances we have left behind the idea that the right at stake can be weighed against competing public interests’ and J. Habermas, *Between Facts and Norms: Contributions to a Discourse theory of Law and Democracy* (Cambridge, Polity Press, 1996)

opposite position, stating that the application of proportionality is not incompatible with the idea of a core essence of the right which cannot be infringed. Indeed, Alexy notices that ‘Constitutional rights gain overproportionally in strength as the intensity of interferences increases. There exists something like a centre of resistance’²⁸².

In Part III of the dissertation, we focus on the legal instruments and the particular provisions of EU free movement, immigration, asylum and refugee law that derive from or relate to the fundamental right to respect for family life. In the cases that the exercise of any related to family life right is dependent upon the acquisition of a certain legal status of the sponsor of that right (e.g. the status of the EU citizen, third-country highly-skilled worker, student, refugee etc.), a short introduction to the rules governing that status has been considered necessary in each Chapter of Part III. This analysis will follow a brief introduction to key constitutional issues of the Member States that are included in the study.

1.2 Basic constitutional issues in the EU countries and applicable domestic legislation

1.2.1 Spain

There are various rights in the Spanish legal system that relate to the foreigners’ family life. To start with, the Spanish Constitution recognises the right to family intimacy²⁸³ and provides that the public authorities shall ensure the social, economic and legal protection of the family²⁸⁴. Furthermore, Article 16 (1) of the Law 4/2000²⁸⁵ provides that the regularly residing immigrants in Spain have a right to family life and family intimacy whereas Article 16 (2) of the same law speaks about the right to family reunification.

It becomes evident that the right to family life is not a constitutionally protected right in the Spanish legal system. In that respect, it should be noticed that there are two approaches in the doctrine with regards to the connection between the fundamental right to family intimacy of Article 18 of the Spanish Constitution and the right to family life and family reunification of

²⁸² R. Alexy, ‘Constitutional Rights, Balancing and Rationality’ (2003) 16(2) *Ratio Juris* 131-140. See also M. Klatt and M. Meister, ‘Proportionality-A Benefit to Human Rights? Remarks on the I-CON Controversy’ (2012) 10(3) *International Journal of Constitutional Law (I-CON)* 687-708

²⁸³ Article 18 of the Spanish Constitution

²⁸⁴ Article 39 (1) of the Spanish Constitution

²⁸⁵ Hereinafter, ‘the Immigration Act’

Article 16 of the Immigration Act. A limited part of the doctrine²⁸⁶ connects Article 18 of the Spanish Constitution with Article 8 of the ECHR and argues that Article 16 of the Immigration Act recognises a single right to family life/family intimacy which is constitutionally protected. On the contrary, the majority of the scholars²⁸⁷ distinguish between the fundamental right to family intimacy and the right to family life, arguing that Article 18 of the Spanish Constitution is not related to Article 8 of the ECHR²⁸⁸. This approach has been adopted by the Constitutional Court as well, which in several judgments²⁸⁹ has stated that Article 18 of the Spanish Constitution cannot be interpreted in the same way as the ECtHR has interpreted Article 8 ECHR and that the Spanish Constitution does not recognise a right to family life or family reunification.

Regardless of whether the right to family life is a constitutionally protected right or not, it is widely accepted that the right to family reunification is an instrument or an administrative procedure which has been established in order to give effect to this right. This is the reason why the applicable regime on family reunification differs between Spanish nationals and foreign nationals but also among foreign nationals depending on their nationality or status²⁹⁰.

As to the applicable Spanish laws²⁹¹, it should be mentioned that there have recently been several reforms in the Spanish immigration legislation with the most significant laws still being the Law 4/2000 (LOEx) as modified by the Laws 8/2000, 11/2003, 14/2003, 2/2009, 10/2011, 2/2012, 16/2012, 17/2012, 4/2013 and 22/2013 and the Regulation 557/2011 (RLOEx)²⁹² as modified by the Royal Decrees 844/2013 and 162/2014. As regards the status of EU citizens residing in Spain, the applicable law is the Royal Decree²⁹³ 240/2007, as modified by the Royal Decrees 1161/2009, 1710/2011, 16/2012, 1192/2012, 987/2015 and by

²⁸⁶ See, among others, R. Moliner Navarro, ‘Reagrupación familiar y modelo de familia en la LO 8/2000 de Derechos y Libertades de los Extranjeros en España’ (2001) 14 *Actualidad Civil* 487-519

²⁸⁷ See, among others, P. Santolaya Machetti, *El derecho a la vida familiar de los extranjeros* (Valencia, Tirant lo Blanch-Institut de Dret Public, 2004) p. 13-62 and I. García Rodríguez, ‘The Right to Family Reunification in the Spanish Law System’ (1999-2000) 7 *Spanish Yearbook of International Law* 1-37

²⁸⁸ For a third stand on the issue see E. Aja Fernandez and M. A. Cabellos Espierrez, ‘La reagrupación familiar’ in E. Aja Fernandez, *La nueva regulación de la inmigración en España* (Valencia, Tirant lo Blanch, 2000) p. 138 where the authors argue that the right to family reunification is a fundamental right

²⁸⁹ See judgments of the Constitutional Court 236/2007 of 7 November 2007 §11 and judgment of the Constitutional Court 186/2013 of 4 November 2013 §7

²⁹⁰ See, for instance, the difference in the family reunification regime between refugees and ‘economic immigrants’.

²⁹¹ It is underlined that the translation of all relevant Spanish legislation to English has been made by the author.

²⁹² Hereinafter, ‘the Immigration Regulation’

²⁹³ Hereinafter, ‘the Royal Decree’ or ‘Royal Decree 240/2007’

the Supreme Court’s judgment of the 1st of June 2010²⁹⁴. Not least, the relevant legislation regarding seekers and beneficiaries of international protection is Law 12/2009.

Lastly, it should be kept in mind that even though EU citizens and third-country nationals follow two different family reunification regimes, which are covered by different laws, Article 1 (3) of the Immigration Act provides that the ‘general regime’ may become applicable to those that are in principle covered by the ‘community regime’ in case and to the extent that the former is more favourable. In that respect, it should be commented that although the provision substantially advantages the position of EU citizens Spain, it raises legal questions which concern the issue whether a law may complement a Royal Decree.

1.2.2 Greece

The diversity in the family life related rights of the Spanish legal system is encountered in the Greek legal system as well. The relevant articles of the Greek Constitution are Articles 5, 9 and 21. In particular, Article 5 provides that all persons shall have the right to develop freely their personality, Article 9 that the private and family life of the individual is inviolable, whereas Article 21 provides that the family, being the cornerstone of the preservation and the advancement of the Nation, as well as marriage, motherhood and childhood, shall be under the protection of the Greek State.

Despite the existence of various provisions, one may easily understand that unlike the Spanish Constitution, the Greek one directly refers to the protection of the individual’s right to family life and the prohibition of any violation to the latter. It is not under dispute that the provisions of Articles 9 and 21 of the Greek Constitution correspond to Article 8 of the ECHR and render the right to family life a constitutionally protected right. It is equally evident that Article 5 and Article 9 refer to every ‘person’ or ‘individual’ and therefore foreigners directly fall within the scope of the provisions. As regards Article 21, although the legislature refers to the family as a cornerstone of the preservation of the *Nation*, it should not be accepted that the family which is protected under this provision is merely that of the Greek national. According

²⁹⁴ Judgment of the Supreme Court of 1 June 2010

to Chrisogonos, the opposite view would amount to an interpretation of the Constitution on the basis of racist criteria, something which is totally unacceptable²⁹⁵.

In any event, it is noteworthy that the Greek Constitution does not make any reference to a right to family reunification. The right to family reunification constitutes an instrumental right, just as it is the case in Spain. Based on this finding, the Greek legislature also treats differently as regards their right to family reunification the persons that reside in the Greek territory on grounds of their nationality (Greek nationals, EU citizens and third-country nationals) but also on grounds of their status (‘regular’ immigrants, refugees, highly-skilled workers etc.).

As regards the most notable judicial interpretation of the above mentioned provisions, it should be noted that pursuant to the Greek Administrative Courts’ settled case law, the combination of Articles 5, 9 and 21 of the Greek Constitution are interpreted to mean that the Greek national does not only have the right to choose a foreign spouse but also the right to ensure common with this spouse living in Greece²⁹⁶. The refusal to grant a residence permit is permissible only for specific and serious reasons of public security. Similar approach has been adopted by the Supreme Administrative Court as regards the immigrant parent of a minor Greek child, even if after divorce the custody has been granted to the other parent²⁹⁷.

As far as the relevant applicable laws²⁹⁸ are concerned, it should first be mentioned that the Greek Immigration legal system has been recently reformed with the applicable legislation now being Law 4251/2014²⁹⁹. As regards EU citizens residing in Greece, the applicable legal instrument is the Presidential Decree 106/2007, as modified by Article 42 of the Law 4071/2012³⁰⁰. The relevant legislation regarding the nationality system in Greece is Law 3838/2010 whereas the applicable law regarding return of irregular immigrants is Law

²⁹⁵ See K. Χρυσόγονος, *Ατομικά και κοινωνικά δικαιώματα* (2^η εκδ., Αθήνα/Θεσσαλονίκη, Εκδόσεις Σάκκουλας, 2002) σ. 511 (K. Chrisogonos, *Individual and social rights*)

²⁹⁶ See, among others, Judgment of the Three-Member Regional Administrative Court of Athens 9471/2006, Judgment of the Supreme Administrative Court 22/2009, Judgment of the Supreme Administrative Court 485/1999, Judgment of the Supreme Administrative Court 1679/2001, Judgment of the Supreme Administrative Court 3045/2002 and Judgment of the Supreme Administrative Court 1906/2003

²⁹⁷ See Judgment of the Supreme Administrative Court 820/2000 and Judgment of the Supreme Administrative Court 1353/2000

²⁹⁸ It is underlined that the translation of all relevant Greek legislation to English has been made by the author.

²⁹⁹ Hereinafter, ‘the Immigration Law’

³⁰⁰ The modifications concerned some problems in the implementation of the Citizenship Directive as detected by the Commission in the Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States published on 10 December 2008, COM (2008) 840 final.

3907/2011. Lastly, seekers and beneficiaries of international protection are in principle covered by the Presidential Decrees 141/2013, 114/2010 and 220/2007 and the Presidential Decrees 131/2006 and 167/2008 as regards their right to family reunification in particular³⁰¹.

1.2.3 Germany

The provision of the German Basic Law (Grundgesetz, GG)³⁰² which protects family and marriage and in principle corresponds to Article 8 of the ECHR³⁰³ is Article 6. Article 6 protects not only the traditional model of marriage and family, namely a union between a man and a woman and the relationship between parents and children accordingly, but also other family models such as one-parent families³⁰⁴. The same provision protects the foreigner’s family in Germany. This becomes apparent from Article 27 of the Residence Act (Aufenthaltsgesetz, Residence Act)³⁰⁵ which explicitly provides that the right to family reunification is explicitly granted to protect marriage and the family in accordance with Article 6 of the Basic Law. Article 6 of the German Constitution reads as follows:

‘Article 6:

[Marriage – Family – Children]

- (1) Marriage and the family shall enjoy the special protection of the state.
- (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.
- (3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.
- (4) Every mother shall be entitled to the protection and care of the community.
- (5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage’.

³⁰¹ It should be noted that the two Presidential Decrees remained in force with the Article 139 (3) of the new Immigration Law and they are applicable only as regards beneficiaries of international protection.

³⁰² It is underlined that the translation of the relevant German Basic Law to English has been based on the official translation of the Federal Ministry of Justice and Consumer Protection (available online at http://www.gesetze-im-internet.de/englisch_gg/index.html).

³⁰³ For the difference between the protection of Article 6 of the German Constitution and Article 8 of the ECHR see, B. Huber, ‘The Application of Human Rights Standards by German Courts to Asylum-Seekers, Refugees and other Migrants’ (2001) 3 *European Journal of Migration and Law* 171-184

³⁰⁴ See D. Kommers and R. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Durham, Duke University Press, 2012) p.601

³⁰⁵ Article 27 (1) of the Residence Act reads as follows: ‘The residence permit to enable foreigners to be joined by foreign dependants so that they can live together as a family (subsequent immigration of dependants) shall be granted and extended to protect marriage and the family in accordance with Article 6 of the Basic Law’.

As regards the most striking case law of the German courts regarding the concept of family under Article 16 of the Basic Law, it should be noted that the Constitutional Court has in various occasions found that cohabitation outside marriage is not equivalent to marriage in the sense of Article 16 of the Basic Law³⁰⁶. Nevertheless, according to the same Court, the same provision does not prevent the grant of certain social benefits to cohabitants³⁰⁷. As regards registered partnerships, which in principle become applicable to same-sex partners, the Constitutional Court has stated that even though Article 6 clearly speaks about marriage, the provision does not imply that other type of relationships should necessarily be treated less favorably than marriages³⁰⁸.

Next, as far as family reunification cases are concerned, the Federal Constitutional law has reaffirmed that Article 6 of the Basic Law does not in principle guarantee a right to entry to the German territory for non-nationals³⁰⁹. Nevertheless, the Court accepted that there are family related rights deriving from Article 6 and held that the Immigration legislation should respect the principle of proportionality. That being said, the Court found that certain requirements for the exercise of the right to family reunification are compatible with the principle of proportionality, as they are necessary for the foreigner’s integration and for the prevention of forced marriages. Nonetheless, a requirement for a three-year ‘waiting period’ was in the same case found excessive.

As regards the relevant German laws³¹⁰ that will be examined in this Chapter, it should first be mentioned that the family reunification for third-country nationals is covered by the Residence Act (Aufenthaltsgesetz, AufenthG). As regards EU citizens residing in Germany, the applicable legal instrument is the Free Movement Act (Freizügigkeitsgesetz/EU, FreizügG/EU)³¹¹. The relevant legislation regarding the nationality system in Germany is the Nationality Act (Staatsangehörigkeitsgesetz, StAG)³¹². Lastly, seekers and beneficiaries of international protection are in principle covered by the Act on asylum procedures

³⁰⁶ Judgment of the Federal Constitutional Court of 11 November 2004

³⁰⁷ Judgment of the Federal Constitutional Court of 3 April 1990

³⁰⁸ Judgment of the Federal Constitutional Court of 17 July 2002

³⁰⁹ Judgment of the Federal Constitutional Court of 12 May 1987

³¹⁰ It is underlined that the translation of the relevant German Residence Act to English has been based on the official translation of the Federal Ministry of Justice and Consumer Protection (available online at http://www.gesetze-im-internet.de/englisch_Residence_Act/index.html).

³¹¹ It is underlined that the translation of the Free Movement Act to English has been made by the author

³¹² It is underlined that the translation of the relevant German Residence Act to English has been based on the official translation of the Federal Ministry of Justice and Consumer Protection (available online at http://www.gesetze-im-internet.de/englisch_rustag/index.html).

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(Asylverfahrensgesetz, AsylVfG), the Act on benefits for Asylum seekers (Asylbewerberleistungsgesetz, AsylbLG) and the Residence Act as regards their right to family reunification in particular.

Chapter 2: Family members of EU citizens

2.1 EU citizenship and the EU citizens’ right to free movement

2.1.1 Overview of the EU citizens’ rights

The Citizenship Directive sets out the conditions under which EU citizens may exercise their right to move and reside in a Member State other than that of their nationality. It concerns not only EU citizens who move for purposes of employment or self-employment but also economically inactive EU migrant citizens and students. The main EU citizens’ rights guaranteed by the Directive are the right of exit and the right of entry among the EU Member States, the right of residence, the right to have their family members joining or accompanying them in another Member State and the right to equal treatment. All rights derive from the EU citizenship which is acquired by every citizen who is a national of one of the EU Member States and is established, as mentioned above, by Article 20 of the TFEU.

The right of residence in the territory of another Member State is divided into three different rights: the right to short-term residence up to three months, the right to residence for more than three months and the right to permanent residence. To begin with, according to Article 6 of the Citizenship Directive, EU citizens have the right to reside freely in the territory of another Member State for three months with the requirement to hold a valid identity card or passport. The only condition imposed is the one of Article 14 (1) of the Directive which reads as follows: ‘Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State’. However, given that Article 24 (2) provides that Member States are not obliged to confer entitlement to social assistance during the first three months of the EU migrant citizen’s residence, this condition is of a rather limited application. The provision of Article 6 should be combined with Articles 4 and 5 which guarantee to EU citizens the right of exit and entry among the Member States without the requirement of holding any visas or equivalent formalities.

Furthermore, EU citizens have the right of residence in the territory of another Member State for more than three months. This right is subject to the restrictions provided for in Article 7. The EU citizens may either be workers or self-employed in the host Member State, economically inactive or students. The first category of EU migrant citizens enjoy the most

favourable legal status, as Article 7 does not set any conditions to EU migrant workers or self-employed. On the contrary, the EU legislature appears stricter with economically inactive persons and students. According to Article 7 (1):

‘[a]ll Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or (c) - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence’.

Not least, Article 7 (3) of the Directive provides that an EU citizen who is no longer a worker shall retain the status of worker or self-employed person in the sense of the Directive in the following cases:

‘(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a jobseeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment’.

A recently adopted by the CJEU judgment suggests that the list of cases of Article 7 (3) of the Directive is not exhaustive. In particular, in *Saint Prix*³¹³ the CJEU held that pregnant women who gave up work or seeking work before the birth of the child retains the status of ‘worker’ within the meaning of Article 45 TFEU provided that they return to work or that they find another job in a reasonable period after the child’s birth.

³¹³ Case C-507/12 *Jessy Saint Prix v. Secretary of State for Work and Pensions* (published in the electronic Reports of Cases)

In any event, it becomes apparent from the wording of Article 7 of the Directive that workers and self-employed EU citizens enjoy an unconditional right to reside in another Member State after the passage of the first three months. On the contrary, economically inactive persons and students should prove to have sufficient resources and a comprehensive insurance for them and their family members. It is noteworthy that the Citizenship Directive does not permit Member States to impose a suitable accommodation requirement as it was provided for in the Migrant Workers Regulation³¹⁴. In any event, these conditions should be subject to the principle of proportionality. In *Baumbast*³¹⁵, a German national had sickness insurance for him and his family which however did not cover all risks. The CJEU held that ‘those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality’³¹⁶ and concluded that:

‘(...) to refuse to allow Mr. Baumbast to exercise the right of residence which is conferred on him by Article 21 (1) TFEU by virtue of the application of the provisions of Directive 90/364 on the ground that his sickness insurance does not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right’³¹⁷.

As far as the condition for ‘sufficient resources’ is concerned, it should be noted that according to Article 8 (3), Member States may not require in the case of EU students the declaration of sufficient resources to refer to any specific amount. Furthermore, according to the fourth paragraph of the same provision, Member States should not lay down a fixed amount which they regard as ‘sufficient resources’ but should take into account the personal situation of the individuals concerned. In any case, this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or higher than the minimum social security pension paid by the host Member State. It should be noted that it is not necessary that the EU citizen is covering these costs himself/herself. In *Zhu and Chen*³¹⁸, a baby was entitled to residence rights just because

³¹⁴ Article 10 (3) of the Migrant Workers Regulation read as follows: ‘3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States’.

³¹⁵ Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7091

³¹⁶ §91

³¹⁷ §93

³¹⁸ Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECR I-9925

another person who was acting as a ‘carer’ was able to demonstrate sufficient resources and sickness insurance for both of them.

Lastly, EU citizens have the right of permanent residence in the host Member State, which is covered by Articles 16-18 of the Citizenship Directive. The general rule is that EU citizens that have been residing in the territory of a Member State for a continuous period of five years acquire the right of permanent residence. The EU citizens who acquire this right are not subject to the conditions provided in Chapter III of the Citizenship Directive and most importantly to the requirement of the ‘sufficient resources’ which was analysed above. The right to permanent residence is not affected by temporary absences which do not exceed a total of six months a year or a longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons, as provided for in Article 16 (3). The right of permanent residence may only be lost through absence of two consecutive years from the host Member State³¹⁹.

Once the EU citizen is settled in a Member State, s/he shall enjoy several rights. Most importantly, s/he enjoys the right to equal treatment with the nationals of that Member State within the scope of the Treaty³²⁰. The relevant provision of the Lisbon Treaty is Article 18 of the TFEU. According to this provision, ‘[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’. The right to equal treatment should be enjoyed in principle with regards to the access to employment, working conditions, remuneration and the general rule is that it is applicable also with respect to social benefits³²¹. Furthermore, EU citizens

³¹⁹ Article 16 (4) of the Citizenship Directive

³²⁰ Article 24 (1) of the Citizenship Directive. See also Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers and the critical article of Brinkmann in that respect. G. Brinkmann, ‘Equal Treatment on the Ground of Nationality for EU Migrant Workers’ (2015) 17 *European Journal of Migration and Law* 239-257

³²¹ See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Free movement of EU citizens and their families: Five actions to make a difference published on 25 November 2013, COM(2013) 837 final at 2.2., where the Commission argues that the first five years of residence in another EU Member State EU citizens are unlikely to be eligible for social assistance benefits since they would have needed to show that they have sufficient resources which should be equal or higher to the income under which social assistance is granted. Nevertheless, according to the Commission ‘[i]f (...) non-active EU citizens applied for a social assistance benefit, for example where their economic situation changes over time, their request must be assessed in the light of their right to equal treatment’. As regards this see also the recently decided case C-333/13 *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig* (not yet reported) where the CJEU held that EU citizens who have never

have the right to vote and stand as candidates at municipal elections and the elections for the European Parliament in the place they reside³²² according to Article 22 of the TFEU and the right to have their families joining or accompanying them in the Member State where they migrate. This right will be analysed in detail below.

2.1.2 Restrictions on the freedom of movement

The right to entry and the right to reside in another Member State are subject to restrictions on grounds of public policy, public security and public health. EU citizens can both be denied entry in the territory of another Member State and be expelled after they are accepted and exercise their right of residence. The fact that unlike nationals of a state, EU citizens can be expelled constitutes a noticeable difference between the two types of citizenship. Article 27 (1) and (2) of the Citizenship Directive read as follows:

‘1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends. 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted’.

Furthermore, Article 28 of the Directive deals with the issues of ‘public policy’ and ‘public security’ in particular:

‘1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

qualified to be covered by the Citizenship Directive in the sense of Article 7 of the Directive cannot rely on the principle of equal treatment as regards social assistance benefits.

³²² On this issue see D. Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 *Modern Law Review* 233-267 and J. Shaw, *The Transformation of Citizenship in the European Union* (Cambridge, Cambridge University Press, 2007)

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989’.

Next, Article 29 elaborates on the concept of ‘public health’:

‘1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.

3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine’.

The wording of the provisions of Article 27 of the Citizenship Directive indicates that the applicable to the restriction of the rights of EU citizens rules, are rather strict. The restriction measure shall be subject to the principle of proportionality and shall be based on a personal conduct of the individual concerned. This means, among others, that collective expulsions of EU citizens are by no means accepted under the Citizenship Directive and that Member States should take into consideration several factors such as the length of the stay of the EU citizen in the Member State, or other social or family links and try to strike a fair balance between the rights of the individual and the interests of the state. In addition, the threat to public policy and public security should be present, genuine and sufficiently serious affecting one of the fundamental interests of society. This condition becomes particularly relevant when the expulsion has been a result of a criminal conviction. In these cases, if the EU citizen has served a prison sentence of a certain length, an expulsion measure can no longer be imposed as the Citizenship Directive requires the threat to public policy or public security to be present.

As regards Article 28, it should be noticed that the provision obliges Member States to take certain factors into consideration when assessing each deportation case. It is interesting to note that the longer the EU citizen resides in another EU Member State, the more protected his/her residence there. This becomes apparent from Article 28 (1) which provides that Member States shall take into account the duration of the EU citizen’s residence in their territory but also from the second and third subparagraphs of the same Article which imply that EU citizens who are permanent residents or have resided in the host Member State for ten years enjoy stronger protection against expulsion. Indeed, Article 28 (2) provides that permanent residents shall only be expelled ‘on *serious* grounds of public policy or public security’ whereas Article 28 (3) provides that in case the EU citizen has resided for ten years in another Member State, his/her expulsion may only be based ‘on *imperative* grounds of public security’. Nevertheless, the CJEU has recently interpreted³²³ the said provision rather strictly holding that the ten 10-year period of residence should be continuous and that a period of imprisonment is both capable of interrupting the continuity of the residence and of affecting the decision on whether the person concerned would enjoy the enhanced protection of Article 28 (3), even if the person had resided in the host Member State for ten years prior to imprisonment.

The Citizenship Directive sets even stricter limitations as regards the threat to public health as according to Article 29 such justification ground for expulsion cannot be invoked after the three-month period of the date of the arrival³²⁴. Medical examinations may only be required in case there are serious indications that it is necessary, they should be free of charge and they shall not be requested as a matter of routine³²⁵.

It is worth mentioning that the list of the reasons of expulsion of an EU citizen is exhaustive, including only reasons of public policy, public security and public health. These grounds shall not be invoked to serve economic ends. This finding becomes particularly important in cases the EU citizen does not meet the conditions of sufficient resources and sickness insurance of Article 7. In such cases, no expulsion can be imposed on them as non-compliance with the requirements referred to in Article 7 does not constitute one of the reasons for expulsion. In that respect, it should be noted that there is a ‘gap’ in the Directive as the latter sets some

³²³ See Case C-400/12 *Secretary of State for the Home Department v. M.G.* (published in the electronic Reports of Cases)

³²⁴ Article 29 (2) of the Citizenship Directive

³²⁵ Article 29 (3) of the Citizenship Directive

conditions with regards to the right of residence of EU citizens in another Member State without providing for consequences in case these conditions are not met. We believe that this ‘gap’ should be covered directly by Article 21 TFEU of the Lisbon Treaty which, as analysed above, provides for the right of EU citizens to move and reside freely within the territory of the Member States.

2.1.3 The EU citizenship as a discriminatory citizenship

The EU citizenship can be characterised as an ‘economic’ rather than a ‘constitutional citizenship’³²⁶. Although the legal status of EU citizens is rather favourable comparing to immigrants coming from non-EU countries, the EU citizenship remains discriminatory especially with regards to people who are in a vulnerable situation. As Chalmers aptly notices ‘[u]nion citizenship is a citizenship for all Europeans who are not poor or sick’³²⁷. The requirements for sufficient resources and sickness insurance imposed on economically inactive people and students, as analysed above, reveal that the EU legislature introduced an EU citizenship and a right to free movement which is more ‘free’ for economically active, rich and healthy people. People who due to a serious health problem or other reasons are unable to work and do not have sufficient resources to support themselves in another Member State or cover the costs of the often expensive health insurance in that state, are excluded from exercising free movement rights. Another typical example of discrimination may be detected with regards to Roma EU citizens who are often treated as third-country nationals as regards deportation or other rights³²⁸.

2.2 Definition of family members of EU citizens

2.2.1 The definition of family members of EU citizens in EU law

2.2.1.1 The Migrant Workers Regulation

The first legal instrument of binding effect which defined ‘EU family’ was the Migrant Workers Regulation. The issue of ‘family’ was considered secondarily in the framework of

³²⁶ For a detailed study on EU citizenship see E. Guild, C. Gortázar Rotaecche and D. Kostakopoulou, *The Reconceptualization of European Union Citizenship* (Leiden/Boston, Martinus Nijhoff, 2014)

³²⁷ D. Chalmers, G.T. Davies and G. Monti, *European Union Law: Text and Materials* (3rd edn, Cambridge, Cambridge University Press, 2014) p. 478

³²⁸ On this issue see J. Gehring, ‘Free Movement for Some: The Treatment of the Roma after the European Union’s Eastern Expansion’ (2013) 15 *European Journal of Migration and Law* 7-28

this Regulation as the latter primarily concerned the rights of the EU workers to undertake work in another Member State. Therefore, following the reasoning that a migrant worker is not likely to move in case s/he cannot have his/her ‘family’ joining him/her, the EU legislature considered the issue of the family members who should be admitted in the host Member State. According to Article 10 (1) of the Migrant Workers Regulation, the persons who should have the right to install themselves with a worker who is a national of a Member State and is employed in the territory of another Member State are: ‘a) His spouse and their descendants who are under the age of 21 years old or are dependants; b) Dependent relatives in the ascending line of the worker and his spouse’. In addition, pursuant to the second paragraph of Article 10, ‘Member States shall facilitate the admission of any member of the family not coming within the provisions of para. 1 if dependent on the worker referred to above or living under his roof in the country whence he comes’.

The conception of ‘family’ under the Migrant Workers Regulation is particularly narrow, traditional and focused on the formal element³²⁹. The idea of ‘family’ is based on a masculine ‘breadwinner’ who has the right to be employed in another Member State and his spouse and legitimate children who have the right to install themselves with him. The wording of the Migrant Workers Regulation and particularly the use of the masculine pronoun ‘his’ leaves no doubt that the family described is of that type³³⁰. It can be assumed that this view reflected the reality of the period that the Migrant Worker Regulation was adopted when a *de jure* family based on marriage was the rule and the so-called ‘atypical families’ constituted a rather rare exception. However, as it will be shown below the narrow definition of ‘family’ has been in general terms further confirmed by the case law of the CJEU in the years following the adoption of the Migrant Workers Regulation, as well as by the Citizenship Directive.

³²⁹ For the scope and definition of ‘EU family’ see also H. Stalford, ‘Regulating Family Life in Post-Amsterdam Europe’ (2003) 28(1) *European Law Review* 39-52, E. Caracciolo di Torella and A. Masselot, ‘Under Construction: EU Family Law’ (2004) 29(1) *European Law Review* 32-51, C. McGlynn, ‘Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?’ (2001) 26(6) *European Law Review* 582-598 and C. McGlynn, *Families and the European Union: Law, Politics and Pluralism* (New York, Cambridge University Press, 2006)

³³⁰ For the use of the masculine pronoun in different provisions of EU law see V. Paskalia, *Free Movement, Social Security and Gender in the EU* (Oxford/Portland, Oregon, Hart Publishing, 2007)

2.2.1.2 The Citizenship Directive

The Migrant Workers Regulation was amended, as mentioned above, by the Citizenship Directive. According to Article 2 (2), the family members who acquire the rights set out in the Directive are:

‘(a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)’.

Furthermore, pursuant to Article 3 (2), the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

‘(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; (b) the partner with whom the Union citizen has a durable relationship, duly attested’.

It becomes apparent that the Citizenship Directive slightly broadens the concept of family in comparison to the one adopted in the Migrant Workers Regulation. First, it includes registered partners in the concept of ‘EU family’ in case registered partnership is treated as equivalent to marriage in the host Member State. Second, under Article 2 (2) (c), the Citizenship Directive explicitly refers to direct descendants not only of the EU citizen but also those of the spouse or partner³³¹. Third, the Citizenship Directive provides in Article 3 (2) (b) that the host Member State shall, in accordance with its national legislation, facilitate entry and residence in its territory of the partner with whom the EU citizen has a durable relationship which is duly attested. The rest of the beneficiaries remain with insignificant differences the same as those covered by the Migrant Workers Regulation.

There are several clarifications that should be made with regards to the legal concept of family contained in the Citizenship Directive. To start with, the term ‘spouse’ merely refers to

³³¹ The CJEU had anyway interpreted Article 10 (1) (a) of the Migrant Workers Regulation as including descendants not only from the present relationship between the worker and the spouse but also descendants of the worker and those of the spouse from previous relationships. See *Baumbast* (cited above). This approach is reflected in the wording of Article 2 (2) (c).

marriage relationships. Nevertheless, Member States are obliged to accept registered partners in case their legislation treats registered partners as equivalent to marriage whereas unregistered partners fall within the scope of Article 3 (2). It should be noted that Member States shall in general offer the same treatment to the EU citizen’s non-marital relationships as they offer for their own nationals due to the principle of non-discrimination which will be analysed below.

The second observation concerns the term ‘descendants’ of Article 2 (2) (c) which according to the literal and more correct interpretation includes not only the children but all direct descendants of the EU citizen, including grandchildren, grand grandchildren etc. This becomes evident by making a comparison with the Family Reunification Directive which speaks about ‘children’ and not ‘descendants’. Respectively, the term ‘ascendants’ refers to all direct ascendants and not only to the parents.

The third observation concerns the persons referred to in Article 3 (2). It should be emphasised that these persons are not treated as equivalent to the family members included in Article 2 (2) as Member States are merely obliged to ‘facilitate’ entry and residence according to national legislation. In that respect, it should be mentioned that the wording of the relevant provision probably suggests that the admission of the family members who are covered in that provision might be subject to stricter immigration rules, such as visas, language and/or integration tests³³². The wide margin of appreciation that Member States enjoy with regards to the implementation of this provision has been recently confirmed by the CJEU in *Rahman*³³³. In any case, it should be noted that the persons falling under Article 3 (2) (a) should fulfil merely one of the three requirements set out in this provision. Thus, they should either be ‘dependants’ or ‘members of the household of the Union citizen having the primary right of residence’, or serious health grounds that strictly require the personal care of the family member by the Union citizen should exist.

2.2.1.3 The CJEU’s case law on the legal concept of the ‘EU family’

As the wording of the Directive is quite ambiguous especially with respect to family models that fall outside the ‘nuclear family’, an analysis of the case law of the CJEU regarding the

³³² See D. Chalmers, G.T. Davies and G. Monti, *European Union Law: Cases and Materials* (2nd edn, Cambridge, Cambridge University Press, 2010)

³³³ Case C-83/11 *Secretary of State for the Home Department v. Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman* (published in the electronic Reports of Cases)

concept of ‘family’ will shed light on the approach adopted at EU level in that respect. This section examines whether certain diverse family models are included or not, in the current EU definition of ‘family’.

To begin with, as noticed in Part I of this thesis, the term ‘diverse’ family relationships, primarily refers to relationships outside marriage. The leading case concerning relationships of certain stability and duration outside marriage is *Reed*³³⁴. In the present case, Miss Reed, an unmarried British national, arrived to the Netherlands and applied for a residence permit on the ground that she lived with Mr. W. It should be noted that Miss Reed and Mr. W. cohabited together in the Netherlands and had a stable relationship of five years. On the basis of these facts, the CJEU was asked to interpret Article 10 of Regulation 1612/68 and more precisely whether that provision can be interpreted as meaning that in certain circumstances the person with whom the worker has a stable relationship outside marriage is to be regarded as his ‘spouse’. The CJEU considered that ‘[t]here is no reason (..) to give the term ‘spouse’ an interpretation which goes beyond the legal implications of that term, which embrace rights and obligations which do not exist between unmarried companions’³³⁵ and concluded that the term ‘spouse’ in Article 10 of the Regulation merely refers to a marital relationship³³⁶.

The judgment confirms that the conception of ‘family’ at EU level is narrow. It should be noted that this case was decided under the old Migrant Workers Regulation and the Citizenship Directive provides as described above, for family life protection to the partner with whom the EU citizen has a durable relationship³³⁷ which is duly attested. Nevertheless, given all that has been analysed above regarding the persons who fall under Article 3 (2) of the Directive, the *Reed* approach that the notion of ‘spouse’ does not cover relationships outside marriage is still present, even following the adoption of the Citizenship Directive. Not least, according to the same judgment, Member States should extend to migrant workers with EU origins the same rights that they afford to their nationals regarding unmarried partner. This

³³⁴ Case 59/85 *State of the Netherlands v. Ann Florence Reed* [1986] ECR 1283

³³⁵ §10

³³⁶ §15

³³⁷ As regards the proof of the existence of the durable relationship, the European Commission expresses the view that ‘[n]ational rules on durability of partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable. However, in this case national rules would need to foresee that other relevant aspects (such as for example a joint mortgage to buy a home) are also taken into account. Any denial of entry or residence must be fully justified in writing and open to appeal’. See Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States published on 2 July 2009, COM(2009) 313 final, at 2.1.1.

becomes evident by the CJEU’s following statement: ‘(...) the Member State which grants such an advantage to its own nationals cannot refuse to grant it to workers who are nationals of other Member States without being guilty of discrimination on grounds of nationality, contrary to Articles 7 and 48 of the Treaty’,³³⁸.

Another ‘diverse’ family model is, as noted above, that of spouses who do not live in the same home. The CJEU dealt with this issue in *Diatta*³³⁹. In the case at hand, Mrs. Diatta was married to a French national who lived and worked in Berlin. After living with her husband for some time, she separated from him with the intention of divorcing and lived since then in a separate accommodation. In accordance with the proceeding for a preliminary ruling, the Bundesverwaltungsgericht referred to the CJEU the following question:

‘Is Article 10 (1) of Regulation (EEC) No 1612/68 to be interpreted as meaning that the spouse of a worker who is a national of a Member State and who is employed in the territory of another Member State may be said to live ‘with the worker’ if she has in fact separated from her spouse permanently but none the less lives in her own accommodation in the same place as the worker?’³⁴⁰.

In its response, the CJEU stated that the family members of a migrant worker are not necessarily required to live permanently with him in order to qualify for a right of residence under Article 10 of the Regulation³⁴¹.

Taking into account the time period that it was adopted, this approach seems to be rather progressive. However, it might be more appropriate to assume that the CJEU attempted to protect a ‘formal’ rather than an ‘atypical’ family, as in the same case it held ‘(...) that the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date’³⁴². This means that the CJEU is most likely of the opinion that a relationship based on marriage is a formal concept which is terminated only the day on which the divorce is issued.

Nevertheless, even in case we accept that the CJEU has adopted a progressive view on that issue accepting family ties between a couple which does not cohabit, it should be born in mind

³³⁸ §29

³³⁹ Case 267/83 *Aissatou Diatta v. Land Berlin* [1985] ECR 567

³⁴⁰ §6

³⁴¹ §22

³⁴² §20

that this case was decided under the Migrant Workers Regulation and the Citizenship Directive requires that the family member should ‘accompany or join’ the sponsor. It could be argued that this might result in a stricter approach regarding families who are not cohabiting. However, according to Chalmers ‘[t]he Court is unlikely to depart from its generally realistic approach to the law in this area and demand cohabitation at all times and circumstances. A spirit of proportionality will prevail’³⁴³. Indeed, in the recently decided *Ogieriakhi*³⁴⁴, the CJEU did not appear to depart from the approach that separation does not break the family bond even in case after separation the spouses started living with other partners.

Furthermore, in *Jia*³⁴⁵ the CJEU discussed the element of ‘dependence’ which is a rather familiar issue within the EU free movement and immigration law. In particular, both the Migrant Workers Regulation and the Citizenship Directive refer to a group of persons who may acquire the rights set out in these legal instruments only if they prove to be dependent on the EU citizen or his/her spouse. These persons may be, as mentioned above, the over 21 years old descendants and direct relatives in the ascending line but also any other person which is covered by the wording of the provision of Article 3 (2) (a) of the Citizenship Directive. The notion of dependence refers in principal to dependence due to health problems, legal, emotional but also financial dependence. The later was proved in the present case, where Mrs. Jia, attempted to acquire the family member’s rights relying on a relationship of dependence with her daughter-in-law, who was a German national living in Sweden. The Swedish authorities rejected the application as they considered that the applicant had not submitted adequate evidence regarding the economic dependence which was claimed to exist upon the EU citizen.

In its judgment, the CJEU clarified two aspects regarding dependent family members. First, it defined the content of ‘dependence’ stating that ‘[i]n order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves’³⁴⁶. Second, according to the same decision, ‘[t]he need for material support must exist in the State of origin of those relatives or the State

³⁴³ D. Chalmers, G.T. Davies and G. Monti, *European Union Law: Cases and Materials* (2nd edn, Cambridge, Cambridge University Press, 2010) p. 467

³⁴⁴ Case C-244/13 *Ewaen Fred Ogieriakhi v. Minister for Justice and Equality, Ireland, Attorney General, An Post* (not yet reported)

³⁴⁵ Case C-1/05 *Yunying Jia v. Migrationsverket* [2007] ECR I-1

³⁴⁶ §37

whence they came at the time when they apply to join the Community national³⁴⁷. This is particularly important as family members who cannot support themselves in the Member State where the EU citizen resides, either because they cannot find employment or for any other reason, but are able to support themselves in their country of origin do not qualify as dependent family members in the meaning of the Citizenship Directive. In the present case, the CJEU further considered the way that the financial support can be proven and rather vaguely held that ‘(...) proof of the need for material support may be adduced by any appropriate means’³⁴⁸.

The notion of dependence was further discussed in *Reyes*³⁴⁹. In the present case, the CJEU was asked to consider whether for the interpretation of ‘dependence’, family members can be required to prove that they have searched unsuccessfully for employment in the country of origin and whether for the interpretation of the same notion any importance should be attached to the fact that the family member will be able, due to his/her age or education, to find employment in the host Member State. The CJEU gave a negative answer to both questions. In particular, the CJEU stated that the fact the EU citizen is sending to the family member an amount of money which is necessary for covering the latter’s basic needs in the country of origin is sufficient for the finding of dependence and that Member States cannot investigate the reasons why the family member becomes dependent on the EU citizen. Furthermore, the CJEU stated that the fact that the family member is expected once admitted, to find employment in the host Member State is an irrelevant factor with regard to the interpretation of the notion of dependence. In its view, a different approach would contradict Article 23 of the Citizenship Directive which clearly provides family members with the right to employment.

Next, Articles 2 (2) and 3 (2) of the Citizenship Directive describe the relationships that fall within the scope of ‘family’ taking for granted that the EU citizen who exercises the free movement right is an adult. Nevertheless, in certain cases the right may be exercised by a child³⁵⁰. In *Zhu and Chen* (cited above), a Chinese national entered the United Kingdom when she was six-month pregnant and then moved to Northern Ireland where she gave birth to the child. The child acquired automatically the Irish nationality as according to the Irish

³⁴⁷ §37

³⁴⁸ §43

³⁴⁹ Case C-423/12 *Flora May Reyes v. Migrationsverket* (published in the electronic Reports of Cases)

³⁵⁰ H. Stalford and E. Drywood, ‘Coming of Age: Children’s Rights in the EU’ (2009) 46 *Common Market Law Review* 143-172

Nationality and Citizenship Act, Ireland allows any person born on the island of Ireland to acquire Irish nationality. Subsequently, her mother asserted a right of both of them to live in the United Kingdom as the daughter was an EU citizen and had a right of free movement within the territory of the EU. The CJEU held that:

‘[i]t is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his/her ‘primary carer’ and accordingly that the ‘carer’ must be in a position to reside with the child in the host Member State for the duration of such residence’,³⁵¹.

It becomes apparent that the situation is the opposite than the one previously discussed in *Jia*. In a usual ‘dependence case’, it is the family member who claims to be dependent on an EU citizen who is exercising his/her free movement right within the EU. On the contrary, in a case of a minor EU citizen it is the latter who is dependent on another person who asserts to be a ‘family member’ for the purposes of the Directive, situation which is not initially covered by the wording of the Citizenship Directive. What is even more striking is that according to the *Zhu and Chen* case, it does not seem to be a requirement that the ‘carer’ is a relative of the sponsor, as the decision refers to a ‘person who is his or her primary carer’. This is a particularly important decision as it recognises that the family protection can be afforded to relationships that fall outside the narrow notion of ‘core family’. It is noteworthy that the rights afforded to these persons are subject to certain restrictions, not different that the ones referred to in Article 7 of the Citizenship Directive. The applicants in this case had proven to have sufficient resources and health insurance and that they would therefore not become a burden on the public finances of the host Member State and that was the reason why the CJEU eventually authorised their residence in the territory of the United Kingdom.

The latter has been confirmed in the recently decided *Alokpa*³⁵². In the present case, a citizen of Togo residing in Luxembourg gave birth to two children who acquired the French nationality as they were recognised by a French national who, as appears from the facts of the case, did not keep further contact with the mother or the children. Mrs. Alokpa applied for a residence permit in Luxembourg on the ground that she was a ‘primary carer’ of EU citizens which resided in another Member State. The CJEU held that Article 21 TFEU and the Citizenship Directive grant to an EU child and to its ‘primary carer’ the right to reside in

³⁵¹ §45

³⁵² Case C-86/12 *Adzo Domenyo Alokpa and Others v. Ministre du Travail, de l'Emploi et de l'Immigration* (published in the electronic Reports of Cases)

another Member State provided that they can prove to satisfy the conditions referred to in Article 7 of the Citizenship Directive. It appears that the resources should only be available for the EU citizen and there is no requirement as to their origin. Furthermore, the CJEU concluded that even if the requirements are not fulfilled, the right of residence may be granted to the ‘primary carer’ exceptionally in case the refusal would in practice force the EU citizen to leave the territory of the EU. In any event, it should be noted that in the present case, the EU citizen does not actually exercise a right to free movement but is directly born in another Member State³⁵³. This however does not seem to be an obstacle for the grant of ‘EU family’ rights.

Next, the concept of ‘diversity’ in family models inevitably contains relationships with diverse sexual orientation³⁵⁴. Starting up with same-sex couples, it should be mentioned that when the Migrant Workers Regulation was adopted, none of the EU Member States had afforded legal recognition to same-sex couples. Nowadays, several countries in the EU have allowed same-sex marriage and others have regulated this issue with registered partnerships or civil unions³⁵⁵. In any case, we believe that since the provision of the Citizenship Directive regarding ‘spouses’ is unconditional, its interpretation should in principle include same-sex spouses, even without the requirement that the host Member State has established same-sex marriage. Not least, the provision regarding relationships outside marriage³⁵⁶ may also encompass same-sex stable relationships but as mentioned above, this provision leaves discretion to the Member States regarding the exact conditions of entry and residence of the partner with whom the Union has a durable relationship. The future case law of the CJEU on the Citizenship Directive will possibly give answers with regards to the application of these provisions to same-sex spouses or couples.

In order to better conceive the approach of the EU law on this issue, it is worth elaborating on what the CJEU has so far said on the so-called ‘LGBT rights’. In *Grant*³⁵⁷, Mrs. Grant worked at the South-West Trains Ltd (SWT), which was a company operating railways in the United

³⁵³ The same is true for the *Zhu and Chen* case cited and analysed right above

³⁵⁴ See also G.N. Toggenburg, ‘LGBT Go Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights Before the European Court of Justice’ (2008) 5 *European Law Reporter* 174-185, M. Bell, ‘Holding Back the Tide? Cross-Border Recognition of Same Sex Partnerships Within the European Union’ (2004) 5 *European Review of Private Law* 613-632 and H. Toner, *Partnership Rights, Free Movement and EU Law* (Oxford/Portland, Hart, 2004)

³⁵⁵ Relevant information available at the EU Commission’s webpage http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm

³⁵⁶ Article 3 (2) (b) of the Citizenship Directive

³⁵⁷ Case C-249/96 *Lisa Jacqueline Grant v. South-West Trains Ltd* [1998] ECR I-621

Kingdom. SWT granted travel concessions not only to the spouses of the employees but also to the partners with whom the employees had had a stable relationship outside marriage. Based on this regulation, Mrs. Grant applied for travel concessions for her female partner, with whom she claimed she had had a ‘meaningful relationship’ for over two years. The company rejected Mrs. Grant’s application on the ground that in case of unmarried partners the benefits could be granted only for a different-sex partner. The CJEU was confronted with two issues. First, whether the above described situation constitutes discrimination on basis of sex and, second, if Article 119 of the EC Treaty covers situations of discrimination on basis of sexual orientation.

As regards the first question, the CJEU compared Mrs. Grant’s situation with that of a male employee who would wish to gain the benefits for his same-sex partner and concluded that ‘[s]ince the condition imposed by the undertaking’s regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex’³⁵⁸. It added that ‘(...) in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of different sex’³⁵⁹.

Confronted with the question whether the EU Treaty covers discrimination on basis of sexual orientation, the CJEU stated that:

‘(...) the scope of that article, as of any provision of Community law, is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context. It follows from the considerations set out above that Community law as it stands at present does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings’³⁶⁰.

The argument put forward by the CJEU was that cohabitation between two persons of the same sex is hardly treated as equivalent to marriage in the EU Member States and that in most of them it is treated either as ‘(...) equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights’ or it is ‘(...) not recognised in any particular way’³⁶¹. There is definitely a lot of space for discussion on the issue of discrimination and the arguments of the CJEU in this judgment but what is important for the

³⁵⁸ §28

³⁵⁹ §35

³⁶⁰ §47

³⁶¹ §32

concept of ‘EU family’ is that in this case the CJEU considered that same-sex relationships are not equivalent to marriage or to stable relationships outside marriage of persons of a different sex.

In *D*³⁶², D, an official of the EU of Swedish nationality working at the Council, registered a partnership with another Swedish national of the same sex in Sweden and applied to the Council for his registered partnership to be treated as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations. The Council rejected the application, on the ground that the provisions of the Staff Regulations could not be interpreted as allowing a ‘registered partnership’ to be treated as being equivalent to marriage. The case was first brought before the General Court which held that the concept of marriage must be understood as meaning a relationship based on civil marriage within the traditional meaning of the term and reference to the laws of the Member States is not necessary where the relevant provisions of the Staff Regulations are capable of being given an independent interpretation. It stressed that the Council was under no obligation to regard a stable relationship with a partner of the same sex as equivalent to marriage, even if that relationship had been officially registered by a national authority and concluded that it would be for the Council, as legislature and not as employer, to make any necessary amendments to the Staff Regulations. The CJEU primarily confirmed the judgment of the General Court.

Next, in *Tadao Maruko*³⁶³, Mr. Maruko had entered into a life partnership with a designer of theatrical costumes. Mr. Maruko’s life partner had been a member of the *Versorgungsanstalt der deutschen Buehnen* (Vddb) and had continued to contribute voluntarily to that institution even during the periods that he was not obliged to do so. Following the death of his life partner, Mr. Maruko applied to the Vddb for a widower’s pension, which was rejected on the ground that its regulations did not provide for such an entitlement for surviving life partners. In fact, the pay scheme provided that a ‘wife’ or a ‘husband’ is entitled to a widow’s or widower’s pension. The CJEU stated that:

‘(...) the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor’s benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the

³⁶² Joined Cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden v. Council of the European Union* [2001] ECR I-4319

³⁶³ Case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Buehnen* [2008] ECR I-1757

same sex in a situation comparable to that of spouses so far as concerns that survivor’s benefit’,³⁶⁴.

The judgment is rather revolutionary in the field of ‘LGBT rights’ as the CJEU for the first time ruled on a case concerning same-sex partners against discrimination based on sexual orientation.

The same approach was adopted in *Jünger Römer*³⁶⁵. In the present case, Mr. Jünger Römer requested that by reason of his registered life partnership with a person of the same sex, the amount of his supplementary retirement pension be recalculated on the basis of the more favourable deduction applied to married partners³⁶⁶. In its decision, the CJEU stressed that:

‘[a]rticle 1 in conjunction with Articles 2 and 3 (1) (c) of Directive 2000/78 preclude a provision of national law such as Paragraph 10 (6) of that Law of the Land of Hamburg, under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership such as that provided for by the Law on registered life partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001, which is reserved to persons of the same gender, and there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension’,³⁶⁷.

It should be noted that the last two judgments have been decided after the adoption of the so-called Framework Directive³⁶⁸ which introduced for the first time in the EU the concept of discrimination on basis of sexual orientation³⁶⁹. Concluding the analysis of the case law of the

³⁶⁴ §73

³⁶⁵ Case C-147/08 *Jünger Römer v. Freie und Hansestadt Hamburg* [2011] ECR I-3591

³⁶⁶ See also the recently decided Case C-267/12 *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* (published in the electronic Reports of Cases) where the applicant was denied work benefits on the ground that such benefits were granted to married employees and not to those that had concluded a civil union with their partners. The CJEU decided that since the situations of the registered partners and spouses are comparable with regards to the concerned employment benefits, there was discrimination on grounds of sexual orientation.

³⁶⁷ See the order of the judgment

³⁶⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

³⁶⁹ According to Article 1 of the Directive, ‘The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment’.

CJEU on same-sex relationships, it should be mentioned that the issue is to be further addressed in *Cocaj*³⁷⁰, a case pending before the CJEU.

The CJEU has appeared to be more favourable in transgender cases. In *P. v. S.*³⁷¹, P. was dismissed from her job as a result of a gender reassignment that she had undergone. The CJEU was asked to interpret Directive 76/207/EEC regarding equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions³⁷². In that respect, it held: ‘(...) in view of the objective pursued by the directive, Article 5 (1) of the directive precludes dismissal of a transsexual for a reason related to a gender reassignment’³⁷³.

Furthermore, in *K.B.*³⁷⁴, K.B. had been working for approximately 20 years for the NHS and was a member of the NHS Pension Scheme. She had a relationship for a number of years with R., a person who was born a woman and following surgical gender reassignment had become a man without having been able to amend his birth certificate to reflect this change officially. As a result K.B. and R. had not managed to marry, even though they wished to do so. Therefore, when K.B. claimed a widower’s pension for R. for the case she would predeceased, the NHS Pensions Agency informed her that as she and R. were not married, R. would not be able to receive a widower’s pension, since that pension was payable only to a surviving spouse. The CJEU found that:

‘(...) Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other’³⁷⁵.

2.2.1.4 The interpretation of Article 3 (1) of the Citizenship Directive

The interpretation of Article 3 (1) of the Citizenship Directive will help us better understand the circumstances under which family members may qualify as such for the purposes of the Directive, and consequently enjoy family rights in another EU Member State. According to

³⁷⁰ Case C-459/14 *Cocaj*

³⁷¹ Case C-13/94 *P. v. S. and Cornwall Country Council* [1996] ECR I-2143

³⁷² Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

³⁷³ §24

³⁷⁴ Case C-117/01 *K.B. v. National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541

³⁷⁵ §36

Article 3 (1) of the Citizenship Directive, ‘[t]his Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them’. Therefore, family members who enjoy the rights of the Citizenship Directive which will be analysed below are in principle those who ‘accompany’ or ‘join’ an EU citizen who ‘moves to’ or ‘resides in’ another Member State. However, the CJEU has given a broader definition of EU citizens who can rely on the Citizenship Directive and consequently have the right to be joined or accompanied by their family members. This section will principally focus on the way the CJEU has interpreted the terms ‘moves or resides’ and ‘accompany or join’.

To begin with, the CJEU has clarified that it is not necessary that the EU citizen actually exercises a movement between Member State in order for the EU family rights to be applicable but suffices that the s/he resides in a Member State other than the one of his/her nationality. This would be the case when the EU citizen is born in a Member State holding the nationality of another Member State. In these cases, the legal status of the ‘carer’ of the EU citizen is covered by the provisions of the Citizenship Directive³⁷⁶. It should be noted that this interpretation is in line with the wording of the Directive which, as mentioned above, provides that the EU citizen may ‘move to’ or ‘reside in’ the host Member State.

Furthermore, in *Singh*³⁷⁷, the CJEU suggested that EU citizens who have exercised their right to free movement can continue to rely on EU law, as regards their right to have their family accompanying them, when they return to their country of origin³⁷⁸. In particular, it held:

‘The answer to the question referred for a preliminary ruling must therefore be that Article 52 of the Treaty and Directive 73/148, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his/her spouse entered and resided in the territory of another Member State’³⁷⁹.

³⁷⁶ See *Alopa* (cited and analysed above)

³⁷⁷ Case C-370/90 *The Queen v. Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265

³⁷⁸ See also A. Tryfonidou, ‘Family Reunification Right of (Migrant) Union Citizens: Towards a More Liberal Approach’ (2009) 15 *European Law Journal* 634-653

³⁷⁹ §25

The issue of the so-called ‘returning EU migrants’ was further discussed in *Eind*³⁸⁰. In the present case, Mr. Eind, a Dutch national, moved to the United Kingdom where he found employment and was subsequently joined by his daughter Rachel who arrived directly from Surinam. After living for a certain period in the United Kingdom, Mr. Eind returned to the Netherlands and tried to acquire a residence permit for his daughter. The Dutch authorities refused to grant a residence permit to the daughter stating that:

‘[a]lthough her father had resided in a Member State other than the Netherlands, he had not, since his return to the Netherlands, been engaged in effective and genuine activities and was not economically non-active for the purposes of the EC Treaty. In those circumstances, Mr. Eind could no longer be regarded as a Community national for the purposes of the Law’³⁸¹.

Mr. Eind argued that he could continue to rely on the EU rights as a ‘returning EU migrant’ and could therefore have his daughter accompanying him to his country of origin. The CJEU in principle adopted the *Singh* approach and accepted Mr. Eind’s arguments.

Interestingly, in the recently decided *O. and B.*³⁸², the CJEU held that it is not necessary that the EU citizen moves to another Member State for the purposes of work in order to claim EU rights on his/her return back to the Member State of origin but suffices that s/he exercises general free movement rights deriving from Article 21 TFEU. Even in such cases, the provisions of the Citizenship Directive apply respectively to family members of EU citizens who return to their country of origin after having resided in another Member State provided that the residence in that other Member State fulfils the conditions referred to in Article 7 or 16 of the Directive. According to the judgment’s wording, the residence in the host Member State should be sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State. It goes without saying that short visits to other Member State fall outside the scope of Articles 7 and 16 and are not sufficient for the application of the provisions of the Citizenship Directive when the EU citizen returns to his/her country of origin.

It becomes apparent that the CJEU has enhanced the scope of the Citizenship Directive and grants in certain circumstances EU family rights to family members who wish to accompany

³⁸⁰ Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind* [2004] ECR I-10719

³⁸¹ §13

³⁸² Case C-456/12 *O. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B.* (not yet reported)

the EU citizen in his/her own Member State, situation which is normally covered by domestic law. The explanation for granting a favourable status to ‘returning migrants’ with regards to family reunification is that if EU citizens know that they cannot bring back their family members to their country of origin in case they wish to return, they will in all probability decide to refrain from moving to another Member State. Therefore, the free movement right in the EU may be jeopardised. In addition, by granting ‘EU returning migrants’ the right to bring their families back to their own countries after they have exercised some free movement right, the EU legislature is ‘encouraging’ EU citizens to actually move to another Member State even for a short period in order to take advantage of EU provisions which in some cases might be more favourable than the ones applied to them by domestic law. The Danish national, for example, who due to strict Danish rules regarding family reunification is not able to bring his/her family members to Denmark, can move to Germany and claim EU family reunification rights when s/he returns back to his/her own country³⁸³.

Furthermore, the CJEU seems to go even further and afford ‘EU family rights’ to nationals of a Member State who do not exercise any free movement right but remain in the territory of the Member State of which they are nationals, provided that they exercise some cross-border economic activity³⁸⁴. This becomes evident in *Carpenter*³⁸⁵. The summary of the facts in the present case can be summarised as follows: Mrs. Carpenter, a Philippines national, was given leave to enter the United Kingdom in September 1994. In May 1996 she married Mr. Carpenter who was a United Kingdom national and was running a business selling advertising space in medical and scientific journals. The business was established in the UK, where the publishers of the journals for which he sold advertising space were based but a significant proportion of the business was conducted with advertisers established in other Member States of the EU. It is noteworthy that Mr. Carpenter travelled often to other Member States for the purpose of his business.

Mr. Carpenter argued that if his wife was deported to Philippines, his economical cross-border activity within the EU would be seriously hindered as Mrs. Carpenter was the one taking care

³⁸³ However, Member States have argued that this would constitute an abuse of right. In that respect, see K.E. Sorensen, ‘Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?’ (2006) 43 *Common Market Law Review* 423-459

³⁸⁴ For the CJEU’s ‘interference’ with an internal situation see H. Toner, ‘Comments on *Mary Carpenter v. Secretary of State*, 11 July 2002 (Case C-60/00)’ (2003) 5 *European Journal of Migration and Law* 163-172

³⁸⁵ Case C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279

of the children while he was traveling for his business in other Member States³⁸⁶. The CJEU in principal agreed with these arguments as in paragraph 39 it stated that ‘[i]t is clear that the separation of Mr. and Mrs. Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr. Carpenter exercises a fundamental freedom’ and concluded that:

‘(...) the answer to the question referred to the Court is that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider’s spouse, who is a national of a third-country’³⁸⁷.

The above mentioned situation was further clarified in *S. and G.*³⁸⁸. In the present cases, the CJEU was asked whether the applicants, being the family members of an EU citizen who resided in his own country but regularly travelled to another Member State for work, are entitled under EU law to a right of residence in the Member State of nationality of the EU citizen. In that respect the CJEU stated that:

‘(...) Article 45 TFEU must be interpreted as conferring on a third-country national who is the family member of a Union citizen a derived right of residence in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU, which it is for the referring court to determine’³⁸⁹.

Furthermore, the CJEU noted that the fact that the third-country family member is taking care of the Union citizen’s child is a relevant factor in the present case but added that ‘[t]he mere fact that it might appear desirable that the child be cared for by the third-country national who is the direct relative in the ascending line of the Union citizen’s spouse is not therefore sufficient in itself to constitute such a dissuasive effect’³⁹⁰.

The circumstances in the present cases are significantly different than those in *Singh* and *Eind* as the CJEU confers family rights to a third-country national who is a family members of an

³⁸⁶ It remains unclear whether the CJEU will adopt the same approach with regards to couples without children

³⁸⁷ §46

³⁸⁸ Case C-457/12 *S. v. Minister voor Immigratie, Integratie en Asiel* and *Minister voor Immigratie, Integratie en Asiel v. G.* (not yet reported)

³⁸⁹ §44

³⁹⁰ §43

EU citizen who resides in the Member State of his/her nationality and has not exercised any free movement right whatsoever. The mere condition set by the CJEU is that the EU citizen is conducting some cross-border economic activity which derives from a fundamental freedom guaranteed by the Treaties and the exercise of such freedom is likely to be threatened in case the family member is deported. However, it should be underlined that although the CJEU ruled that the family members have the right of residence in the concerned Member State it clearly stated that this right does not derive from the Citizenship Directive but from Article 45 TFEU. This being said, it remains unclear what the exact conditions governing the residence of these family members will be. The CJEU is expected to further clarify on this issue in its future case law.

Furthermore, in *Ruiz Zambrano*³⁹¹, the CJEU held that EU rules also apply to nationals of a Member State and to their third-country family members to whom they are dependent, in case the expulsion of the latter would deprive those EU citizens of their right of residence in the Union. In particular, Mr. and Mrs. Zambrano were Columbian nationals who moved to Belgium seeking asylum and subsequently gave birth to two children who were granted Belgian nationality. The Belgian authorities had rejected Mr. and Mrs. Zambrano’s applications for residence permits and Mr. Zambrano challenged these decisions arguing that he enjoyed a right of residence as a ‘carer’ of a minor child who is a national of a Member State. The CJEU accepted his arguments holding that in case the expulsion of the parents would result in their EU children having to abandon the territory of the Union, EU law should be applicable even if those EU children reside in the territory of the Member State of which they are nationals and they have never exercised free movement.

It is worth mentioning that the case displays several similarities with *Zhu and Chen* or *Alokpa* (both cited above) which were analysed above in the framework of the concept of ‘EU family’. The important difference is that in *Chen* and in *Alokpa*, the ‘EU child’ was a national of another Member State whereas in the present case, Mr. and Mrs. Zambrano’s children were nationals of the Member State in which their ‘carers’ sought a residence permit. The CJEU seems therefore to ‘interfere’ even further in ‘internal situations’ and apply EU rules even in cases that do not involve any cross border movement or element³⁹². The latter finding was

³⁹¹ Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)* [2011] ECR I-1177

³⁹² See also A. Wiesbrock, ‘Granting Citizenship-Related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?’ (2012) 14 *European Journal of Migration and Law* 63-94

confirmed in *McCathy*³⁹³ and *Dereci*³⁹⁴. It should be stressed that the CJEU clearly states that the parents’ rights cannot be covered by the Citizenship Directive but in this case they derive from Article 20 of the TFEU. It should be highlighted that although the CJEU rules that the parents should be granted a work permit as well, the exact conditions of employment and residence of these parents in the host Member State remain unknown³⁹⁵.

Another issue which is particularly relevant in relation to the conditions under which a family member can enjoy EU family rights is the issue of whether there exists a requirement of prior lawful residence of the family member in the Union. In that respect, two contradictory judgments of the CJEU are particularly relevant. In *Akrich*³⁹⁶, the CJEU held that:

‘[i]n order to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation 1612/68, the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated’³⁹⁷.

In the present case, the CJEU analysed the issue of motives as well stating that:

‘(...) the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State’³⁹⁸.

The only exception seems to be marriages of convenience as it is highlighted in the judgment that where a national of a Member State and a third-country national have entered into a marriage of convenience in order to take advantage of the provisions relating to entry and residence of third-country nationals, Article 10 of the Migrant Workers Regulation is not applicable³⁹⁹.

³⁹³ Case C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department* [2011] ECR I-3375

³⁹⁴ Case C-256/11 *Murat Dereci and Others v. Bundesministerium für Inneres* [2011] ECR I-11315

³⁹⁵ The CJEU is soon expected to clarify whether the ‘Ruiz Zambrano’ principals become applicable even in cases the non-EU parent has committed serious crimes. The relevant cases are Case C-165/14 *Rendon Marin* and Case C-304/14 *CS*.

³⁹⁶ Case C-109/01 *Secretary of State for the Home Department v. Hacene Akrich* [2003] ECR I-9607

³⁹⁷ §61

³⁹⁸ §61

³⁹⁹ Regarding the issue of motives see also R.C.A. White, ‘Conflicting Competences: Free Movement Rules and Immigration Laws’ (2004) 29(3) *European Law Review* 385-396 and A.P. Van der Mei, ‘Comments on Akrich (Case C-109/01 of 23 September 2003) and Collins (Case C-138/02 of 23 March 2004)’ (2004) 6 *European Journal of Migration and Law* 277–284

It is noticeable that the requirement for a lawful residence in the Union appears to be placed above all requirements. The CJEU’s may be summarised as follows. The motives for which a couple consisting of an EU citizen and a non-EU citizen decides to move to another Member State are not relevant, even in case they move in order to enjoy a more favourable status on their return to the Member State of which the EU citizen is a national. The motives may be relevant only in cases of marriages of convenience as there is a requirement for a genuine marriage for family rights to be applicable. However, even if the marriage is genuine and real, Article 10 of the Migrant Workers Regulation does not apply in case the third-country national was not lawfully resident in the EU. The judgment can be criticised mostly for reading outside the scope and the wording of the Migrant Workers Regulation which was then in force but it was in any case short-lived as it was overruled by the CJEU in *Metock*⁴⁰⁰.

In *Metock*⁴⁰¹, the CJEU was asked to give answer to two main questions⁴⁰². First, whether the requirement for a prior lawful residence is compatible with the Citizenship Directive and second, if the spouse of a migrant Union citizen benefits from the provisions of the Citizenship Directive, irrespective of when and where the marriage took place and of the circumstances in which he entered the host Member State. The CJEU’s answer in the first question was negative. It argued that the conclusions in *Akrich* (cited above) should be reconsidered and held that no prior lawful residence requirement in the national legislation of a Member State is compatible with the scope of the Citizenship Directive. The guidance given regarding the second question was also in favour of third-country family members as the CJEU considered that it is not relevant when and where the marriage took place or the conditions under which the third-country national entered the Member State. For justifying this view, the CJEU relied on the wording of the provision of Article 3 (1), stating that the Citizenship Directive merely provides for family members who ‘accompany’ or ‘join’ the EU citizen and does not require that the third-country national should be a family member before entering the Member State or before the EU citizen is entering the host Member State exercising his/her free movement right.

The CJEU’s approach regarding both issues seems reasonable. It is worth mentioning that the *Akrich* case (cited above) was decided under the Migrant Workers Regulation and therefore

⁴⁰⁰ Case C-127/08 *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* [2008] ECR I-6241

⁴⁰¹ See also C. Costello, ‘Metock: Free Movement and ‘Normal Family Life’ in the Union’ (2009) 46 *Common Market Law Review* 587-622

⁴⁰² It is noteworthy that the case was decided with the accelerated process.

the whole discussion concerning the issue of prior lawful residence of a third-country family member in the Union was already present when the Citizenship Directive was being adopted. Consequently, if the EU legislature wanted to impose any requirement for prior lawful residence, s/he would have included it in the wording of Article 3 or elsewhere in the Citizenship Directive. In general, Article 3 (1) of the Citizenship Directive should not be interpreted strictly. This view is supported by the CJEU’s view in *Metock* (cited above) that ‘(...) [u]nion citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals’⁴⁰³. Since the Migrant Workers Regulation did not provide for family members ‘joining’ or ‘accompanying’ but only referred to family members who have the right to install themselves with the worker in the host Member State, the interpretation of Article 3 (1) of the Directive currently in force should be liberal and in favour of third-country family members⁴⁰⁴.

To sum up, it is settled case law that EU rules regarding family members apply to EU citizens that move to another Member State, EU citizens that are born in another Member State and reside there without exercising a free movement right, ‘returning EU citizens’ and EU citizens who stay in the country of their nationality with the condition that they conduct some cross-border economic activity or in case the deportation of their ‘carer’ would threaten their residence in the Union. Furthermore, it is irrelevant whether family members join the EU citizen from within the Union or outside, whether they became family members before or after they entered the host Member State or whether before or after the EU citizen entered the host Member State and whether they were regularly or irregularly residing in the Union before they became family members of the EU citizen.

2.2.2 The definition of family members of EU citizens in national legislation

2.2.2.1 Spain

The Spanish legislature implements effectively the relevant provisions of the Citizenship Directive that concern the concept of family⁴⁰⁵. Given that the definition presents small differences, we consider it necessary to cite the relevant provisions of the Spanish legislation. According to Article 2 of the Royal Decree 240/2007, the family members that have the right

⁴⁰³ §59

⁴⁰⁴ S. Currie, ‘Accelerated Justice or a Step Too Far? Residence Rights of Non-EU Family Members and the Court’s Ruling in *Metock*’ (2009) 34(2) *European Law Review* 310-326

⁴⁰⁵ Articles 2 (2) and 3 (2) of the Citizenship Directive

to accompany or join the EU citizen in Spain are: a) the spouse, as long as there has been no agreement or declaration of the invalidity of the marriage or divorce, b) the partner with whom the EU citizen has a registered partnership in one of the EU Member States, as long as the partnership has not been cancelled, fact which should be sufficiently proven, c) the direct descendants of the EU citizen registered partner, who are younger than 21 or are dependants or disabled, and those of his/her spouse, as long as the marriage or partnership has not been cancelled or terminated, and d) the direct ascendants and those of the spouse or the registered partner that are dependants, as long as the marriage or partnership has not been cancelled or terminated.

Furthermore, the Royal Decree 240/2007 provided that Spanish public authorities shall facilitate the entry and residence of other family members until the second degree in direct or collateral line, who are not included in Article 2 of the Royal Decree and who are dependants or live with the EU citizen or where serious health grounds strictly require the personal care of the family member by the EU citizen and of the partner with whom the EU citizen has a durable relationship duly attested⁴⁰⁶. Nevertheless, this provision has been modified by the Royal Decree 987/2015 and, therefore, the above family members are not necessarily required to be until the second degree in direct or collateral line. The new Royal Decree also specifies on the proof of the existence of the durable relationship stating that one year of cohabitation should be considered sufficient, whereas in case the couple has children together, they merely need to prove the existence of cohabitation. It should be noted that Royal Decree 987/2015 achieves a better transposition of the Directive as the requirement that the family members should be until the second degree in direct or collateral line is not provided for by the Directive. Not least, the fact that the new Royal Decree provides some guidance with regards to the proof of existence of the unmarried partnership is by all means a positive development.

It should be underlined that the spouses or partners may be of the same or different sex as same-sex marriages are legally recognised in Spain. It is also interesting to underline that the provision of the Citizenship Directive regarding registered partnerships has been implemented in the Spanish legal system. It can be argued that the Spanish legislature could have excluded registered partners from the concept of family members, especially due to the fact that the legal status of non-marital relationships depends on each Autonomous Community and it

⁴⁰⁶ 19th additional provision of the 4th final provision of the Royal Decree 240/2007

would be rather difficult to reach a conclusion as to whether registered partnerships are treated as equivalent to marriage in Spain.

2.2.2.2 Greece

In Greece, the Presidential Decree applicable to family members of EU citizens implements correctly the family members in accordance with Article 2 (2) of the Citizenship Directive, as well as the rest of the beneficiaries who are facilitated entry and residence⁴⁰⁷. Nevertheless, it should be highlighted that although registered partnerships were introduced in the Greek legal system by the Law 3719/2008, the Greek legislature does not include registered partners in the definition of family members of EU citizens. Given that according to the prevailing opinion⁴⁰⁸, registered partnerships are not treated in the Greek legal system as equivalent to marriage, the Greek legislation does not infringe the Citizenship Directive. Indeed, a careful reading of the Law 3719/2008 demonstrates that registered partners do not enjoy the same rights as spouses in all aspects⁴⁰⁹. Next, the concept of spouses does not include same-sex spouses as the Greek legal system does not recognise same-sex marriage. In that respect, it should be mentioned that the Greek parliament has recently approved a law on same-sex partnerships⁴¹⁰. Nevertheless, given that the Presidential Decree only allows for spouses to join the EU citizen, it is questionable whether the said law on same-sex partnerships will have a direct impact on same-sex partners of EU citizens residing in Greece.

As regards the interpretation of the term ‘descendants’ and ‘ascendants’, the Greek legislature seems to be in line with the interpretation adopted above in this study. This becomes apparent if we consider that the Greek legislature in the initial Article 2 of the Presidential Decree spoke about the sponsor and the spouse’s *children*, provision which was later on modified by Article 42 of the law 4071/2012 in order to refer to the *direct descendants*⁴¹¹. The same considerations apply with regards to the concept of ascendants⁴¹². Lastly, as regards the

⁴⁰⁷ See Articles 2 (2) and 3 (2) of the Presidential Decree 106/2007

⁴⁰⁸ Manoledaki thinks that the Greek legislature considers ‘registered partnerships’ as something ‘inferior’ than marriages. See E. Κουνουγέρη-Μανωλεδάκη, *Οικογενειακό δίκαιο* (τόμος II, 5^η εκδ., Αθήνα/Θεσσαλονίκη, Εκδόσεις Σάκκουλας, 2012) σ. 593-594 (E. Kounougeri-Manoledaki, Family law)

⁴⁰⁹ The most notable differences concern inheritance rights, as well as the dissolution of the registered partnership.

⁴¹⁰ Law 4356/2015

⁴¹¹ On this discussion see also Δ. Λέντζης, ‘Η έννοια της οικογένειας στο πλαίσιο της Οδηγίας 2004/38/EK για την ελεύθερη κυκλοφορία και διαμονή των πολιτών της Ευρωπαϊκής Ένωσης’ (2014) 9 *Αρμενόπουλος* 1492-1500 (D. Lentzis, The concept of family under the Directive 2004/38 on free movement and residence of EU citizens)

⁴¹² See Article 2 (2) (c) of the Presidential Decree 106/2007

persons who are covered by Article 3 (2) of the Presidential Decree⁴¹³, it should be mentioned that according to the Directions of the Ministry of Home Affairs⁴¹⁴, they are merely facilitated entry and residence in the sense that their application is examined in priority order. Nevertheless, in case these family members are third-country nationals, they are covered by the general regime for family reunification as for the rest of the aspects of the procedure.

2.2.2.3 Germany

In Germany, the Citizenship Directive has been implemented effectively as regards the definition of family members, as well as those persons who are facilitated entry and residence. One of the problems in the implementation concerned registered partners who were not included in the concept of family before the last reform but were granted a less favourable status⁴¹⁵. It was indeed questionable whether the German legislature treats registered partnerships as equivalent to marriages which would result in the legislature having to accept registered partners of EU citizens under the same conditions as spouses. The new Article 3 (2) 1 of the Free Movement Act includes registered partners of the EU citizen who are now treated in the same way as spouses. The above modification primarily affects same-sex partners as the Law on Life Partnerships (LPartG) applies to same-sex partners.

2.3 The rights of family members of EU citizens

2.3.1 The rights of family members of EU citizens in EU law

2.3.1.1 Overview of the rights

For reasons of equality among the members of the family, family members of EU citizens enjoy the same rights as EU citizens. This being said, these rights are in principle those discussed in Chapter 2.1.1, namely the right to entry and exit between Member States⁴¹⁶, the right of residence for up to three months⁴¹⁷, the right of residence for more than three months in case the EU citizen who they join or accompany satisfies the conditions referred to in

⁴¹³ For the legal status of partners with whom the EU citizen has a durable relationship, duly attested in particular see Joint Ministerial Decision 23443/2011 and the discussion made below with regards to partners of Greek nationals.

⁴¹⁴ Circular of the Ministry of Interior 4174/2008

⁴¹⁵ Indeed, the corresponding provision of the Free Movement Act in principle referred to the spouse (‘der Ehegatte’).

⁴¹⁶ Articles 4 and 5 of the Citizenship Directive

⁴¹⁷ Article 6 of the Citizenship Directive

Article 7⁴¹⁸ of the Citizenship Directive, the right of permanent residence when they have resided with the Union citizen in the host Member State for a continuous period of five years⁴¹⁹, the right to take up employment or self-employment⁴²⁰ and the right to equal treatment with the nationals of the host Member State⁴²¹. It should be emphasised that family members of EU citizens enjoy the above mentioned rights independently of whether they are EU citizens or third-country nationals themselves or on their nationality. Nonetheless, as it will be analysed below, there are some rules that concern exclusively third-country family members.

As regards the right of entry into and exit from the EU, Article 4 of the Citizenship Directive provides that no exit visa or equivalent formality may be imposed on EU or non-EU family members of EU citizens. Moreover, according to Article 5, EU family members can enter the territory of the Member States only with a valid identity card or passport whereas third-country family members are required to have an entry visa. The latter is not required for third-country family members who possess the residence card referred to in Article 10 of the Citizenship Directive. Furthermore, the right of residence for up to three months is not subject to any conditions other than the requirement to hold a valid identity card or passport as regards EU family members and a valid passport with regards to third-country family members⁴²², as well as the requirement that they do not become an unreasonable burden on the social assistance system of the host Member State⁴²³.

As for the right of residence for more than three months, the Citizenship Directive does not impose any requirements on the family members themselves as according to Articles 7 (1) (d) and 7 (2) they have the right of residence provided that the EU citizen who they join or accompany satisfies the conditions referred to in Article 7 (1) (a), (b) or (c). Therefore, it is the EU citizen who is required to prove that s/he is either a worker or self-employed or that being economically inactive or a student s/he has sufficient resources and health insurance for his/her EU or third-country family members, pursuant to what has been discussed above. It follows that workers or self-employed enjoy a much more privileged status not only with regards to their own free movement right but with the right to be joined or accompanied by

⁴¹⁸ Articles 7 (1) (d) and 7 (2) of the Citizenship Directive

⁴¹⁹ Articles 16 (1) and 16 (2) of the Citizenship Directive

⁴²⁰ Article 23 of the Citizenship Directive

⁴²¹ Article 24 (1) of the Citizenship Directive

⁴²² Articles 6 (1) and 6 (2) of the Citizenship Directive

⁴²³ Article 14 (1) of the Citizenship Directive

their family members as well, as they can bring their family members in the host Member State without any further conditions.

That being said, it becomes evident that the criticism of the EU citizenship being discriminatory is relevant in the field of family life as well. It would not be unreasonable to argue that family members are in fact divided into two categories, one concerning family members of workers and self-employed and another less privileged one that concerns family members of students and economically inactive persons. This is further confirmed by the derogation referred to in Article 7 (4) of the Citizenship Directive which gives discretion to the Member States to apply the ‘stricter’ Article 3 (2) to the dependent direct relatives in the ascending line and those of his/her spouse or registered partner, instead of Article 2 (2)⁴²⁴ in case the EU citizen is a student.

Next, family members shall register with the authorities in the host Member State presenting the documents provided for in Article 8 (5) and Article 10 (2) for EU family members and third-country family members accordingly. The Citizenship Directive provides for an issue of a ‘registration certificate’ for EU family members and a ‘residence card’ for third-country family members. Furthermore, according to Article 11, the residence card should be valid for five years from the date of issue or for a shorter period if the envisaged period of residence of the Union citizen is shorter than five years. In any event, the validity of this card should not be affected by temporary absences not exceeding six months a year, or by absences of longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or third-country⁴²⁵.

As regards the right of permanent residence, the requirement for a 5 years continuous residence which was discussed above in the case of EU citizens, applies accordingly to their family members⁴²⁶. In that respect, it should be highlighted that in *Onuekwere*⁴²⁷, the CJEU held that Article 16 (2) of the Citizenship Directive is interpreted to mean that the periods of imprisonment of a third-country national in the host Member State cannot be taken into consideration in the context of the acquisition by that national of the right of permanent

⁴²⁴ The derogation referred to in Article 14 (4) of the Citizenship Directive is also relevant in this criticism.

⁴²⁵ Article 11 (2) of the Citizenship Directive

⁴²⁶ Article 16 (2) of the Citizenship Directive

⁴²⁷ Case C-378/12 *Nnamdi Onuekwere v. Secretary of State for the Home Department* (published in the electronic Reports of Cases)

residence and that imprisonment of a third-country family member does interrupt the continuity which is required for the acquisition of the permanent right of residence under Article 16 (2) and 16 (3) of the Citizenship Directive. Not least, in *Ogieriakhi* (cited above) the CJEU stated that a spouse of an EU citizen may qualify for a permanent residence permit even if during the five-year period of residence, the spouses decided to separate, they started residing with other partners and they stopped cohabitating.

Family members who have the right of residence or permanent residence shall be entitled to take-up employment and self-employment and enjoy equal treatment with the nationals of the host Member State⁴²⁸. Several problems may be detected with regards to the implementation of the provision that calls for equal treatment, especially in relation to third-country family members. In that respect, Chalmers notices that the job vacancies are often addressed to EU citizens instead of EU citizens and their family members⁴²⁹. In any event, equal treatment extends to access to social assistance but pursuant to Article 24 (2) of the Citizenship Directive:

‘[b]y way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14 (4) (b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families’.

Finally, it should be added that the Regulation No. 492/2011⁴³⁰ which deals with the freedom of workers within the EU, makes a special reference to the right of the children of the EU citizen who is employed in another Member State who ‘(...) shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory’⁴³¹. ‘Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions’⁴³².

⁴²⁸ Article 24 of the Citizenship Directive

⁴²⁹ D. Chalmers, G.T. Davies and G. Monti, *European Union Law: Text and Materials* (3rd edn, Cambridge, Cambridge University Press, 2014) p. 481

⁴³⁰ Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union

⁴³¹ First subparagraph of Article 10 of the Regulation No. 492/2011

⁴³² Second subparagraph of Article 10 of the Regulation No. 492/2011

2.3.1.2 Restrictions on the rights of family members of EU citizens

The family members’ rights can be restricted exactly in the same way as the EU citizens’ rights and on the same grounds of public policy, public security and, in the first three month of residence, public health. The principles which were described above are identically applicable to the case of family members. Nevertheless, there is a provision in the Citizenship Directive regarding restrictions on the freedom of movement which will be applicable only in case the EU citizen has family members. This provision is Article 35 which concerns marriages of convenience. This article reads as follows:

‘Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31’.

It should be noted that in September 2014, the European Commission published a Handbook in order to help Member States and national authorities to fight against abuses of the right to free movement and in particular against marriages of convenience. The Handbook contains definitions of different types of marriages of convenience, as well as a definition of what constitutes in the Commission’s view an authentic marriage⁴³³, the applicable legal framework in these cases⁴³⁴ and some instructions on how the national authorities could detect, investigate and sanction more efficiently marriages of convenience⁴³⁵.

Generally speaking, the Handbook deals with the issue in a satisfactory manner as it underlines that fundamental rights should have an important role throughout the entire investigation procedure and reminds that according to the CJEU’s case law, any limitation to the right to free movement should be interpreted strictly. Nevertheless, the Commission’s Handbook can be criticised for its limited scope. Indeed, the Handbook makes clear that it merely applies to marriages between an EU citizen who has exercised his/her free movement right and a third-country national and not to marriage of convenience contracted between two third-country nationals. In any event, although lacking binding effect, the Handbook is likely to influence in a positive way the investigation procedures regarding marriages of convenience.

⁴³³ SWD (2014) 284 final, at Section 2

⁴³⁴ SWD (2014) 284 final, at Section 3

⁴³⁵ SWD (2014) 284 final, at Section 4

2.3.2 The rights of family members of EU citizens in national legislation

2.3.2.1 Spain

In Spain, the Citizenship Directive has been implemented effectively as regards the principal rights of family members of EU citizens⁴³⁶. There are however several comments that are worth being made with regards to the Spanish legislation. In that respect, it should be noticed that when the Royal Decree 240/2007 was adopted the Spanish legislature provided that the residence for more than three months should not be subject to any requirement other than the possession of a passport or an identification card⁴³⁷. Therefore, the Royal Decree introduced a more favourable legal framework⁴³⁸ than the one provided for by the Citizenship Directive⁴³⁹. Nevertheless, the Spanish legislature modified this provision of the Royal Decree 240/2007 with the Royal Decree 16/2012 and the Spanish legislation now implements literally the conditions referred to in Article 7 of the Citizenship Directive. Interestingly, the Royal Decree 16/2012 has implemented the derogation⁴⁴⁰ set out in the Directive according to which only the spouse or registered partner and the dependent children of an EU citizen who is a student shall have the right to join or accompany him/her. As regards the concept of ‘sufficient resources’, the Royal Decree provides that there is no fixed amount which is regarded as ‘sufficient resources’ and that this amount shall in no case be higher than the amount under which social assistance is granted to Spanish nationals or higher than the minimum social security pension.

Next, it should be pointed out that the Royal Decree provides⁴⁴¹ that the family members of the EU citizen who has acquired the right of permanent residence before the passage of the five years period shall also be entitled to a right of permanent residence. Not least, family members of EU citizens may reunify with their own family members but in case these family members of EU citizens are third-country nationals, they are covered by the ‘general regime’ for family reunification. In other words, although third-country family members of EU citizens enjoy a favourable status as regards their own residence in Spain, they are treated as

⁴³⁶ See Articles 3-6 of the Royal Decree 240/2007

⁴³⁷ Article 7 of the Royal Decree 240/2007

⁴³⁸ According to the Commission’s report on the implementation of the Citizenship Directive, among all EU Member States, only in Spain and in Estonia the right to residence for more than three months was not made conditional upon the requirements referred to in Article 7 of the Directive. See COM(2008) 840 final, at 3.4.1.

⁴³⁹ Article 7 of the Citizenship Directive

⁴⁴⁰ Article 7 (4) of the Citizenship Directive

⁴⁴¹ Article 10 (3) of the Royal Decree 240/2007

any other third-country national as regards the exercise of their right to reunify with their family members. Lastly, it should be noted that EU citizens residing in Spain enjoy full rights of work and that their rights may be restricted on grounds of public policy, public security and public health pursuant to Article 15 of the Royal Decree 240/2007 which is in line with the relevant provisions of the Citizenship Directive.

2.3.2.2 Greece

The Greek legislature implements the principal rights of family members of EU citizens in a satisfactory way as well⁴⁴². However, we consider necessary to make the following comments with regards to the issue of the rights of family members of EU citizens in the Greek legal system.

To begin with, it is noteworthy that the Greek legislature implemented the requirements provided for in Article 7 of the Directive regarding the right of residence for more than three months already with the first implementing legislation of the Citizenship Directive in 2007⁴⁴³. The derogation set out in the Directive regarding students has been implemented in the Greek legal system as well and therefore as family members of an EU student are merely considered the dependent children and the spouse⁴⁴⁴. As regards the direct ascendants of EU citizens residing in Greece for studying purposes, these are facilitated entry and residence in accordance with the rules described above, whereas the rest of the family members are not provided with any entry or residence facility⁴⁴⁵.

In any event, in specific cases where there is reasonable doubt as to whether the conditions set out in Article 7 are met, the competent authorities may carry out controls. These controls are not a prerequisite for the grant or renewal of the residence permit, under no circumstances may be systematic and shall only be carried out if there are serious indications of abuse of right⁴⁴⁶. Furthermore, Article 8 (3) of the Presidential Decree provides that for the calculation of the sufficient resources, public authorities shall take into account the personal situation of the person concerned and the minimum pension granted in Greece. In case the EU citizen

⁴⁴² See Articles 4-7 and 13 (1) of the Presidential Decree 106/2007

⁴⁴³ The requirements set out in Article 7 of the Citizenship Directive were already introduced by the Presidential Decree 106/2007 which was the first legal instrument that implemented the Citizenship Directive. The relevant provision was not affected by the modifications of the Law 4071/2012.

⁴⁴⁴ Article 7 (4) of the Presidential Decree 106/2007

⁴⁴⁵ See Circular of the Ministry of Interior 4174/2008

⁴⁴⁶ Article 7 (5) of the Presidential Decree 106/2007

fulfils the requirements referred to in Article 7, his/her family members are granted a residence permit of five-year duration⁴⁴⁷. This rule applies regardless of the family member’s age or relation with the EU citizen. A seventeen years old child, for instance, is being granted a residence permit for five years regardless of the fact that in the meantime s/he is expected to reach 21, age at which s/he would normally be required to prove that s/he is a dependant in order to qualify as a family member⁴⁴⁸. The residence permit for family members may be of shorter duration only in case the sponsor’s residence permit is of shorter duration as well⁴⁴⁹.

As regards the right of permanent residence, the lawful continuous residence appears correctly to be the only requirement and therefore family members or the EU citizens do not need to prove that they are workers, self-employed or that they have sufficient resources in order to acquire the permanent residence in Greece⁴⁵⁰. Family members of EU citizens are required to reside in Greece for five years as family members for the acquisition of the permanent residence even in case the family was created after the EU citizen’s first entry to Greece and the latter possibly already holds a right to permanent residence or s/he is likely to acquire this status before the completion of five years of residence by the family member. The duration of the permanent residence permit is for ten years and is renewed without further requirements, other than the proof of the actual residence in the Greek territory during this period⁴⁵¹.

As regards the rest of rights of family members of EU citizens in Greece, it should be noted that the right to employment or self-employment activity is rightly granted in the Greek legal system to all family members of EU citizens⁴⁵², no matter whether the family member was a dependant in the country of origin or not. As for the rest of the rights, the right to equal treatment outstands with Greece having implemented the derogation referred to in Article 24 (2) of the Citizenship Directive⁴⁵³. Finally, as regards the restrictions on the free movement of EU citizens and their family members in Greece, these may be imposed merely on grounds of

⁴⁴⁷ Article 10 (1) of the Presidential Decree 106/2007

⁴⁴⁸ See Circular of the Ministry of Interior 4174/2008

⁴⁴⁹ Article 10 (1) of the Presidential Decree 106/2007

⁴⁵⁰ Article 13 (1) of the Presidential Decree 106/2007

⁴⁵¹ Article 17 (5) of the Presidential Decree 106/2007

⁴⁵² See Article 20 (1) of the Presidential Decree 106/2007

⁴⁵³ See Article 20 (3) of the Presidential Decree 106/2007

public policy, public security or public health with the relevant provisions of the Citizenship Directive having been accurately transposed into the Greek legislation⁴⁵⁴.

2.3.2.3 Germany

In Germany, the domestic legislation implements the Citizenship Directive correctly, though with certain deficiencies. A comparison between the provision of the German law which sets out the requirements for the exercise of the right to residence for more than three months and Article 7 of the Citizenship Directive proves that the implementation has not been accurate. In particular, Article 2 (2) of the Free Movement Act provides that the EU citizen: a) should either be a worker or should carry out vocational training, b) s/he should be a job-seeker for up to six months or more than six months in case s/he can prove that s/he is still looking for employment and has reasonable prospects of being engaged c) s/he is entitled to pursue independent economic activity d) s/he without taking up residence in Germany is providing services in the federal territory e) s/he is recipient of services f) s/he is economically non-active with the condition that s/he has sufficient resources and sickness insurance g) s/he is a family member of an EU citizen fulfilling the conditions of residence in Germany or h) s/he is a permanent resident in the federal territory.

Not least, it should be underlined that as it is the case with the other two countries of the present study, Germany has made use of the derogation set out in the Citizenship Directive regarding students and therefore pursuant to Article 4 of the Free Movement Act, in case the EU citizen is a resident in Germany as a student, only the spouse, the partner and the children are regarded as family members. The said provision does not make any reference to the student’s direct relative in the ascending line and therefore these family members are logically covered by Article 36 of the Residence Act which is analysed below. Given that the Citizenship Directive provides that Member States should apply Article 3 (2) of the Directive to the student’s direct relatives in the ascending line, the transposition is not effective with regards to the student’s direct ascendants.

Next, as far as the right of EU citizens to take up employment or self-employment and the right to equal treatment are concerned, it should be noted that there are no specific provisions

⁴⁵⁴ See Article 21 (1) and (2) of the Presidential Decree 106/2007. For the way these principles have been applied by the Greek Courts see, among others, Judgment of the Three-Member Regional Administrative Court of Athens 6318/2007

in the Free Movement Act, but these rights are guaranteed to EU citizens in Germany by the direct applicability of the EU Treaties⁴⁵⁵. In addition, pursuant to Article 4a (1) of the free Movement Act, EU citizens are granted a right of permanent residence after five years of residence in Germany. No particular problems with regards to the transposition the relevant provision of the Citizenship Directive has been detected in that respect.

As regards the restrictions on the right of entry and residence and the protection against expulsion, Article 6 (1) and (6) of the Free Movement Act transpose effectively Article 27 (1) of the Citizenship Directive. It is noteworthy that Article 6 (1) refers to the EU Treaty for the definition of these concepts of public policy, public security and public health. Furthermore, as regards Article 27 (2) of the Citizenship Directive, the German legislature implements correctly that the criminal convictions cannot in themselves constitute grounds for taking restriction measures but the second subparagraph of the same article is defectively implemented as the German legislature merely speaks about a ‘genuine’ and ‘sufficiently serious’ danger which affects a fundamental interest of the society without mentioning that this threat should also be ‘present’⁴⁵⁶. Lastly, the German legislature implements effectively Article 28 of the Directive which concerns protection against expulsion. The corresponding provision of the Free Movement Act is Article 6 (2), (3) and (4).

2.4 The family members’ autonomous right of residence

2.4.1 The family members’ autonomous right of residence in EU law

2.4.1.1 Introductory considerations

The family members’ rights are in principle dependent on the rights of the EU citizen that they ‘join’ or ‘accompany’. Consequently, any break of the bond with the EU citizen may jeopardise the rights of family members in the host Member State. We can detect two approaches on whether family members should be legally safeguarded in the event of divorce, annulment of marriage or termination of the registered partnership and death or departure of the EU citizen. The first one argues that the idea behind family reunification is merely to make EU citizens’ free movement right more appealing and easier to achieve and therefore

⁴⁵⁵ See the study ‘Conformity Study for Germany: Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’ made by Milieu Ltd (available online at https://200438ecstudy.files.wordpress.com/2013/05/germany_compliance_study_en.pdf)

⁴⁵⁶ See Article 6 (2) of the Free Movement Act

the termination of the family relationship between the EU citizen and the family member should result in the termination of the rights of the latter in the host Member State. The second approach is more human rights oriented and argues that once family members are established in the host Member State, they should be given an autonomous right of residence in case the relationship with the EU citizen terminates in any way.

The Citizenship Directive distinguishes with regards to that issue between EU and third-country family members in the most direct way throughout the entire Directive. The general rule is that EU family members do not lose their right of residence in the above mentioned circumstances, whereas third-country family members can maintain their rights in the host Member State if they fulfil certain requirements which primarily concern the period that they have been living in the host Member State and the duration of the marriage. We believe that the explanation for this is that the EU legislature probably ‘feared’ that an equally favourable status for third-country family members would ‘encourage’ the so-called ‘marriages of convenience’⁴⁵⁷. Although there is no doubt that ‘marriages of convenience’ do exist in the Union, this approach may result in certain third-country family member not taking the initiative to terminate the marriage before the passage of the required period merely for fear of losing the right of residence in the territory of the host Member State. In any case, both EU and third-country family members that acquire the independent right of residence are in principle required to prove that they meet the conditions laid down in Article 7 (1) (a), (b), (c) or (d).

2.4.1.2 Death or departure of the EU citizen

The provision that deals with the Union citizen’s death or departure is Article 12 of the Citizenship Directive. According to Article 12 (1), the citizen’s death or departure shall not affect the right of residence of his/her family members who are EU nationals themselves, provided that the latter meet the requirements referred to in Article 7 (1) (a), (b), (c) or (d).

⁴⁵⁷ For the issue of ‘marriages of convenience’ in different Member States see B. De Hart, ‘The Marriage of Convenience in European Immigration Law’ (2006) 8 *European Journal of Migration and Law* 251–262, M.C. Foblets and D. Vanheule, ‘Marriage of Convenience in Belgium: The Punitive Approach Gains Ground in Migration Law’ (2006) 8 *European Journal of Migration and Law* 263–280, D. Digruber and I. Messinger, ‘Marriage of Residence in Austria’ (2006) 8 *European Journal of Migration and Law* 281–302 and H. Wray, ‘An Ideal Husband? Marriages of Convenience, Moral Gate-Keeping and Immigration to the UK’ (2006) 8 *European Journal of Migration and Law* 303–320

Furthermore, in the case of death of the EU citizen, third-country family members do not lose their right of residence in case they have been residing in the host Member State as family members for at least one year before the Union citizen’s death⁴⁵⁸. Pursuant to the second subparagraph of Article 12, third-country family members shall prove that they are workers or self-employed or that they have sufficient resources and sickness insurance for themselves and their family members not to become a burden on the social assistance system of the host Member State or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. It is noteworthy that the option which would correspond to Article 7 (1) (c) is not provided for third-country family members in case of death of the EU citizen who they were joining or accompanying.

Next, it should be noted that according to Article 12 (3) of the Citizenship Directive, the EU citizen’s death or departure from the host Member State shall not affect the right of residence of his/her children or the parent who has custody of them, if the children are enrolled at an educational establishment for the purposes of studying there and until the completion of their studies. It is underlined that according to the literal interpretation of the provision, the children are merely required to be enrolled at the educational establishment and not actually attend the course. It should also be emphasised that the provision does not require the family member to meet the conditions referred to in Article 7 of the Citizenship Directive. Lastly, a *contrario* interpretation of the provision leads as to the conclusion that in case there are no children enrolled at an educational establishment of the host Member State, the departure of the EU citizen shall entail loss of the right of residence of the third-country family members.

2.4.1.3 Divorce, annulment of the marriage, termination of the registered partnership or separation

The provision that deals with the cases of divorce, annulment of the marriage or termination of the registered partnership is Article 13 of the Citizenship Directive. According to Article 13 (1), these occasions should not affect the right of residence of the EU family members in case they meet the conditions set out in Article 7 (1) (a), (b), (c) or (d).

On the contrary, third-country family members should fulfil one of the conditions provided for in Article 13 (2) in order to maintain the right of residence. More precisely, a) the third-

⁴⁵⁸ Article 12 (2) of the Citizenship Directive

country national should have been married with the EU citizen for at least three years including one year in the host Member State, or b) s/he should have been given custody of the Union citizen’s children, or c) in case the residence is warranted by particularly difficult circumstances, or d) the third-country family member has a right of access to a minor child and the court has ruled that such access should take place in the host Member State. In any event, the third-country national should provide evidence that s/he is a worker or a self-employed or being economically inactive, s/he has sufficient resource and health insurance not to become a burden in the host Member State or is a family member of a person satisfying these requirements⁴⁵⁹.

It should be noted that according to a recent judgment of the CJEU⁴⁶⁰, in case the divorce took place after the EU citizens’ departure from the host Member State, the applicable rules will be that of the departure and not of the divorce. This would be the case even if the third-country family member fulfils the requirements referred to in Article 13 (2) of the Citizenship Directive and would have been able to remain in the host Member State, had the divorce occurred before the Union citizen’s departure of the host State. It should be commented that the judgment adopts a strict view given that, as seen above, the departure of the Union citizen from the host Member State shall not entail loss of the right of residence of the family members only in case there are children who are enrolled at an educational establishment.

Lastly, separation does not affect the legal status of an EU citizen’s family member. The rules applying in case of divorce, annulment of marriage or termination of the registered partnership do not respectively apply in case a couple does not wish to form a family anymore and live separately without having resolved their legal relationship officially. Indeed, in *Diatta* (cited above)⁴⁶¹, the CJEU held that the marital relationship is not regarded to be dissolved merely because the spouses live separately, even where they intend to divorce at a later date⁴⁶² and concluded that members of a migrant worker’s family are not necessarily required to live permanently with him in order to qualify for a right of residence under the Migrant Workers Regulation that was then in force⁴⁶³.

⁴⁵⁹ Article 13 (2) of the Citizenship Directive

⁴⁶⁰ See Case C-218/14 *Kuldip Singh, Denzel Njume, Khaled Aly v. Minister for Justice and Equality* (not yet reported)

⁴⁶¹ The case is discussed more in detail above in Chapter 2.2.1.3 of Part III

⁴⁶² §20

⁴⁶³ See also *Baumbast* (cited above)

It should be added that the CJEU has appeared particularly favourable in cases of separation or divorce between the EU citizen and the third-country family member in case there are children who are enrolled at the host Member State’s educational system. There are two interesting cases⁴⁶⁴ decided by the CJEU regarding that issue, namely the *Ibrahim* and *Teixeira* cases⁴⁶⁵. The facts of the cases can be summarised as follows. In *Ibrahim*, Mrs. Hassan Ibrahim was a Somali national who arrived in the United Kingdom to join her Danish husband who worked there. Some years later, they separated and Mrs. Ibrahim, being the ‘primary carer’ of her four children who attended school in the UK, became dependent on the social assistance system of the host Member State. The facts in *Teixeira* are highly similar. Mrs. *Teixeira* was a Portuguese national, who initially arrived in the United Kingdom with her husband but then separated from him and being unemployed, she lived with her daughter who attended school at the host Member State.

The CJEU was confronted mainly with the issue of whether in a case that the children are enrolled at the educational system of the host Member State, the ‘primary carer’ and the children have a right of residence in the host Member State only if the conditions referred to in Article 7 of the Citizenship Directive are fulfilled. More precisely, the CJEU was asked whether it is a prerequisite that they have sufficient resources and sickness insurance so as to not become a burden in the host Member State. The CJEU answered negatively:

‘(...) the children of a national of a Member State who works or has worked in the host Member State and the parent who is their ‘primary carer’ can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation No 1612/68, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State’⁴⁶⁶.

The CJEU’s approach in the present cases seems to take into account the best interest of the child and the view that children should not suffer the consequences of the separation or divorce of their parents. It can be argued that this approach is related to Article 12 (3)⁴⁶⁷ of the Citizenship Directive which does not refer to any kind of financial sufficiency of the child or

⁴⁶⁴ For an analysis of the present cases see also P. Starup and M.J. Elsmore, ‘Taking a Logical Step Forward? Comment on *Ibrahim* and *Teixeira*’ (2010) 35(4) *European Law Review* 571-588

⁴⁶⁵ Case C-310/08 *London Borough of Harrow v. Nimco Hassan Ibrahim* [2010] ECR I-1065 and Case C-480/08 *Maria Teixeira v. London Borough of Lambeth* [2010] ECR I-1107. See also *Baumbast* (cited above)

⁴⁶⁶ §59

⁴⁶⁷ It is recalled that Article 12 (3) reads as follows: ‘The Union citizen’s departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies’

the ‘carer’, providing only that the children or the parent who has custody over the children have the right of residence in case the former are enrolled at an educational establishment. In that respect we suggest that Article 12 (3) should not be limited to the two occasions that it mentions, namely death or departure, but should be applied to cases of divorce, annulment of marriage and termination of registered partnership as well.

2.4.1.4 Concluding considerations

It should be concluded that the EU legislature appears rather reluctant with regards to the issue of death, departure or divorce of the EU citizen in the host Member State. EU family members maintain the right of residence as described above but only if they meet the conditions provided for in Article 7 (1). Although this seems at first sight a quite favourable provision, it is actually as strict as it gets as EU family members are EU citizens themselves and therefore they could anyway rely on their EU citizenship in order to acquire free movement rights pursuant to Article 7 (1) of the Citizenship Directive. As a result, the provisions regarding death, departure and divorce of the EU citizen can be read as not conferring any favourable status to EU family members whatsoever. The approach is apparently even stricter with regards to third-country family members who in addition have to comply with the requirements of certain duration of the marriage and residence in the host Member State or the rest of the requirements referred to therein. Regardless of all the above, the provision concerning families which have children enrolled at an educational establishment of the host Member State in conjunction with the case law of the CJEU in analogous cases shall be highly welcomed.

2.4.2 The family members’ autonomous right of residence in national legislation

2.4.2.1 Spain

In Spain, the applicable Royal Decree distinguishes between family members who are EU citizens and those who are third-country nationals, following the guidelines of the Citizenship Directive on that issue⁴⁶⁸. To start with, the Citizenship Directive has been transposed accurately as regards family members who are EU citizens themselves⁴⁶⁹.

⁴⁶⁸ Article 9 of the Royal Decree 240/2007

⁴⁶⁹ Article 9 (1) of the Royal Decree 240/2007

As regards third-country family members, the relevant domestic legislation provides that the death of the EU citizen does not affect their right of residence in case they have lived in Spain as family members before the death of the EU citizen⁴⁷⁰. It becomes apparent that the Spanish legislature merely provides that the family members should have lived with the EU citizen in Spain without imposing the one-year residence requirement that is provided for by the Directive and therefore the Spanish legislation is more favourable towards the third-country national than the Citizenship Directive. Next, the Spanish legislature effectively transposes the provision of the Directive concerning families who have children who are enrolled at an educational establishment⁴⁷¹.

Next, in case of invalidity of the marriage, divorce or cancellation of the registered partnership between an EU citizen and a non-EU family member, the latter retains his/her right of residence under certain circumstances⁴⁷². These circumstances are the ones provided in the Citizenship Directive⁴⁷³ which has been implemented into Spanish legislation without any modifications. Interestingly, although the Citizenship Directive in its provision 13 (2) (c) speaks about ‘particularly difficult circumstances’ giving as mere example the case that the family member has been victim of domestic violence, Article 9 (4) of the implementing law extends this right to family members who have been victims of trafficking from their spouse or partner during the marriage⁴⁷⁴.

As regards the cases of divorce, it should be mentioned that this is an occasion where the ‘general regime’ might be more favourable for family member than the ‘community regime’. In particular, as it will be discussed below, family members of third-country nationals may possess an autonomous right of residence in cases of divorce, if they have lived with the sponsor in Spain for two years, whereas family members of EU citizens need three years of marriage, one of which should be in Spain. Whether the ‘general regime’ is more favourable than the ‘community’ one is hard to assess, as it will depend on the specific circumstances of each case. Nevertheless, it should be born in mind that in case a family member of an EU citizen benefits more from what is provided for in the ‘general regime’ Article 1 (3) of the Immigration Act should become applicable.

⁴⁷⁰ Article 9 (2) of the Royal Decree 240/2007

⁴⁷¹ Article 9 (3) of the Royal Decree 240/2007

⁴⁷² Article 9 (4) which has been modified by the Royal Decree 1710/2011

⁴⁷³ Article 13 (2) of the Citizenship Directive

⁴⁷⁴ Article 9 (4) (c) 2o of the Royal Decree 240/2007

2.4.2.2 Greece

In Greece, Articles 12 and 13 of the Citizenship Directive have been implemented accurately⁴⁷⁵. For the purposes of this paragraph it suffices to notice that in case these requirements are not fulfilled by all family members, the application for an autonomous right may be lodged by the family member who fulfils the requirements and the rest of the family members may submit an application accompanied by the residence card that would prove that they were family members of the person who fulfils these requirements already before the death of the EU citizen⁴⁷⁶. Not least, third-country family members of EU citizens who have acquired the autonomous right of residence cannot have their own family members joining them in Greece, other than those included in the family that was already established before the death of the EU citizen⁴⁷⁷. Furthermore, they acquire the permanent right of residence after five years of continuous residence in Greece. In these cases, the period that they have lived as family members of the EU citizen before the acquisition of the autonomous right may be taken into account⁴⁷⁸.

2.4.2.3 Germany

In Germany, in cases of death of the Union citizen, divorce or termination of the registered partnership, family members who are EU citizens themselves should fulfil the requirements referred to in Article 2 (2) of the Free Movement Act which corresponds to Article 7 of the Citizenship Directive in order to retain the right of residence. Therefore, the Citizenship Directive has been implemented correctly in that respect.

As regards non-EU family members, the provision of the Citizenship Directive regarding death of the Union citizen is contained in the German legislation as well⁴⁷⁹. Nevertheless, Article 3 (4) of the Free Movement Act does not implement effectively the Directive as it provides that the parent who has the custody of the child who *attends* school in Germany shall retain the right of residence until the completion of the child’s education in the federal territory, whereas the Directive merely requires the children to be *enrolled* at the educational establishment of the Member State. This differentiation in the wording might sound

⁴⁷⁵ See Articles 11-12 of the Presidential Decree 106/2007

⁴⁷⁶ See Circular of the Ministry of Interior 4174/2008

⁴⁷⁷ See Circular of the Ministry of Interior 4174/2008

⁴⁷⁸ See Circular of the Ministry of Interior 4174/2008

⁴⁷⁹ See Article 3 (3) of the Free Movement Act

insignificant at first sight but is likely, in certain cases, to restrict the family member’s rights⁴⁸⁰.

As regards divorce or termination of the partnership, non-EU spouses may also acquire an autonomous right of residence under certain circumstances which are highly similar to those set out in the Citizenship Directive⁴⁸¹. In any cases, the spouse should prove to meet the conditions referred to in Article 2 (2) of the Free Movement Act. It should be mentioned that the German law is more restrictive with regards to the independent right of residence in comparison to the Directive as it solely refers to the ‘spouses’ whereas the Directive speaks about ‘family members’.

2.5 ‘Discrimination’ and ‘reverse discrimination’

2.5.1 Definition of the terms in EU law

The co-existence of EU and domestic rules on family reunification may raise interesting legal issues of ‘discrimination’ and ‘reverse discrimination’. To start with, it should be mentioned that there are three types of family reunification. The first one is the one discussed in the present Chapter of the thesis and concerns EU citizens who move to another Member State. It is covered by EU law. The second one is also covered by EU law and concerns family reunification of third-country nationals who reside in the territory of the EU. The third one is family reunification of nationals of a Member States who remain in the territory of their country of nationality and is covered by the relevant domestic laws of the Member State⁴⁸².

The principle of non-discrimination in the field of family reunification implies that Member States should not in principle treat EU citizens in a less favourable way than they treat their own nationals. Article 18 of the TFEU provides that ‘[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination

⁴⁸⁰ In contrast, see the study ‘Conformity Study for Germany: Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’ made by Milieu Ltd where the authors find no real difference between the implementing provision of the German legislation and the corresponding provision of the Citizenship Directive (available online at https://200438ecstudy.files.wordpress.com/2013/05/germany_compliance_study_en.pdf)

⁴⁸¹ See Article 3 (5) of the Free Movement Act

⁴⁸² Following the recent judgments of the CJEU in *Ruiz Zambrano*, *McCarthy* and *Dereci* (cited above) which were analysed above, some authors speak about a fourth type of family reunification which derives from the EU citizenship itself without the requirement of any cross-border movement or element. For this issue see A. Staver, ‘Free Movement and the Fragmentation of Family Reunification Rights’ (2013) 15 *European Journal of Migration and Law* 69-89

on grounds of nationality shall be prohibited’ whereas Article 24 of the Citizenship Directive provides that:

‘[s]ubject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence’.

Two arguably contradictory judgments become particularly relevant in that respect. In *Reed* (cited above)⁴⁸³, the CJEU held that a Member State who grants a ‘social advantage’ to its nationals cannot refuse to grant it to workers of another EU Member State who reside in its territory without being guilty of discrimination on grounds of nationality. In the said case the CJEU found that reunification with an unmarried partner constituted a ‘social benefit’ and therefore the Member State concerned had violated EU rules by not granting this right to EU citizens who resided in its territory although there existed such possibility for its own nationals.

The issue was further discussed in *Kaba*⁴⁸⁴. In the present case, Mr. Kaba was a Yugoslav national who entered the United Kingdom and married a French national. He challenged the UK immigration law regarding the status of ‘indefinite leave to remain’ which is equivalent to the ‘long-term resident’ status in the EU law. In particular, the UK law provided that family members of UK nationals could acquire the ‘indefinite leave to remain’ after one year of residence whereas family members of EU citizens should ‘wait’ for four years. It is noteworthy that UK immigration legislation regarding family reunification is generally stricter with regards to the admission of family members of UK citizens in comparison to the rules concerning EU citizens that they have moved to UK⁴⁸⁵. The question referred to the CJEU was whether ‘indefinite leave to remain’ can be regarded as a social advantage in the scope of the Migrant Workers Regulation which was then in force and whether treating EU citizens and UK nationals in a different way was discriminatory.

The CJEU found that there was no discrimination. It reaffirmed that according to EU law ‘(...) the right of nationals of a Member State to reside in another Member State is not

⁴⁸³ The case is discussed more in detail above in Chapter 2.2.1.3 of Part III

⁴⁸⁴ Case C-356/98 *Arben Kaba v. Secretary of State for the Home Department* [2000] ECR I-2623

⁴⁸⁵ S. Peers, ‘Dazed and Confused: Family Members’ Residence Rights and the Court of Justice’ (2001) 26(1) *European Law Review* 76-83

unconditional⁴⁸⁶. A migrant worker should fulfil certain conditions in order to enjoy the right of residence in the territory of another Member State, namely to be a worker or a job seeker. On the contrary, ‘persons present and settled in the UK’ enjoy an unconditional right of residence in the UK. Consequently, since the conditions regarding the two categories of persons are not the same, the conditions regarding their family members could not be the same either. Thus, the CJEU concluded that there was no discrimination as the latter is defined as treating the same or similar situations in a different way. It is worth mentioning that the judgment has been criticised by EU law specialists who argued that the CJEU had actually chosen the wrong comparators. In their opinion, the CJEU should not have compared the legal situation of EU migrant workers with that of the UK nationals but the question should be whether the family members’ situation was comparable⁴⁸⁷. Whatever the outcome of the two above discussed cases, Member States should implement EU laws respecting the principle of non-discrimination and affording the same level of protection as regards ‘social advantages’ to EU citizens than the one they have afforded to their own nationals.

As regards the issue of ‘reverse discrimination’, it should first be noted that Member States are left free to treat their own nationals worse than nationals of other Member States as in principle EU rules become applicable only in case there is a cross-border element⁴⁸⁸. The CJEU has reaffirmed this finding holding that if it is the nationals of a Member State who are given a less favourable status with regards to family reunification than the one afforded to EU citizens in the same Member State, there is no violation of EU law as the latter is not applicable and the situation is regarded as a purely domestic one. This was the case in *Uecker and Jacquet*⁴⁸⁹, where the applicants being the spouses of German nationals who resided in Germany argued that they should be given the same rights with regards to employment as the ones which would have a spouse of an EU citizen living in Germany. The CJEU held:

‘In that regard, it must be noted that citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law. Furthermore, Article M of the Treaty on European Union provides that nothing in that Treaty is to affect the Treaties

⁴⁸⁶ §30

⁴⁸⁷ See S. Peers, ‘Dazed and Confused: Family Members’ Residence Rights and the Court of Justice’ (2001) 26(1) *European Law Review* 76-83

⁴⁸⁸ For a more detailed analysis regarding the notion of ‘reverse discrimination’, as well as the case law of the CJEU on the same issue, see D.B. Marín Consarnau, *La reagrupación familiar en el régimen comunitario: problemas de discriminación inversa* (Barcelona, Bosch, 2010)

⁴⁸⁹ Joint Cases C-64/96 and C-65/96 *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen* [1997] ECR I-3171

establishing the European Communities, subject to the provisions expressly amending those treaties. Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State⁴⁹⁰.

It should be noticed that it is for the Member States to possibly adapt their national immigration legislation in order to avoid ‘reverse discrimination’ in their legal systems. In that respect, the adoption of the Citizenship Directive may constitute an opportunity for certain Member States to reconsider the legal framework of family reunification for their own nationals. However, it should not be overlooked that the issue of reverse discrimination might in the future be tackled by the EU legislature or the EU judicial authority through a different interpretation of Article 3 (1) of the Citizenship Directive which would detach the family reunification rights from the requirement of the prior exercise of freedom of movement rights⁴⁹¹.

2.5.2 The cases of EU Member States in particular: Domestic competences in reunification regimes and issues of ‘discrimination’ and ‘reverse discrimination’

2.5.2.1 Spain

A clear example of ‘reverse discrimination’ could be detected in the Spanish legal system when the Royal Decree 240/2007 was adopted. In particular, the Spanish legislature initially provided in Article 2 that the Royal Decree should be applied to citizens of *another* EU Member State and their family members, wording which explicitly excluded Spanish nationals from the ‘community regime’ introduced by the Royal Decree⁴⁹². As a result, as soon as the Royal Decree 240/2007 was adopted, certain family members of Spanish nationals were placed in a worse position as far as their rights regarding entry, residence and employment were concerned in comparison to family members of EU citizens residing in Spain. The provision at issue was the additional provision 20 of the previous Immigration

⁴⁹⁰ §23

⁴⁹¹ C. Berneri, ‘Protection of Families Composed by EU Citizens and Third-country Nationals: Some Suggestions to Tackle Reverse Discrimination’ (2014) 16 *European Journal of Migration and Law* 249-275 and H. Oosterom-Staples, ‘To What Extent Has Reverse Discrimination Been Reversed?’ (2012) 14 *European Journal of Migration and Law* 151-172

⁴⁹² It should be mentioned that all the previous regulations regarding the status of family members of EU citizens in Spain, extended this status to family members of Spanish nationals as well. For this issue see S. Iglesias Sánchez, ‘Dos cuestiones suscitadas por la transposición española de la Directiva 2004/38/CE a través del RD 240/2007: el régimen aplicable a los ascendientes de españoles y la extensión del concepto ‘miembros de la familia de los ciudadanos de la Unión’’ (2007) 28 *Revista de Derecho Comunitario Europeo* 913-939 p. 918 where the author explains that family members of Spanish nationals have been traditionally covered by the ‘community regime’ in the Spanish legal system.

Regulation⁴⁹³ which provided that third-country ascendants of Spanish nationals should be covered by the ‘general regime’ for family reunification.

The above described situation was terminated by the Supreme Court’s judgment of the 1st of June 2010. The said Court in this judgment annulled, among other provisions, the phrase ‘of another Member State’ from Article 2 of the Royal Decree 240/2007 and therefore the new wording of the Royal Decree includes family members of Spanish nationals as the requirement for the EU citizen to have the nationality of another Member State has been waived. This being said, the legal regime described in the corresponding section regarding family members of EU citizens residing in Spain fully applies to cases of all family members of Spanish nationals as well. As mentioned above, the regulatory change exclusively affects family reunification of Spanish nationals, and those of their spouses, with their direct ascendants, as Spanish nationals enjoyed the ‘community regime’ standards as regards reunification with the spouse, registered partner and children already before the above mentioned judgment⁴⁹⁴.

It is noteworthy that the Supreme Court does not base its judgment on a possible infringement of the anti-discrimination provision of Article 14 of the Spanish Constitution but rather examines the issue from the point of view of the Spanish ‘returning migrants’. In its view, Spanish nationals who have exercised their right to free movement should be given the same legal status as the one acquired in the Member State that they immigrated when returning back to Spain⁴⁹⁵. It is worth mentioning that according to part of the doctrine the fact that the Supreme Court avoids to take a stand as to whether the ‘reverse discrimination’ introduced by the Royal Decree 240/2007 infringes Article 14 of the Spanish Constitution, raises concerns that the family reunification regime for Spanish nationals might in the future make once again a stricter turn⁴⁹⁶.

As a concluding remark it should be noted that the reform in the family reunification regime for Spanish nationals best reflects the indirect influence that the EU immigration law may

⁴⁹³ Royal Decree 2393/2004

⁴⁹⁴ See also Instruction of the General Directorate of Immigration of November 2010 regarding the cancelation of various provisions of the Royal Decree 240/2007-DGI/SGRJ/3/2010

⁴⁹⁵ This approach is in line with the case law of the CJEU on the issue of ‘returning migrants’ as analysed in the relevant Chapter.

⁴⁹⁶ J.L. Rodríguez Candela and D. Boza Martínez, ‘Los españoles también son ciudadanos de la Unión y otras consecuencias de la sentencia de la Sala de lo Contencioso-Administrativo del Tribunal Supremo de 1 de junio de 2010’ (2011) 26 *Revista de Derecho Migratorio y Extranjería* 189-203

have to a purely domestic issue. Nevertheless, it remains unclear whether the competent Spanish courts and the immigration authorities will follow the CJEU’s guidelines with regards to the Citizenship Directive when dealing with family members of Spanish nationals. It would appear rather bizarre that they interpret the same provisions in two different ways depending on whether the case concerns a Spanish national or an EU citizen, especially in case this different treatment is more restrictive for Spanish nationals. To what extent the Spanish Courts will interpret the various concepts regarding family members of Spanish nationals in an analogous way that the CJEU interprets the provisions of the Citizenship Directive remains to be seen in the future case law of the national courts. Another issue which remains unclear is whether the Spanish national is required to have his/her residence in Spain in order for the ‘community regime’ to become applicable to his/her family members.

2.5.2.2 Greece

In order to conclude whether issues of ‘discrimination’ or ‘reverse discrimination’ arise in the Greek legislation, we should examine the rules applicable to cases of family members of Greek nationals who reside in Greece. To start with, according to the relevant definition given in Article 1 of the Immigration Law, ‘family members’ of a Greek national who resides in Greece are: a) the spouse, b) the younger than 21 descendants in direct line and those of the Greek national’s spouse, including adopted ones, or older than 21 in case they are dependants and c) the direct ascendants and those of the spouse in case they are dependants⁴⁹⁷. It is evident that the definition is identical to the one regarding family members of EU citizens.

Nevertheless, what attracts our attention is the fact that the Greek legislature does not include registered partners in the concept of family members of Greek nationals either. This approach was justified in case of family members of EU citizens mainly due to what is provided for in Article 2 (2) (b) of the Citizenship Directive⁴⁹⁸ and was discussed above. Nonetheless, such an approach is rather inexplicable in case of Greek citizens and will in many cases result in Greek nationals having no choice but marry in case they have a partner of a foreign nationality, while they are also given the choice of registering their partnership in case they have a Greek partner. A reform of the definition of family members seems necessary in order

⁴⁹⁷ Article 1 (1) (le) of the Immigration Law

⁴⁹⁸ It is recalled that Article 2 (2) (b) of the Directive provides that Member States shall include the registered partner in the definition of family members if their legislation ‘treats registered partnerships as equivalent to marriage’. Since in Greece the registered partnership are not considered equivalent to marriage, there is no such obligation deriving from the Citizenship Directive.

for this discrimination to be waived. This reform will allow same-sex partners to be included in the concept of family given that, as seen above, the Greek legal system recognises same-sex partnerships but not same-sex marriages.

Next, the Joint Ministerial Decision 23443/2011 provides that the partner with whom the Greek national has a durable relationship, duly attested may be authorised entry and residence in Greece. The same Joint Ministerial Decision provides that the registration of the partnership, as well as the existence of the couple’s common child constitute sufficient evidence of the stability of the relationship, whereas the latter may also be proven by the fact that the partners have undertaken long-term legal, social or economic commitments⁴⁹⁹. It should be underlined that unmarried partners are by no means treated equally to the rest of the family members of a Greek citizen. The more outstanding differences concern the duration of the residence permits which according to Article 1 (7) of the Joint Ministerial Decision may be of one year and renewable, the fact that they are granted restrictive, at least for the first year, access to the labour market⁵⁰⁰ and the fact that they are required to cohabite with the Greek national⁵⁰¹. It should be mentioned that all the above concern unmarried partners of EU citizens who reside in Greece as well, and therefore no issues of ‘discrimination’ or ‘reverse discrimination’ arise from these provisions.

The family members’ application should be accompanied by evidence of the existence of the family relationship with the Greek national and, when applicable, of the existence of the element of dependence in case of adult children or ascendants. In particular, it should be proven that the family member is materially supported by the Greek citizen and s/he was supported or lived with the other spouse in the country of origin or that there are serious health reasons that require the personal care of the family members from the Greek citizen⁵⁰². No requirement for proof of sufficient resources or sickness insurance is imposed on Greek nationals and/or their family members.

The fact that the Immigration Law does not require Greek nationals to fulfil sufficient resources and sickness insurance requirement in order to be joined by their family members raises issues of ‘discrimination’. This is so because EU citizens who reside in Greece may

⁴⁹⁹ Article 1 (5) of the Joint Ministerial Decision

⁵⁰⁰ Article 1 (11) of the Joint Ministerial Decision

⁵⁰¹ Article 1 (4) of the Joint Ministerial Decision

⁵⁰² Article 82 (3) of the Immigration Law

exercise their right to have their family members joining or accompanying them under a considerably stricter regime as they should meet certain conditions which are not imposed on Greek nationals. We are of the opinion that the relevant provision of the Presidential Decree which speaks about sufficient resources and sickness insurance, although in line with the Citizenship Directive, does in all probability infringe EU rules and the Greek legislature should consider modifying it in order for EU citizens to be granted the same benefits that Greek citizens enjoy with regards to their right to be joined by their family members in Greece.

As regards the right to employment, it should be noted that Article 85 (2) of the Immigration Law provides that the spouse and the direct blood descendants of the sponsor and the spouse should have the right to employment, service provision and professional activity. The same right is provided for every family member who holds the permanent residence card or is entitled to an autonomous residence right⁵⁰³. It is remarkable that the ascendants of the Greek national, in case they are not Greek nationals themselves, and more importantly those of the spouse do not have right to access to the labour market. This situation constitutes ‘reverse discrimination’ given that, as seen above, the ascendants of EU citizens residing in Greece do enjoy the right to employment and therefore Greek citizens are covered by a less favourable regime with regards to this issue.

Lastly, speaking about family members of Greek nationals, special reference should be made to Article 87 of the Immigration Law. In particular, the said provision provides that the residence permit for family members of Greek citizens may be granted to the parents of minor Greek children that reside in Greece independently of the way that these children acquired the Greek nationality. The same is true for the minor siblings of these children. In that respect, it should definitely be outlined that this is one of the particularly rare cases throughout this study that we detect that family rights are conferred to family members in the horizontal line.

There are several comments that are worth being made with regards to the provision of Article 87. First, it should be mentioned that the said provision is in line with the *Ruiz Zambrano* case (cited above). Second, it should be noted that Article 87 becomes important mainly in two cases. The first directly relates to what has so far been discussed with regards to the legal status of family members of Greek citizens. In particular, the third-country national, who

⁵⁰³ Article 85 (3) of the Immigration Law

marries a Greek national and gives birth to a child who acquires the Greek nationality, may rely on Article 87 if, after the divorce with or death of the Greek national, this third-country spouse has not been able to acquire an autonomous right of residence. In this case, the third-country spouse is benefitted from a favourable status as s/he is granted a five-year residence permit without the need of proof that s/he is a worker or has sufficient resources in order to maintain himself/herself and his/her family members. The second case tightly relates to the applicable nationality system in Greece and more particularly to the acquisition of the Greek nationality from children who are born in Greece. It is briefly mentioned that the Greek nationality system is in principle the ‘Ius Sanguinis’ system. Nevertheless, the Greek legislature has introduced in its nationality system some ‘Ius Soli’ elements. This has a result that in certain circumstances immigrant children may become Greeks by birth in the Greek territory, even though their parents acquire a foreign nationality⁵⁰⁴.

In particular, according to Article 1 (2) (b) and (c) of the Law 3838/2010 the Greek nationality is granted to the child born in Greece first, in case the latter cannot acquire a foreign nationality by birth, nor can s/he obtain such nationality by declaration of his/her parents at the relevant foreign authorities in Greece and second, in case this child is of unknown nationality when the failure to detect the child’s nationality is not a result of the parents’ refusal to cooperate. In addition, Law 3838/2010 introduced the so-called ‘double Ius Soli’ in its Article 1 (2) (a), which means that the child born in Greece may acquire the Greek nationality in case one of his/her parents has been also born in Greece and resides lawfully there.

Not least, Article 1A of the same law provides that the child born in Greece may acquire the Greek nationality in case both his/her parents have lived lawfully for five years in Greece or independently of whether the child has been born in Greece, if s/he lives in Greece lawfully and completes successfully six years of Greek school. Nonetheless, it should be emphasised that Article 1A was found by the Supreme Administrative Court to be unconstitutional and

⁵⁰⁴ For more details regarding the Greek legislation on nationality see Z. Παπασιώπη-Πασιά, *Δίκαιο Ιθαγένειας* (8^η εκδ. Αθήνα-Θεσσαλονίκη, Εκδόσεις Σάκκουλας, 2011) (Z. Papasiopi-Pasia, Nationality law), Z. Παπασιώπη-Πασιά, ‘Η αντιμετώπιση των de facto ανιθαγενών σε εθνικό και κοινοτικό επίπεδο’ (2013) 2 *Επιθεώρηση Μεταναστευτικού Δικαίου*, 123-136 (Z. Papasiopi-Pasia, Dealing with de facto stateless persons at national and Community level) and E. Μουσταϊρά, ‘Κτήση ιθαγένειας κράτους από τέκνα αλλοδαπών-συγκριτική επισκόπηση δικαίων ευρωπαϊκών κρατών’ (2013) 2 *Επιθεώρηση Μεταναστευτικού Δικαίου*, 150-155 (E. Moustaira, Access to nationality from the immigrant’s children- comparative overview of the laws of European countries)

has been cancelled by judgment 460/2013⁵⁰⁵. The said judgment caused several problems to second-generation migrants who could no longer accede to Greek nationality. Nevertheless, in February 2015, the situation changed once again with the Law 4332/2015 that allowed for acquisition of nationality by birth in case same requirements, similar to the ones referred to in Article 1A are fulfilled.

2.5.2.3 Germany

In Germany, the provision that deals with family members of a German national is that of Article 28 of the Residence Act, in conjunction with Article 27 of the same Act which contains general principles which are applicable to all cases of family migration. Article 28 (1) provides that as family members of a German national for the purposes of family migration are considered the spouse, the minor unmarried child of the German, the parent of a minor, unmarried German for the purposes of care and custody and the parent of the minor, unmarried German who does not possess the right of care and custody in case the family unity already exists in Germany⁵⁰⁶. Same-sex registered partners of a German national are also included in the definition of family pursuant to Article 27 (2) of the Residence Act. Not least, other dependants of the German national may also qualify as family members in order to avoid particular hardship, in line with Article 36 of the Residence Act which also applies to German nationals and will be analysed more in detail below.

These family members may rely on family migration rights only in case the German national’s ordinary residence is in Germany. This is not an arbitrary interpretation but a rule explicitly provided for in Article 28 (1) 3 of the Residence Act. Family members of German nationals are not granted a right of residence in Germany merely because they are related to a German national but in order to join the latter and lead a family life with him/her in the federal territory. The German legislature appears rather clear with regards to this issue avoiding interpretation problems which have been emerged in the other two countries of the

⁵⁰⁵ Judgment of the Supreme Administrative Court 460/2013. For a critical analysis of the Supreme Administrative Court’s judgment 460/2013 see Θ. Αντωνίου, ‘Η Ολομέλεια του Συμβουλίου της Επικρατείας απέναντι σε νέες προκλήσεις από το δίκαιο της ιθαγένειας-ένα βήμα μπροστά ένα βήμα πίσω (Σκέψεις με αφορμή την απόφαση 460/2013 της Ολομελείας ΣτΕ)’ (2013) 2 *Επιθεώρηση Μεταναστευτικού Δικαίου*, 137-149 (T. Antoniou, Plenary session of the Supreme Administrative Court on the new challenges of nationality law - a step front a step back (Comments on the Supreme Administrative Court judgment 460/2013)) and K. Φαρμακίδης-Μάρκου, ‘Περί της απονομής της ελληνικής ιθαγένειας-Προβληματισμοί βάσει και της πρόσφατης απόφασης 460/2013 του Συμβουλίου της Επικρατείας’ (2013) 2 *Επιθεώρηση Μεταναστευτικού Δικαίου*, 156-161 (K. Farmakidis-Markou, Grant of Greek nationality-Concerns on the recent judgment 460/2013 of the Supreme Administrative Court)

⁵⁰⁶ See Article 28 (1) 3 of the Residence Act

study whose laws rather ambiguously speak about family members of the national without specifying whether this national shall reside in their territory or not.

The right to family reunion of the German national is subject to several conditions. First, the minimum age requirement for spouses which is set at the age of 18 and the integration measures imposed on spouses of third-country nationals are pursuant to Article 28 (1) 3 of the Residence Act applicable to the spouses or registered partners of German nationals as well. Having said that, all that is discussed below regarding the application of these conditions to family members of third-country nationals and the situations under which the family member is exempted from fulfilling these requirements are applicable to spouses of Germans as well. Second, in principle the German national should meet some material conditions as well, in the sense that s/he should not be reliant on social benefits. This condition derives from Article 27 (3) of the Residence Act which applies both to German nationals and third-country nationals and is analysed more in detail below. It should be noted that this requirement was extended to German nationals in 2007 and it applies only in ‘exceptional cases’⁵⁰⁷. No requirement for suitable accommodation is imposed on German nationals.

Family members of German nationals may be granted a settlement permit if they fulfil four requirements. In particular, they should have been in possession of a residence permit for three years, the family unity with the German national should continue to exist, there should be no grounds for expulsion and they should prove to have sufficient command of the German language. In case they do not fulfil one of the above mentioned requirements, the residence permit may be extended for as long as the family unity continues to exist⁵⁰⁸. Not least, Article 28 (3) of the Residence Act provides that Articles 31 and 34 of the same shall apply to family members of German nationals as regards the rest of the situations that may give rise to an independent right of residence. Next, the residence permit is granted for an initial period of at least one year pursuant to Article 27 (4) of the Residence Act and enables its holder to pursue economic activity⁵⁰⁹. Nonetheless, the residence permit is not granted in cases of marriages of convenience and forced marriages as Article 27 (1a) of the Residence Act applies to spouses of German nationals as well.

⁵⁰⁷ On this issue see L. Block and S. Bonjour, ‘Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands’ (2013) 15 *European Journal of Migration and Law* 203-224

⁵⁰⁸ Article 28 (2) of the Residence Act

⁵⁰⁹ See Article 27 (5) of the Residence Act

Given that the German legislature explicitly provides that the residence permit for family reasons is also granted to the foreign parent of a minor, unmarried German, a reference to the acquisition of the German nationality by birth deems necessary. Article 4 of the German Nationality Act distinguishes among three cases. According to the first one, a child acquires the German nationality by birth if one of his/her parents is German (‘*Ius Sanguinis*’)⁵¹⁰. The second case introduces a rule according to which a child which is found in the German territory shall be considered a German until otherwise proven⁵¹¹. Lastly, as regards children who are born in the German territory from parents who are regularly residing in Germany, they may acquire German nationality provided that one of the parents: a) has been regularly residing in Germany for eight years and b) has been granted a permanent residence permit or is a Swiss national or a family member of a Swiss national holding a residence permit on the basis of the EU-Switzerland Agreement on freedom of movement⁵¹². If the child acquires German nationality in any of the above mentioned ways, the foreign parent shall be granted a residence permit as a family member of a minor child.

According to all that has been exposed above, ‘reverse discrimination’ is detected in Germany as well, as German nationals should fulfil requirements which are not applicable to EU citizens residing in Germany. In principle, these requirements are the integration measures and the minimum age requirement which are not applicable to spouses of EU citizens residing in Germany. Not least, the concept of family appears narrower as the ascendants of the German national’s spouse are not included in the family members eligible for reunification whereas the initial residence permit granted is of one year. Given that the regime applicable to EU citizens is more favourable for EU citizens residing in Germany, there is by all means an issue of ‘reverse discrimination’ in the German legal system.

2.6 Association agreements

We consider it appropriate to examine the association agreements in this Chapter as, in some cases, the family related rights that derive from these agreements are similar to the ones applicable to EU citizens. The term association agreements, refers to agreements which are concluded between the Union and non-EU countries. To begin with, the EEA agreement with

⁵¹⁰ Article 4 (1) of the Nationality Act

⁵¹¹ Article 4 (2) of the Nationality Act

⁵¹² Article 4 (3) of the Nationality Act

Norway, Iceland and Liechtenstein and the bilateral agreement with Switzerland⁵¹³ principally extends EU free movement rights to the nationals of these countries. Having said that, the rules which were analysed above concerning family members of EU citizens, apply in principle to EU citizens who move to the states with which the Union has concluded these agreements but also to the nationals of the latter states who move to any of the Member States of the Union⁵¹⁴. However, it should be born in mind that the CJEU has ruled that identical or similar provisions of EU free movement rules and rules covered by the association agreements cannot always be interpreted in the same way⁵¹⁵. It should be highlighted that all three countries of the study apply the EU regime to nationals of Norway, Iceland, Liechtenstein and Switzerland.

Furthermore, the position of Turkish workers and their family members in the EU is governed by Decision No. 1/80 of the Association Council⁵¹⁶. The main provision regarding employment of Turkish workers in the EU is Article 6 (1). According to this provision, a Turkish worker duly registered as belonging to the labour force of a Member State:

‘(...) shall be entitled in that Member State, after one year’s legal employment, to the renewal of his permit to work for the same employer, if a job is available; shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation; shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment’.

As regards family members, Article 7 provides that they:

‘(...) shall be entitled-subject to the priority to be given to workers of Member States of the Community-to respond to any offer of employment after they have been legally resident for at least three years in that Member State; shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years’.

Furthermore, according to Article 7 (2), the children of a Turkish worker who have completed a course of vocational training in the host Member State are entitled to respond to any

⁵¹³ On this issue see S. Peers, ‘The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis’ (2000) 2 *European Journal of Migration and Law* 127-142

⁵¹⁴ It should be underlined that on 9 February 2014 the Swiss citizens voted in a referendum in favour of the imposition of quotas on immigration coming from the EU. The response by the EU is by the time the Chapter is being written still pending.

⁵¹⁵ See Case 270/80 *Polydor Limited y RSO Records Inc. v. Harlequin Records Shops Limited y Simons Records Limited* [1982] ECR 329

⁵¹⁶ Decision No. 1/80 of the Association Council of 19 September 1980 on the development of the association

employment offer in that state provided that one of their parents has been legally employed there for at least three years. Children of Turkish workers shall enjoy equal treatment with regards to access to education in the host Member State and may be eligible for related to education benefits⁵¹⁷. Lastly, it should be mentioned that Member States may limit the application of the above mentioned provisions on grounds of public policy, public security and public health⁵¹⁸.

The Decision No. 1/80 does not provide for a right to first admission for Turkish nationals and their family members. The rules concerning the initial entry for residence and employment are regulated by the Family Reunification Directive. In any event, the CJEU has clarified that Turkish nationals can rely on the provisions of the Decision even if they entered the territory of a Member State for purposes other than employment, such as family reunification or studies⁵¹⁹. It should be noted that the Decision does not grant to Turkish nationals and their family members a right to free movement between EU Member States either.

Moreover, although the said Decision does not contain a definition of ‘family members’, the CJEU has ruled that ‘family members’ primarily refer to the spouse and the minor child of the Turkish national⁵²⁰. It is worth mentioning that in *Ayaz*⁵²¹, the CJEU considered that Article 7 of the Decision is not limited to the worker’s blood relations and concluded that a stepson is a ‘family member’ of a Turkish worker in the sense of the above mentioned provision. It should be highlighted that in the present case, the CJEU referred to the interpretation given to Article 10 (1) of the Migrant Workers Regulation which covers the relation of an EU migrant worker with the child of his/her spouse. Not least, the notion of ‘family member’ may in some cases cover relationships outside marriage as well. This becomes evident in *Eyüp*⁵²² where the CJEU found that unmarried partners may rely on Article 7 of the Decision at least in case they divorced and then they cohabited with the purpose of remarrying.

⁵¹⁷ Article 9 of the Decision No. 1/80

⁵¹⁸ Article 14 of the Decision No. 1/80

⁵¹⁹ See Cases C-237/91 *Kazim Kus v. Landeshauptstadt Wiesbaden* [1992] ECR I-6781; C-98/96 *Kasim Ertanir v. Land Hessen* [1997] ECR I-5179; C-294/06 *The Queen, on the application of Ezgi Payir, Burhan Akyuz and Biorl Ozturk v. Secretary of State for the Home Department* [2008] ECR I-203 and C-337/07 *Ibrahim Altun v. Stadt Böblingen* [2008] ECR I-10323

⁵²⁰ See Cases C-351/95 *Selma Kadiman v. Freistaat Bayern* [1997] ECR I-2133 and C-329/97 *Sezgin Ergat v. Stadt Ulm* [2000] ECR I-1487

⁵²¹ Case C-275/02 *Engin Ayaz v. Land Baden-Württemberg* [2004] ECR I-8765

⁵²² Case C-65/98 *Safet Eyüp v. Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* [2000] ECR I-4747

It should be mentioned that in the recently decided *Dogan*⁵²³, the CJEU found that imposing on family members of a Turkish national who ran a business in Germany the condition that they demonstrate beforehand that they have sufficient knowledge of the German language in a procedure for family reunification, breaches Article 41 of the 1970 protocol to the EU/Turkey Association Agreement. According to this provision, ‘[t]he Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services’.

Lastly, the EU has also concluded agreements with the Western Balkans states (the Former Yugoslav Republic of Macedonia, Albania, Montenegro, Bosnia-Herzegovina and Serbia), with Russia and the rest of the ex-Soviet states except Belarus and Turkmenistan, with Algeria, Morocco and Tunisia, with Chile, Columbia and Peru, with Korea and with the African, Caribbean and Pacific states. In all of these agreements, there is no right to initial entry and access to employment for the workers or for their family members. The provisions referring to family members are rather limited and mostly concern their legal status after they have been admitted to the Member State concerned and have acceded to the labour market.

⁵²³ Case C-138/13 *Naime Dogan v. Bundesrepublik Deutschland* (not yet reported)

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Chapter 3: Family reunification of third-country nationals

3.1 Definition of family members of third-country nationals

3.1.1 The definition of family members of third-country nationals in EU law

The Family Reunification Directive defines family in a narrow way and contains several derogations which may limit even further the number of persons who can qualify as ‘family members’ for the purposes of family reunification. The family which is accepted for reunification purposes is a ‘traditional’ one. In short, Member States are only obliged to admit the sponsor’s spouse and the minor children over whom the sponsor or the spouse have exclusive custody. This approach appears restrictive already before any of the derogations is applied. However, as it will be analysed below, the Family Reunification Directive gives Member States the possibility to apply some particularly controversial derogations which may limit even further the legal concept of family in the family reunification context.

In particular, the definition of ‘family members’ for the purposes of family reunification of third-country nationals is provided for in Article 4 (1) of the Family Reunification Directive which reads as follows:

‘1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor’s spouse;

(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;

(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;

(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement’.

It should be underlined that the Directive imposes an obligation on Member States to accept only the spouse and not the registered or unregistered partner. Even in the case of spouses, Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is allowed reunification⁵²⁴. Therefore, certain spouses may be refused reunification for age reasons in case a Member State implements the said derogation. As regards the issue of polygamy, the Family Reunification Directive provides that Member States shall not authorise the entry of a further spouse where the sponsor already lives with a spouse and that by way of derogation from paragraph 1 (c), Member States may also limit reunification with the minor children of the further spouse⁵²⁵.

Minor children must not be married and must be below the age of majority of the host Member State, which would normally be that of 18 years. Nevertheless, minor children may in some cases also be excluded from the definition of family due to two derogations provided for in the Family Reunification Directive. Firstly, according to the last subparagraph of Article 4 (1), Member States may impose integration conditions on the over 12-year old child who arrives independently from the rest of his/her family. Secondly, pursuant to Article 4 (6), Member States are allowed to treat children as young as 15 years old as not qualifying for minor children in the sense of the first paragraph of Article 4. Both derogations were challenged in *Parliament v. Council* (cited above). Before proceeding to the family members who may optionally be accepted for family reunification under the Family Reunification Directive, a careful look at the judgment as regards the two derogations regarding minor children deems necessary due to the fact that they both relate to the way family is defined under the Directive.

In particular, shortly after the Family Reunification Directive was adopted, the European Parliament brought an action against the Council of the EU, claiming that the provisions of Article 4 (1), Article 4 (6) and Article 8 of the Directive infringe fundamental rights. The Parliament argued that the above mentioned provisions infringe the right to respect for family life and the principle of non-discrimination as guaranteed by the ECHR⁵²⁶ and as they result from the constitutional traditions common to the Member States. The Parliament further invoked the relevant provisions of the ECFR, as well as several provisions of international conventions.

⁵²⁴ Article 4 (5) of the Citizenship Directive

⁵²⁵ Article 4 (4) of the Citizenship Directive

⁵²⁶ Articles 8 and 14 of the Citizenship Directive

As regards the final subparagraph of Article 4 (1), the Parliament argued that a condition for integration laid down by national legislation does not fall within one of the legitimate objectives of Article 8 (2) ECHR. In its view, according to the case law of the ECtHR, any interference with the right to family life must be justified and proportionate. However, the final subparagraph of Article 4 (1) of the Family Reunification Directive does not require any weighing of the interests at issue⁵²⁷. Furthermore, the said provision does not define the concept of integration and Member States can therefore restrict significantly the right to family reunification⁵²⁸. From its side, the Council observed that the right to respect for family life is not equivalent to the right to family reunification and that the ECtHR finds no violation of Article 8 of the ECHR in case family reunification can take place in the country of origin of the third-country national. Furthermore, the Council argued that the ECtHR has found no violation of Article 8 of the ECHR in certain reunification cases concerning minors aged under 12 and claimed that it is justified to apply an integration condition just to the minor children and not the spouse of the sponsor as the former are likely to spend a greater proportion of their lives in the host Member State⁵²⁹.

The CJEU held that the provision preserves for Member States a margin of appreciation which is no different than the one given by the ECtHR in equivalent family reunification cases. In addition, the CJEU stated that the Family Reunification Directive obliges Member States to have due regard to the best interest of the children⁵³⁰ and that this axiom should be followed when Member States implement the provision which is under discussion:

‘(...) [A] child’s age and the fact that a child arrives independently from his or her family are also factors taken into consideration by the European Court of Human Rights, which has regard to the ties which a child has with family members in his or her country of origin, and also to the child’s links with the cultural and linguistic environment of that country’⁵³¹.

Moreover, according to the CJEU’s view, the fact that the Family Reunification Directive does not define the concept of integration does not mean that Member States are entitled to employ this provision contrary to the general principles of EU law and, in particular, to fundamental rights.

⁵²⁷ §42

⁵²⁸ §41

⁵²⁹ §49

⁵³⁰ Article 5 (5) of the Family Reunification Directive

⁵³¹ §65

As regards the issue of discrimination based on age, invoked by the Parliament, the CJEU underlined that:

‘(...) the choice of the age of 12 years does not appear to amount to a criterion that would infringe the principle of non-discrimination on grounds of age, since the criterion corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third-country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties’⁵³².

It added that:

‘[t]he very objective of marriage is long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents. It was therefore justifiable for the Community legislature to take account of those different situations, and it adopted different rules concerning them without contradicting itself’⁵³³.

Taking into consideration all of the above, the CJEU concluded that the last subparagraph of Article 4 (1) does not violate the right to respect for family life, the obligation to have regard to the best interest of the children or the principal of non-discrimination on grounds of age, either in itself or in that it authorises Member States to act in such a way⁵³⁴.

As regards Article 4 (6), the Parliament argued that the provision does not respect the right to family life and that integration could be achieved by less radical means than discrimination on grounds of age. It further argued that the ‘grounds other than family reunification’ referred to in the provision, is particularly vague and provokes legal uncertainty. From its side, the Council mainly argued that the provision does not contravene fundamental rights and that its mere purpose is to achieve better integration for the family members encouraging sponsors to have their children come at a very young age.

The CJEU’s approach was similar to the one adopted with regards to the last subparagraph of Article 4 (1), which was analysed right above. It referred to Article 5 (5) of the Family Reunification Directive which requires Member States to have due regard to the best interest of the children and to Article 17 of the same Directive which requires them to take account of a number of factors, one of which is the person’s family relationships and stated that Article 4 (6) should be read in light of these provisions. It concluded that the provision of Article 4 (6) of the Family Reunification Directive does not breach the fundamental right of respect for

⁵³² §74

⁵³³ §75

⁵³⁴ §76

family life or the principle of non-discrimination neither in itself nor in that it authorises Member States to do so.

Regardless of the outcome in *Parliament v. Council* (cited above), it should be mentioned that the last subparagraph of Article 4 (1) explicitly provides that the restriction should be already part of the national legislation on the date of the implementation of the Directive. Even in this way, the mere fact that the Directive provides for an option to refuse entrance to a 12 years old child just because s/he does not pass an integration test is representative of the narrow conception of family that the EU legislature has adopted in the field of family reunification of third-country nationals. The same is true for the derogation which concerns children who are at the age of 15. Even though the said provision also includes a clause that it could only be introduced before the implementation date of the Directive, its adoption reveals that the ‘threshold’ of what constitutes family has been set particularly low in the Family Reunification Directive. It should be noticed that the ‘integration conditions’ of the last subparagraph of Article 4 (1) will be analysed in the corresponding section which concerns the requirements for family reunion.

Returning to the rest of the family members, it should be noted that Article 4 (2) provides that the following persons may optionally be authorised entry and residence in the host Member State:

‘(a) 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;

(b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health’.

In addition, pursuant to Article 4 (3) of the Family Reunification Directive:

‘The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third-country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third-country national who is bound to the sponsor by a registered partnership in accordance with Article 5 (2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons. Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification’.

Next, pursuant to Article 5 of the Family Reunification Directive, any application for family reunification should be accompanied by evidence of the existence of the family relationship. According to the same provision, ‘(...) Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary’⁵³⁵. It should be underlined that some Member States have resorted to the use of a DNA testing in order to verify whether the family relationship exists. The DNA testing has been considered by some Member States as a relatively cheap, accurate and fast method to establish biological relatedness⁵³⁶. However, we believe that depending on the way these tests are actually implemented by Member States, the waiting period for the acquisition of the family member status may be prolonged and certain human rights may be violated. Moreover, with regards to the verification of a relationship outside marriage, Member States shall consider as evidence factors such as common children, previous cohabitation, registration of the partnership and any other reliable means of proof⁵³⁷.

At this point it should be highlighted that on 3 April 2014 the European Commission published guidance on the application of the Family Reunification Directive⁵³⁸. The adoption of guidance followed a Green Paper which was published in 2011 with the purpose of gathering opinions regarding the more effective application of the Directive⁵³⁹. The document contains the European Commission’s views on how Member States should apply the Family Reunification Directive and is without prejudice to the CJEU’s case law and the future developments in the field. Given the importance of the said document and the fact that the guidelines contained therein are in generally speaking towards the right direction, we consider it necessary to examine its content in each of the sections of the present Chapter.

As regards the interpretation of the notion of family members of Article 4⁵⁴⁰, the Commission notes that when a Member State decides to apply the optional provisions of Article 4 (2) and (3) of the Family Reunification Directive and grant a right to family reunification with the

⁵³⁵ Second Subparagraph of Article 5 (2) of the Family Reunification Directive

⁵³⁶ See among others, T. Heinemann, U. Naue and A.M. Tapaninen, ‘Verifying the Family? A Comparison of DNA Analysis for Family Reunification in Three European Countries (Austria, Finland and Germany)’ (2013) 15 *European Journal of Migration and Law* 183-202 (2013)

⁵³⁷ Last subparagraph of Article 5 (2) of the Family Reunification Directive

⁵³⁸ Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification published on 3 April 2014, COM(2014) 210 final. Hereinafter, ‘the Commission’s guidance for the application of the Family Reunification Directive’.

⁵³⁹ Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC) published on 15 November 2011, COM(2011) 735 final

⁵⁴⁰ COM(2014) 210 final, at 2.2.

family members referred to therein, then the Directive is fully applicable. This is particularly important given that the Family Reunification Directive is not clear on what the applicable standards with regards to the persons referred to in these provisions are. The Commission therefore suggests that although it is in the discretion of each Member State to decide whether third-country nationals will have a right to reunify with first-degree ascendants, adult children, registered partners and partners in a stable relationship, these Member States which decide to do so, should apply the minimum standards provided for by the Directive. Not least, the Commission clarifies on the concept of ‘dependency’ stating that it must be interpreted in line with the analogous concept in EU free movement law. This is also a particularly important suggestion, especially given that the recent judgment of the CJEU in *Reyes* (cited above) is expected to simplify the procedure regarding dependent family members.

Not least, the Commission states that Member States have a certain margin of appreciation as regards the evidence of the existence of the family relationship submitted with the application⁵⁴¹. This being said, Member States may conduct interviews and investigations and request a DNA testing. However, these measures should be proportionate and should not be allowed in case the existence of the family relationship may be proved by less restrictive means. As regards the evidence for the existence of the stable relationship outside marriage, Member States may accept any appropriate means of proof such as correspondence, joint bills, bank accounts or ownership of real estate.

3.1.2 The definition of family members of third-country nationals in the national legislation

3.1.2.1 Spain

In Spain, the legislature has adopted a rather broad definition of family for third-country national. This definition is significantly broader than the one provided for by the Family Reunification Directive and the one adopted in the other two Member States of the present study. To start with, third-country nationals have the right to reunify with their spouse, as long as they have not been separated *de jure* or *de facto* and on the condition that the marriage has not been concluded in abuse of law⁵⁴². Furthermore, the same provisions provide that the third-country national does not have a right to reunify with more than one spouse even if the

⁵⁴¹ COM(2014) 210 final, at 3.2.

⁵⁴² Article 17 (1) (a) of the Immigration Act and 53 (a) of the Immigration Regulation

law of the country of origin permits polygamy⁵⁴³. In case the third-country national is married to several spouses, he can only reunify with a further spouse in case he proves that the previous marriages have been dissolved through a legal process that regulates the previous spouse’s situation with regard to the common house and the spousal and children’s support⁵⁴⁴.

In relation to reunification with the spouse, it is worth making the following comments. First, there is no doubt that the fact that the spouses are not *de facto* separated is particularly difficult to prove. In fact, part of the doctrine⁵⁴⁵ believes that the investigations with regards to the *de facto* separation of the spouses may violate the right to intimacy and therefore suggests that the provision should merely speak about a legal separation which is easier to prove through a court order or any other appropriate means. Second, in the event of polygamous marriages, it can be assumed that it is the sponsor’s own decision which of the spouses he will reunify with. Indeed, the law merely excludes reunification with a further spouse but does not specify as to which spouse should be entitled to family reunification. Third, as it is the case with the spouse of the EU citizen residing in Spain, the third-country national’s spouse may be of the same or different sex.

Furthermore, third-country nationals have the right to reunify with the person with whom they has a relationship which is analogous to a spousal one⁵⁴⁶. These relationships may be registered partnerships which have not been cancelled⁵⁴⁷ or unregistered partnerships in case the later have been established before the third-country national started residing in Spain⁵⁴⁸. It should be noted that unregistered partnership can be proven through documents published by a public authority, without prejudice to any other legal evidence⁵⁴⁹. It is worth mentioning that all that has been discussed above regarding polygamous marriages, as well as same-sex marriages apply accordingly to registered or unregistered partnerships⁵⁵⁰. It should be underlined that family reunification with an unmarried partner was not provided for in the Immigration Act 4/2000 but was introduced later on with the Immigration Act 2/2009 on which the Immigration Regulation finds its base.

⁵⁴³ Second subparagraph of Article 53 (a) of the Immigration Regulation

⁵⁴⁴ Third subparagraph of Article 53 (a) of the Immigration Regulation

⁵⁴⁵ J.J. Ezquerro Ubero, ‘El derecho a vivir en familia de los extranjeros en España’ (1997) 1 *Migraciones* 177-215 p. 201

⁵⁴⁶ Article 17 (4) of the Immigration Act and Article 53 (b) of the Immigration Regulation

⁵⁴⁷ Second subparagraph of Article 53 (b) of the Immigration Regulation

⁵⁴⁸ Third subparagraph of Article 53 (b) of the Immigration Regulation

⁵⁴⁹ Third subparagraph of Article 53 (b) of the Immigration Regulation

⁵⁵⁰ Last subparagraph of Article 53 (b) of the Immigration Regulation

The proof of the existence of a registered partnership appears less problematic than the one regarding unregistered partnerships, as such relationship may be proven by the submission of the certificate of registration. As regards unregistered partnerships it should be mentioned that the literal interpretation of the relevant provision brings us to the conclusion that there is no need for cohabitation between the partners in order for them to be regarded as ‘partners’. Indeed, both Article 17 (4) of the Immigration Act and Article 53 (b) of the Immigration Regulation speak about unregistered partnerships which should be proven and should comply with the necessary requirements in order to have effects in Spain. Therefore, according to the wording of the above mentioned provisions, the couple may have lived in separate homes in the country of origin and may have interrupted at some point their relationship. Having said that, the proof of the existence of the unregistered partnership appears rather difficult and it will depend on the relevant legislation of the Autonomous Communities in Spain which are competent for the configuration and the effects of such partnerships.

Next, third-country nationals have the right to reunify with their minor children, including adopted ones or adult children who have a disability or are objectively unable to provide for their own needs on account of their state of health⁵⁵¹. In cases the child is one of the spouses only, it is required that this spouse is exercising the custody alone or s/he has been granted exclusive custody upon the child and the latter is under his/her care⁵⁵². As regards adopted children, the adoption should meet all necessary requirements in order to have effects in Spain⁵⁵³. Furthermore, the sponsor has a right to reunify with the persons that are legally represented by him/her, if the latter are less than 18 years at the time on which the application for their residence permit is submitted or they have a disability or are objectively unable to provide for their own needs on account of their state of health⁵⁵⁴.

Before proceeding to the rest of the family members who may be granted a residence permit for the purposes of family reunification, it is worth elaborating on some of the aspects regarding reunification with the descendants. First, the age of majority is that of 18 years. As a result, even if the parent is still responsible for his/her child according to the applicable law in the country of origin, s/he does not have the right to reunify with him/her in case the latter is older than 18 which is the age of adulthood from a Spanish law perspective.

⁵⁵¹ Article 17 (1) (b) of the Immigration Act and first subparagraph of Article 53 (c) of the Immigration Regulation

⁵⁵² Second subparagraph of Article 53 (c) of the Immigration Regulation

⁵⁵³ Third paragraph of Article 53 (c) of the Immigration Regulation

⁵⁵⁴ Article 17 (1) (c) of the Immigration Act and Article 53 (d) of the Immigration Regulation

Second, a significant deference may be detected in the circumstances under which an immigrant may reunify with his/her adult children in the framework of the ‘general regime’ in comparison to the applicable rules under ‘community regime’. As analysed above, the older than 21 children of an EU may join or accompany the latter in Spain in case they are dependants. On the contrary, the corresponding provisions in the Immigration Act and the Immigration Regulation speak about adult children who are disabled or objectively unable to provide for their own needs due to their state of health. The wording of this provision, which in fact is in line with the Family Reunification Directive, indicates that the over 18 children of third-country nationals may not qualify as a dependent family member in the purposes of family reunification in case s/he depends economically on the third-country national, as it is the case with adult children of EU citizens. Thus, job seekers and students are excluded from the scope of the provision.

On the contrary, the same provision appears favourable towards the immigrant in the sense that it does not require the adult child to be unmarried. The provision is more favourable than the one provided for by the Directive and therefore compatible with EU rules. However, there are authors who claim that the Spanish legislature should have implemented this provision in the way it is suggested by the Directive, as authorising an adult married person to reunify with his/her parents may have implications on the family that this person has created, given that his/her spouse would not be able to follow him in Spain⁵⁵⁵.

Next, the sponsor may reunify with his children of a further spouse in case of polygamous marriages. The Spanish legislature has not implemented the derogation set out in the Family Reunification Directive and even though the sponsor is not allowed to reunify with a further spouse, he can have the child of that spouse joining him in Spain provided that he proves to have the custody of that child and the latter is under his care. The different treatment as regards spouses and children in a polygamous family unit may result in the child having to be separated from one of the two parents, either joining the father in Spain or staying with his/her

⁵⁵⁵ See M. P. Diago Diago ‘La reagrupación familiar de descendientes, personas sujetas a representación legal y de la ‘pareja de hecho’ en la enésima modificación de la Ley 4/2000’ (2011) 26 *Revista de Derecho Migratorio y Extranjería* 11-26

mother in the country of origin, although there is no divorce or separation and the persons concerned wish to live together⁵⁵⁶.

Not least, the sponsor has the right to reunify with his/her first degree ascendants in the direct line, or those of the spouse or partner, in case the latter are dependants, older than 65 and there are reasons that justify the necessity of their residence in Spain⁵⁵⁷. Exceptionally, if there are humanitarian reasons, family reunification may be possible with first degree ascendants in the direct line who are younger than 65⁵⁵⁸. The third and fourth subparagraph of Article 53 Immigration Regulation define the concept of ‘humanitarian reasons’, whereas the last subparagraph of the same provision analyses the concept of ‘dependant’. It is noteworthy that the fact that there should be reasons that justify the necessity of the ascendants’ residence in Spain, except for raising questions of compatibility with the Family Reunification Directive as it will be argued below, constitutes a requirement which makes family reunification with the ascendants particularly difficult if not impossible to achieve. This is mostly so due to the ambiguity of the concept ‘reasons that justify the necessity of their residence in Spain’ which leaves wide discretion to the public authorities as to its interpretation⁵⁵⁹.

Finally, as regards the means of proof of the existence of the family relationship, it should be noted that the Immigration Regulation of 2011 which is now in force, has waived the relevant provision of the Immigration Regulation of 2004⁵⁶⁰, which was incorporated in the provisions concerning family reunification and regulated the way family relations were to be proven in the family reunification procedure. Indeed, Article 57 of the Immigration Regulation which currently deals with the issue of the visa for family reunification does not make a reference to the way the family relationship may be checked. Nevertheless, this issue is now covered by a general provision concerning visas which provides that the consular authorities may conduct a personal interview with the persons concerned in order to verify their identity, the validity of

⁵⁵⁶ J. Arieta-Araunabeña Alzaga, B. Gamboa Uribarren and M.L. Labaca Zabala, ‘El derecho al reagrupamiento familiar en la legislación, jurisprudencia y doctrina de España’, (2009) 16 *Cartapacio de Derecho: Revista Virtual de la Escuela Superior de Derecho* 1-55

⁵⁵⁷ First subparagraph of Article 53 (e) of the Immigration Regulation

⁵⁵⁸ Second subparagraph of Article 53 (e) of the Immigration Regulation

⁵⁵⁹ See also D. Moya Malapeira and I. Martín Hermosín, ‘Familia y extranjería’ in C. Villagrasa Alcaide, *Derecho de familia* (Barcelona, Editorial Bosch, S.A., 2011) p. 250 where the authors argue that this concept has led to a great legal uncertainty and has caused various judiciary claims. Not least, the authors claim that the Immigration Regulation should specify what should be understood by the concept ‘reasons that justify the necessity of their residence in Spain’ or adopt the relevant expression used in Article 4 (2) (a) of the Family Reunification Directive, namely ‘(...) do not enjoy proper family support in the country of origin’.

⁵⁶⁰ Article 43 (3) of the Royal Decree 2393/2004

the submitted documentation and truthfulness of the motives for the visa application⁵⁶¹. Not least, it should be noted that although the use of DNA tests is not provided for in law, it constitutes a practice that is followed by several Spanish consular authorities⁵⁶².

3.1.2.2 Greece

The Greek legislature appears rather stringent in defining the persons who may qualify as family members of a third-country national who resides in Greece. In particular, pursuant to the definition given in Article 1 of Law 4251/2014⁵⁶³, family member of third-country nationals are the over 18-years spouse and the minor unmarried children that the spouses have in common. The sponsor may also reunify with his/her minor unmarried children and those of the spouse, provided that the custody has been granted to him/her in case of the sponsor’s own children or to the spouse in case of the spouse’s minor unmarried children. It should be noted that adopted minor children are included among the family members with whom the third-country national may reunify in Greece.

Not surprisingly, the sponsor cannot reunify with a further spouse in case he already lives with a spouse in Greece as polygamy is not recognised as a family relation in the Greek legal system⁵⁶⁴. He may also not reunify with the children that he has in common with the further spouse, except in cases that he has been granted the custody⁵⁶⁵. The minimum age of 18 concerns only the spouse who wishes to enter Greece as a family member. On the contrary, no minimum age requirement is imposed on the sponsor. As regards unmarried partners, the Greek law ‘remains silent’ even following the Law 3719/2008 which regulated the issue of unmarried partners in the Greek legal system. This approach directly affects same-sex partners who at the time being may not be accepted for family reunification.

As far as reunification with children is concerned, the following observations are considered necessary. First, it is apparent that Greece uses the 18-years threshold in order to define who is considered as a minor and may therefore qualify as a family member of the third-country national. The derogations provided for by the Family Reunification Directive regarding the 15 or 12-years old minor children have not been implemented in the Greek legal system. There is

⁵⁶¹ Paragraph 4 of the Additional Provision 10 of the Immigration Regulation

⁵⁶² For a critique on the use of DNA tests by the Spanish consulates see E. La Spina, ‘DNA Testing for Family Reunification in Europe: An Exceptional Resource?’ (2012) 6(3) *Migraciones Internacionales* 39-74

⁵⁶³ Article 1 (lc) of the Immigration Law

⁵⁶⁴ First subparagraph of Article 70 (3) of the Immigration Law

⁵⁶⁵ Second subparagraph of Article 70 (3) of the Immigration Law

also no provision concerning adult unmarried children who are dependants or at least objectively unable to provide for their own needs on account of their state of health. Second, Greece does also not make use of the optional provision of the Family Reunification Directive according to which family reunification with minor children may be authorised even when the custody of the child is shared between the spouse or the sponsor and a third person provided the third person has given his or her agreement. Third, it should be highlighted that according to the Greek legislation the minor children should be unmarried in order to reunify with the third-country sponsor who resides in Greece.

It should be noted that in order to verify the existence of the family relationship, the competent authority may invite the sponsor to an interview or conduct any other necessary investigation and may require the sponsor to submit all the relevant supporting documents in accordance with Article 136 (1) of the Immigration Law⁵⁶⁶. Greece does not use DNA tests for the verification of the existence of the family relationship.

3.1.2.3 Germany

In Germany, the legal concept of family for the purposes of family reunification presents particularities. To begin with, the third-country national is entitled to reunify with his/her spouse⁵⁶⁷. This right is not unconditional as the spouse should be at least 18 years⁵⁶⁸ old and shall be able to communicate in German on a basic level⁵⁶⁹. As regards unmarried partners, it should be noted that in principle Germany does not accept unmarried registered or unregistered partners. The only exception concerns same-sex registered partners who are treated as equivalent to spouses pursuant to Article 27 (2) of the Residence Act. In any event, it should be mentioned that third-country nationals who have a partner of the same sex are likely to face several problems in reunifying with the latter in Germany given that the majority of the countries of origin do not provide for a registration for same-sex couples. Lastly, as regards polygamous marriages, a further spouse is not accepted in case the sponsor already lives with one spouse in the federal territory⁵⁷⁰.

⁵⁶⁶ Article 70 (4) of the Immigration Law

⁵⁶⁷ Article 30 of the Residence Act

⁵⁶⁸ Article 30 (1) 1 of the Residence Act

⁵⁶⁹ Article 30 (1) 2 of the Residence Act

⁵⁷⁰ Article 30 (4) of the Residence Act

Next, the third-country national may reunify with his/her minor children in case they are unmarried⁵⁷¹. It is underlined that the age of majority in Germany is that of 18 years. However, according to Article 32 (2) of the Residence Act, in case the minor child is over 16 years old and arrives independently from his/her parents, s/he should meet integration conditions before s/he could qualify as a family member for the purposes of family reunification. It should be noted that in principle the sponsor or the spouse should have the sole right of care and custody of the child. In case the right of care and custody is shared, the minor child is granted a residence permit in order to join one parent only if the other parent has given his/her consent to the child’s stay in Germany or if a relevant binding decision has been supplied by a competent authority⁵⁷².

‘A minor, unmarried child of a foreigner may otherwise be granted a residence permit if necessary in order to prevent special hardship on account of the circumstances pertaining to the individual case concerned. The child’s well-being and the family situation are to be taken into consideration in this connection’⁵⁷³.

No specific restrictions are imposed for reunion with the child of a further spouse in cases of polygamous marriages. The rules described right above shall be applicable.

Even though family reunification is in principle limited to members of the ‘core family’, the German legislature has introduced an interesting provision which concerns other dependent family members who fall outside the ‘core family’. In particular, according to Article 36 (2) of the Residence Act, ‘[o]ther dependants of a foreigner may be granted a residence permit for the purpose of subsequent immigration to join the foreigner, if necessary in order to avoid particular hardship’. In the scope of this provision fall, first and foremost, the adult dependent children and the ascendants who, as seen above, are included in an optional provision in the Directive. However, Article 36 (2) speaks about ‘dependants’ in general and therefore according to the literal and more correct interpretation of the provision other relatives such as uncles, aunts, grandparents, grandchildren or siblings may qualify as family members in case they are dependants and in order for particular hardship to be avoided⁵⁷⁴. It should be highlighted that although Article 36 (2) of the Residence Act is a significant provision as it grants the right to family reunification to family members falling outside the ‘nuclear family’,

⁵⁷¹ Article 32 of the Residence Act

⁵⁷² Article 32 (3) of the Residence Act

⁵⁷³ Article 32 (4) of the Residence Act

⁵⁷⁴ A. Walter, *Familienzusammenführung in Europa: Völkerrecht, Gemeinschaftsrecht, Nationales Recht* (Baden-Baden, Nomos, 2009)

the percentage of residence permits which are issued under this provision is extremely small⁵⁷⁵ as the standards of the provision are particularly difficult to reach.

Furthermore, minor children may also in certain cases qualify as sponsors. Article 36 (1) of the Residence Act provides that a residence permit shall be issued to the parents of a minor foreigner who holds a residence permit pursuant to Articles 25 (1) or (2) or Article 26 (3), if no parent holding the custody is present in Germany. The provision deals with minor children of foreign nationality who are present in Germany and are themselves holders of the right to family reunification. Such provision is not encountered in the Greek and Spanish legal system as regards reunification rules of third-country nationals. Indeed, the legislatures are more often concerned with this case when the minor is a national of the state or a seeker or beneficiary of international protection. The German provision, although it is doubtful that it will be invoked frequently, constitutes a welcome consideration.

As regards the proof of the existence of the family relationship, the applicants are in principle required to provide documentation. Nevertheless, the German authorities often do not trust the documents and require interviews or DNA tests⁵⁷⁶. It should be noted that the provisions of the Residence Act which deal with family migration do not provide for such test. Nonetheless, the General Instructions on the application of the Residence Act gives such possibility⁵⁷⁷. The same Instructions provide that the DNA test for the proof of the family relation is voluntary and is used as a choice of last resort⁵⁷⁸. However, as long as the refusal to participate in such examination will lead to the rejection of the application, some scholars have expressed the view that the participation is not indeed voluntary⁵⁷⁹.

In conclusion, it can be argued that the concept of ‘family’ under German law is broader than that set out in the Family Reunification Directive. This opinion is mostly based on the fact that as mentioned above the Article 36 of the Residence Act allows reunification with dependants who fall outside the notion of ‘core family’. Nevertheless, given that the threshold of Article 36 is as mentioned above quite difficult to reach and that spouses and minor children of 16

⁵⁷⁵ See Federal Office for Migration and Refugees, *Das Bundesamt in Zahlen 2011. Asyl, Migration, ausländische Bevölkerung und Integration*, Nuremberg (2012)

⁵⁷⁶ See T. Heinemann, U. Naue and A.M. Tapaninen, ‘Verifying the Family? A Comparison of DNA Analysis for Family Reunification in Three European Countries (Austria, Finland and Germany)’ (2013) 15 *European Journal of Migration and Law* 183-202

⁵⁷⁷ General Instructions on the application of the Residence Act, 2009, No. 27.0.5

⁵⁷⁸ General Instructions on the application of the Residence Act, 2009, No. 27.0.5

⁵⁷⁹ T. Heinemann and T. Lemke, ‘Suspect Families: DNA Kinship Testing in German Immigration Policy’, (2013) 47 (4) *Sociology* 810-826

and 17 years may not be accepted if they fail the integration tests, it is difficult to conclude whether the definition of family under German immigration law is indeed broader than the one provided for by the Family Reunification Directive.

3.1.2.4 Tendencies in the rest of the EU countries and ‘MIPEx countries’

According to the Commission’s implementation report⁵⁸⁰ on the Family Reunification Directive, several Member States have set a minimum age requirement for spouses with 5 of them setting it at the highest possible age of 21 years⁵⁸¹. It should be noticed that among all Member States only Cyprus and Germany have implemented the derogation concerning the 12 years old child who arrives independently from the rest of the family and that the derogation of Cyprus is not valid as it was adopted after the deadline for implementation⁵⁸². No Member State has invoked the derogation regarding the 15 years old child⁵⁸³. 7 Member States allow unmarried partners whereas half of them admit first-degree relatives in the ascending line of the sponsor and the spouse⁵⁸⁴. As regards the results of the MIPEx study⁵⁸⁵, it should be noted that among the 38 participant countries, immigration law recognises same-sex partners in 26 countries and long-term relationships in 17 countries. In 30 countries the age of majority for couples is 18 or 19 years. As regards dependants falling outside the notion of ‘nuclear family’, these are entitled to family reunification in 25 countries. The MIPEx study further indicates that 10 countries provide for reunification with ascendants and 6 countries with adult children.

3.2 Conditions for the exercise of the right to family reunification

3.2.1 The conditions for family reunification in EU law

3.2.1.1 Type of residence permit

The sponsor should hold a residence permit issued by a Member State for a period of validity at least of one year and have reasonable prospects of obtaining the right of permanent

⁵⁸⁰ See Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification published on 8 October 2008, COM(2008) 610 final. Hereinafter, ‘the Commission’s implementation report on the Family Reunification Directive’.

⁵⁸¹ See COM(2008) 610 final, at 4.1.

⁵⁸² See COM(2008) 610 final, at 4.1.

⁵⁸³ See COM(2008) 610 final, at 4.1.

⁵⁸⁴ See COM(2008) 610 final, at 4.2.

⁵⁸⁵ Results available online at www.mipex.eu

residence⁵⁸⁶. The wording of Article 3 is problematic as it provides that the residence permit should have a minimum validity of at least one year but leaves open the ‘maximum minimum duration’ of the residence permit. Therefore, Member States are left excessive discretion as they can require the sponsor to hold a residence permit of duration of more than one year before s/he can apply for reunification. The Family Reunification Directive should have rather be more concrete as regards the type of the residence permit especially given that its goal is to set the minimum standards below which no Member State should legislate.

In any event, it should be underlined that the Directive at hand clearly provides that this residence permit should merely give ‘reasonable prospects’ of a permanent residence and therefore Member States cannot require the third-country national to already enjoy the right of permanent residence. It is needless to mention that the sponsor’s intention or plan to actually apply for the permanent status at the moment s/he would qualify for it is totally irrelevant. The crucial element is whether the residence permit that s/he holds gives the prospects of obtaining such right. Furthermore, according to the same provision, the Family Reunification Directive does not apply where the sponsor is an asylum seeker, a beneficiary of temporary or subsidiary protection or is applying for such status⁵⁸⁷ or s/he is a family member of a Union citizen⁵⁸⁸.

The Commission in its guidance for the application of the Family Reunification Directive clarifies on the concept of ‘reasonable prospects of obtaining the right of permanent residence’ of Article 3 (1)⁵⁸⁹ adopting the same view that has been expressed in this section. In particular, the Commission notes that the test for this finding entails a prognosis of the likelihood of meeting the criteria for long-term residence taking into account administrative practices and the circumstances of the case. However, the requirements for the long-term residence status should not be fulfilled at the time of the assessment of the application for family reunification. Member States should assess whether the residence permit is likely under regular circumstances to be renewed until the period required for the acquisition of the long-term residence status.

⁵⁸⁶ Article 3 of the Family Reunification Directive

⁵⁸⁷ Article 3 (2) of the Family Reunification Directive

⁵⁸⁸ Article 3 (3) of the Family Reunification Directive

⁵⁸⁹ COM(2014) 210 final, at 2.1.

3.2.1.2 Prior lawful residence and ‘waiting period’

Member States may require the sponsor to have resided lawfully in their territory for a certain period before family reunion is possible. According to the first subparagraph of Article 8 of the Family Reunification Directive, this residence may be up to two years long. By way of derogation, Member States may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of residence permit to the family members, only if the national legislation of the Member State on the date of the adoption of the Directive takes into account its reception capacity⁵⁹⁰. The provision of Article 8 is draconian as it will result in third-country nationals being in some cases separated from their family members for a continuous period of two or three years before reunification may take place.

As regards the prior lawful residence, it should be clarified that it is calculated on the basis of the lawful residence of the sponsor in the host Member State and not from the day on which the application is made. This is the only interpretation that fits the spirit of the provision. Member States which count the two years of residence from the date on which the application is lodged without taking into account prior lawful residence of the sponsor infringe the Family Reunification Directive. As regards the issue of the three-year ‘waiting period’, this becomes applicable to Member States with ‘quota system’ according to which, only a certain number of residence permits may be issued every year. When this number is exhausted, the applications are considered for the issue of the residence permits of the following year. In such case, Member States are obliged under the Family Reunification Directive to issue the residence permit after three years regardless of whether the quota is exhausted or not.

It is worth underlining that the Commission in its guidance for the application of the Family Reunification Directive adopts the same view as the one that has been expressed right above with regards to the calculation of the two years of prior lawful residence giving some further clarifications. In particular, the Commission points out that the maximum of two years of prior lawful residence should not be applied in the same way to all applicants without regard to the particular circumstances of each case and the best interest of the child⁵⁹¹. Moreover, the Commission is of the view that since the purpose of the minimum prior lawful residence requirement is the achievement of better integration, its length depends on whether this

⁵⁹⁰ Second subparagraph of Article 8 of the Family Reunification Directive

⁵⁹¹ COM(2014) 210 final, at 4.6.

requirement serves this purpose and respects the principle of proportionality. The Commission expresses the view that any lawful residence in the territory of a Member State should be taken into account in the determination of the ‘lawful stay’ of a sponsor, even if these stays preceded the existence of the family. Third-country nationals who have resided in a territory of a Member State for a period of 2 years as students and found employment directly after their studies, are entitled to a right to family reunification directly as soon as they have their first residence permit for one year, given that the requirement for a lawful residence of two years has already been fulfilled while they were students. However, irregular stays may not, in the Commission’s view, be taken into account.

It should be noted that the provision of Article 8 was the third one which was discussed in *Parliament v. Council* (cited above). As regards this provision, the Parliament argued that the periods of two and three years restrict significantly the right to family reunification and that the derogation of the second paragraph could give rise to different treatment in similar cases, depending on whether or not the Member State concerned has legislation which takes its reception capacity into account. The Parliament also argued that a criterion founded on the Member State’s reception capacity is equivalent to a quota system, which is incompatible with Article 8 of the ECHR. From its side, the Council argued that the minimum lawful residence requirement has the purpose of better integration and ensures 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’⁵⁹². Furthermore, the Council observed that the requirement for a minimum lawful residence exists in the legislation of most Member States and that the competent courts have not found it unlawful.

As it was the case with regards to Articles 4 (1) and 4 (6) of the same Directive, the CJEU in its judgment, accepted the arguments of the Council. It stated that the derogation set out in Article 8 of the Family Reunification Directive should be regarded as part of the Member States’ margin of appreciation and not as a provision restricting family reunification. In particular, in the CJEU’s view, the margin of appreciation consists of permitting a Member State to set a requirement for a minimum lawful residence to the sponsor that would ensure that family reunification will take place in more favourable conditions and that family members will settle down properly after a certain level of integration has already been achieved. Furthermore, Member States should have due regard to the best interest of the

⁵⁹² §93

minor children when examining the reception capacity of the country at the time of the application. Consequently, the CJEU concluded that the provision of Article 8 of the Family Reunification Directive does not contravene fundamental rights.

3.2.1.3 The material conditions

The person who submits the application for family reunification may be required to provide evidence that the sponsor has: a) a normal accommodation which meets the general health and safety standards in the Member State concerned, b) sickness insurance covering all risks normally covered for the nationals of the Member State concerned for him/her and his/her family members and c) stable and regular resources which are sufficient to maintain himself or herself and his/her family members without resource to the social assistance system of the host Member State⁵⁹³. As regards the stable and regular resources, it should be emphasised that Article 7 (1) (c) of the Family Reunification Directive provides that ‘[m]ember states shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members’.

The Commission in its guidance for the application of the Family Reunification Directive expresses its view on the requirements of accommodation, sickness insurance and sufficient resources⁵⁹⁴. In that respect, the Commission suggests that the criteria with regards to the accommodation⁵⁹⁵ should not be stricter than the accommodation occupied by a comparable family in the same region. In addition, the Commission notes that it may be disproportionate to ask for the accommodation requirement to be fulfilled at the moment of the application for family reunification and that Member States could accept evidence that this condition would be met by the time of the effective family reunification. It should be noted that the latter clarification becomes particularly important in cases of lengthy application procedures.

As regards the sufficient resources requirement⁵⁹⁶, the Commission is of the opinion that as a general rule a permanent employment contract should be considered sufficient proof.

⁵⁹³ Article 7 of the Family Reunification Directive. For an analysis of the ‘accommodation’ and ‘sufficient resources’ requirements referred to in Article 7 see also J. Hardy, ‘The Objective of Directive 2003/86 is to Promote the Family Reunification of Third Country Nationals’ (2012) 14 *European Journal of Migration and Law* 439-452

⁵⁹⁴ COM(2014) 210 final, at 4.

⁵⁹⁵ COM(2014) 210 final, at 4.2.

⁵⁹⁶ COM(2014) 210 final, at 4.4.

Furthermore, as regards temporary contracts that can be prolonged, the Commission encourages Member States to not automatically reject an application based on the nature of the contract but to take into consideration all the relevant circumstances of the case at hand. Not least, the Commission underlines that Member States are allowed to take into consideration minimum wages and the number of family members when assessing whether the requirement for sufficient resources is fulfilled but the national wage should be seen as the maximum amount which may be required except if the Member State decides to take into account the number of family members that seek reunification with the sponsor. Lastly, Member States are encouraged to conduct an individual assessment taking into account all the relevant circumstances of a case and not set a minimum limit under which all applications would be rejected.

It should be highlighted that the CJEU has already adopted a judgment with regards to the requirement for stable and regular resources, in *Chakroun*⁵⁹⁷. We believe that the present judgment constitutes the most important one concerning the Family Reunification Directive. In the present case, Mr. Chakroun was a Moroccan national who resided in the Netherlands holding a residence permit for an indefinite period and received since 2005 unemployment benefits. In March 2006, Mr. Chakroun’s wife wished to join him with the proceedings of family reunification. The application was refused on the ground that Mr. Chakroun’s unemployment benefit amounted to 1.322,73 Euros net per month and was therefore below the standard income for family formation, which was 1.441,44 Euros per month. It should be mentioned that the Dutch legislation provided for different amount of ‘sufficient resources’ depending on whether the family was formed before or after the sponsor had entered the territory of the Member State and that the resources of Mr. Chakroun would be sufficient for the minimum income in case family had been formed before his entry in the Netherlands but not in the event of family formation, as his case was considered.

The case was brought before the CJEU, which was asked to clarify the following questions:

‘By its first question, the Raad van State asks whether the phrase ‘recourse to the social assistance system’ in Article 7 (1) (c) of the Directive is to be interpreted as permitting a Member State to adopt rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance to meet

⁵⁹⁷ Case C-578/08 *Rhimou Chakroun v. Minister van Buitenlandse Zaken* [2010] ECR I-1839

exceptional, individually determined, essential living expenses, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies (‘*minimabeleid*’)⁵⁹⁸.

‘By its second question, the national court asks whether the Directive, in particular Article 2 (d) thereof, is to be interpreted as precluding national legislation which, in applying the income requirement pursuant to Article 7 (1) (c) of the Directive, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State’⁵⁹⁹.

In answering the first question the CJEU stated that setting as a reference amount the 120% of the minimum income of a worker aged 23 does not meet the objective of Article 7 (1) (c) of the Family Reunification Directive as the latter refers to ‘(...) social assistance (...) which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed’⁶⁰⁰. Therefore, the CJEU concluded that Article 7 (1) (c) should be interpreted as precluding Member States from adopting rules which would refuse family reunification to a sponsor who has a stable income to cover regular but not exceptional and individually determined needs⁶⁰¹.

As regards the second question, the Dutch Government argued that the distinction between establishment of a family and family reunification is in line with Article 17 of the Family Reunification Directive which requires Member States to take due account of the nature and solidity of the person’s family relationships. The Dutch Government further argued that as a general rule, the family relationship is less intense in cases of family formation than in cases of family reunification and therefore a different treatment is justified.

Nonetheless, these arguments did not seem to convince the CJEU which based its judgment both on the wording of the Family Reunification Directive and on the ECHR and the ECFR. In particular, recital 6 of the preamble of the Directive provides that ‘[t]o protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria’. In addition, according to the CJEU’s view Article 8 of the ECHR and Article 7 of the ECFR do not draw any distinction between families which were formed before or after the sponsor’s entry into the

⁵⁹⁸ §32

⁵⁹⁹ §53

⁶⁰⁰ §49

⁶⁰¹ The Directive seems to also preclude national rules such as those which concern disproportional fees for visas and residence permits or certain rules concerning integration tests before entry. See K. Groenendijk, ‘Family Reunification as a Right Under Community Law’ (2006) 8 *European Journal of Migration and Law* 215-230

host Member State. Therefore, the CJEU concluded that the Family Reunification Directive must be interpreted as precluding national legislation from distinguishing when applying the stable and regular resources requirement of Article 7 (1) (c) according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.

Independently of the way the CJEU answered the two preliminary ruling questions, we consider the most important finding of the judgment to be contained in paragraph 43, where the CJEU stated that family reunification constitutes the general rule of the Directive, that any restrictions should be interpreted strictly and that the margin of appreciation should not be used by Member States in a way that would undermine the objective of the Family Reunification Directive which is to promote reunification:

‘Since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof’.

We are of the opinion that this finding was not obvious before the adoption of the said judgment and concerns not only the requirement for regular and stable resources but all restrictions included in the Directive. Indeed, several scholars are of the opinion that the entire Family Reunification Directive should be read in light of the principles provided for in paragraph 43 of the *Chakroun* case (cited above)⁶⁰².

Next, the issue of the stable and regular resources was discussed by the CJEU in the joint cases *O et S* and *L*⁶⁰³ as well. The facts of the two cases are similar and concern third-country nationals who held the right of permanent residence in Finland and each of them had the exclusive custody of an EU minor from previous marriages with Finnish nationals. In both cases, the third-country nationals entered into a new marriage with a third-country national with whom they had children who were third-country nationals as well. Subsequently, the new spouses applied for a residence permit with the procedures of family reunification and their applications were refused on the ground that they did not have secure means of subsistence. The questions referred to the CJEU primarily concerned the issue whether the spouses could

⁶⁰² See, among others, S. Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford, Oxford University Press, 2011) p. 461 and J. Hardy, ‘The Objective of Directive 2003/86 is to Promote the Family Reunification of Third Country Nationals’ (2012) 14 *European Journal of Migration and Law* 439–452 p. 443

⁶⁰³ Joint Cases C-356/11 and C-357/11 *O. and S. v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L.* (published in the electronic Reports of Cases)

acquire a right to stay in Finland given that their wives had the exclusive custody of an EU citizen. However, the CJEU referred to the Family Reunification Directive as in its view the circumstances of the cases should be considered in light of the provisions of this legal instrument. For the purposes of this Chapter of the dissertation, the analysis of the judgment will be focused on the interpretation of the Family Reunification Directive.

To start with, the CJEU stated that the mere fact that the sponsor is also a parent of an EU citizen born from a previous marriage does not preclude the application of the Family Reunification Directive. In that respect, the CJEU held that it is the sponsor that should meet the conditions laid down in Article 7 of the Family Reunification Directive and not the family members with whom family reunification is sought. Furthermore, the CJEU noted that the discretion given to Member States in relation to the conditions provided for in Article 7 should be exercised in a way that does not undermine the objectives of the Directive and in line with fundamental rights as guaranteed by the ECHR and the ECFR. In particular, Member States should respect Article 7 of the ECFR and have due regard to the best interest of the child. It concluded that ‘[i]t is for the competent national authorities, when implementing Directive 2003/86 and examining applications for family reunification, to make a balanced and reasonable assessment of all the interests in play, taking particular account of the interests of the children concerned’⁶⁰⁴.

The judgment is particularly important for several reasons. First, the CJEU repeated the principle that since in the relationship between the sponsors and their spouses and children in common falls within the scope of Article 4 (1) of the Family Reunification Directive, Member States are in principle obliged to authorise family reunification without being given any margin of appreciation⁶⁰⁵. Indeed, Article 4 does not leave Member State any margin of appreciation with regards to family reunification with the spouse and the minor child. Second, the Finnish immigration authorities erred in taking into consideration the income of the spouses instead of the income of the sponsors, as it clearly provided for in the wording of Article 7 of the Directive. Third, Article 7 (1) (c), which is undoubtedly one of the most controversial provisions of the Directive, as well as the discretion afforded to Member States through that provision should be interpreted and implemented by the Member States in light of Article 7 and Article 24 (2) and (3) of the ECFR. This does not mean that Member States

⁶⁰⁴ §81
⁶⁰⁵ §70

are deprived the above mentioned discretion but when they exercise it, they should try to strike a fair balance between the involved interests, paying special attention to the right to respect for family life and the best interest of the child⁶⁰⁶.

3.2.1.4 Integration conditions vs. integration measures

There are two requirements in the Family Reunification Directive that refer to integration. The first one provides that Member States may, before authorising entry and residence of an over 12 years child who arrives independently from the rest of his-her family, verify whether s/he meets a condition for integration⁶⁰⁷ and the second one that Member States may require family members to comply with integration measures⁶⁰⁸. To start with, we believe that the final subparagraph of Article 4 (1) does not seem to raise particular issues of interpretation as the legislature clearly speaks about a ‘condition for integration’ which in case not met, the application for reunification is rejected. This provision is mostly criticised for its actual content. On the contrary, Article 7 (2) appears more controversial as regards the exact time of the procedure that these measures may be imposed. The analysis of the AG’s opinion in *Dogan* (cited above) and the CJEU’s judgment in *K. and A.*⁶⁰⁹ made below will help us clarify these issues⁶¹⁰.

Before analysing the relevant case law with regards to these requirements, it should be noted that the Commission in its guidance for the application of the Family Reunification Directive states that the integration measures of Article 7 (2) of the Family Reunification Directive do not constitute an absolute condition upon which family reunification is dependent. Although Member States are authorised by the Directive to require family members to show some willingness to integrate, by following language or integration courses in the country of origin, they may not refuse entry or residence on the sole ground that the family member has failed an integration exam. In addition, the Commission states that:

‘(...) language and integration courses should be offered in an accessible way (available in several locations), be free or at least affordable, and tailored to individual needs, including

⁶⁰⁶ It should be noted that there is another case regarding the notion of ‘stable’ and ‘regular’ resources pending before the CJEU (Case C-558/14 *Khachab*)

⁶⁰⁷ Final subparagraph of Article 4 (1) of the Family Reunification Directive

⁶⁰⁸ Article 7 (2) of the Family Reunification Directive

⁶⁰⁹ Case C-153/14 *K. and A. v. Minister van Buitenlandse Zaken* (not yet reported)

⁶¹⁰ For a more detailed analysis of the certain case see G. Milios, ‘Family Reunification for Third-Country Nationals: Minimum Age for Spouses, Integration Measures and the Application of the Individual Assessment. Comments on *Noorzia* and *Dogan*’ (2015) 17 *European Journal of Migration and Law* 127-146

gender specific needs (e.g. childcare facilities). While pre-departure integration measures may help prepare migrants for their new life in the host country by providing information and training before migration takes place, integration measures may often be more effective in the host country⁶¹¹.

As regards the CJEU’s case law, we consider it appropriate to start the analysis with the case *Dogan*, as this was the first case which dealt with this issue. In *Dogan*, Mrs. Dogan, a Turkish national applied to the German Embassy in Turkey in order to reunify with her husband who was also a Turkish national living in Germany. The applicant submitted a certificate of knowledge of the German language which stated that she had passed the A1 exam with a grade 62/100. The German Embassy rejected the application on the ground that the applicant, being illiterate, had passed the exam by luck and therefore the requirement for a basic knowledge of the German language was not fulfilled. In these circumstances, the CJEU was asked to consider whether a provision of national law which provides that the admission of a family member of a third-country national is made conditional upon the submission of evidence that this family member has basic knowledge of the language of the Member State concerned, violates Article 7 (2) of the Family Reunification Directive.

AG Paolo Mengozzi pointed out that the second subparagraph of Article 7 (2) of the Family Reunification Directive clearly provides that the integration measures of the first subparagraph of Article 7 (2) may only be applied in case of refugees, once the family members have been granted family reunification. Therefore, from *a contrario* interpretation of the provision, it follows that the integration measures referred to in Article 7 (2) may also be applied before admission in case of third-country nationals who do not have the refugee status.

However, the AG went on to consider what the exact meaning of ‘integration measures’ of Article 7 (2) is. In that respect, the AG noted that the term ‘integration measures’ should be distinguished from the term ‘integration conditions’. In his view a comparison between the first and the second paragraph of Article 7 reveals that although according to the first paragraph the family member is required to provide evidence that the sponsor meets the conditions referred to therein, such evidence is not required with regards to the integration measures referred to in the second paragraph. The AG further noticed that the last subparagraph of Article 4 (1) of the Family Reunification Directive clearly speaks about ‘integration conditions’ whereas Article 7 (2) refers to ‘integration measures’, terminology

⁶¹¹ COM(2014) 210 final, at 4.5.

which has not been picked up randomly by the EU legislature. The AG concluded that even though the integration measures of Article 7 (2) can be applied before admission, they merely aim at facilitating the integration of the family member in the host Member State and they do not constitute a condition for admission.

Moreover, the AG underlined that the national law should provide for an individual assessment of each case and should take into consideration other relevant factors such as disability, age, illiteracy and educational level which may result in the family member not being able to provide the relevant language certificate. In the present case, requiring Mrs. Dogan to prove knowledge of the German language should be regarded as a disproportionate measure to the objectives of the Directive, taking into consideration Mrs. Dogan’s age and the fact that she was illiterate. Taken into account all of the above, the AG concluded that a national legislation of a Member State which makes the admission of a family member conditional upon the submission of evidence that this family member has basic knowledge of the language of that Member State, without allowing for the possibility of exceptions based on individual assessment of the ongoing application and without taking into consideration all the relevant circumstances of each case, contravenes Article 7 (2) of the Family Reunification Directive.

It should be noted that the CJEU decided to not answer the question which concerned the Family Reunification Directive and limited its ruling on the interpretation of the standstill clause of the EU Association Agreement with Turkey. In particular, after finding that the requirement that family members of Turkish nationals should demonstrate beforehand that they acquire basic knowledge of the language of the Member State concerned infringes the Association Agreement contracted between the EU and Turkey, the CJEU did not consider it necessary to rule on whether the same requirement violates the Family Reunification Directive as well. In that respect, it should be noted that although the judgment can be characterised, at first sight, as favourable towards the third-country national, the CJEU was then criticised for losing a significant opportunity to interpret a crucial provision of the Family Reunification Directive which would affect not only Turkish nationals but any third-country national residing in the EU⁶¹².

⁶¹² For this critique see G. Milios, ‘Family Reunification for Third-Country Nationals: Minimum Age for Spouses, Integration Measures and the Application of the Individual Assessment. Comments on *Noorzia and Dogan*’ (2015) 17 *European Journal of Migration and Law* 127-146

This interpretation came a bit later with the recently decided *K. and A.* (cited above), a Dutch case which concerns Article 7 (2) of the Directive as well. In the present cases, both applicants applied for family reunification alleging that they suffered from health problems which made it impossible for them to take the integration exam outside the Netherlands and before entry was authorised. The preliminary ruling questions, in essence, concerned the issue whether Member States may require the third-country family member to pass an integration examination which entails the payment of various costs before authorising entry into that Member State for the purposes of family reunification.

In answering the preliminary ruling question, the CJEU repeated some principles which have been previously mentioned in judgments concerning the Family Reunification Directive such the ‘*Chakroun* principal’ that family reunification constitutes the general rule and that the restrictions should be interpreted strictly. This principal becomes according to the CJEU’s view applicable also to the ‘integration measures’ referred to in Article 7 (2). In particular, the CJEU highlights that although Member States may impose these integration measures before admission to their territory, the legitimacy of the measures depends on whether they actually facilitate the integration of family members in the host state. The integration measures cannot aim at ‘filtering’ those who will be accepted for reunification⁶¹³ and are not considered legitimate in case of family members who ‘(...) despite having failed the integration examination, they have demonstrated their willingness to pass the examination and they have made every effort to achieve that objective’⁶¹⁴.

Furthermore, the CJEU went on to underline the importance of the individual circumstances of each case, ‘(...) such as the age, illiteracy, level of education, economic situation or health’⁶¹⁵ of a sponsor’s relevant family members, stating that they should be taken into consideration in order for family members to be exempted from the requirement to pass an integration test, in line with Article 17 of the Family Reunification Directive. Finally, the CJEU found that the related to the integration test procedure costs, which amounted to 110 Euros for examination preparation pack and 350 Euros for the course fee, were capable of making family reunification impossible or particular difficult to achieve and therefore they were not compatible with the Directive. The CJEU reached this conclusion considering that

⁶¹³ §57

⁶¹⁴ §56

⁶¹⁵ §58

these costs had to be paid again every time the family member would retake the relevant examination.

It should be mentioned that the CJEU’s judgment in the present case is in line at least to a certain degree with the AG’s opinion in *Dogan* (cited above) and is convincing and consistent with the CJEU’s prior case law concerning the Family Reunification Directive. It is highly important that the CJEU repeats that the aim of the Directive is to facilitate reunification and underlines that the individual assessment should play an important role in decisions regarding Article 7 (2) as well. As regards the distinction between ‘integration measures’ and ‘integration conditions’, the CJEU is of the view that the integration measures of Article 7 (2) do not constitute requirements in the sense that a failure to a test may directly lead to a rejection of the application for family reunification. This approach seems reasonable according to all that has been exposed above and has been supported by the majority of the scholars⁶¹⁶ in EU immigration law long before the adoption of the said judgment. On the downsides of the judgment the fact that the CJEU does not refer to Article 7 of the ECFR but limits its judgment to the interpretation of the provision of the Directive which was at stake⁶¹⁷. This issue is analysed in detail in the conclusions of the dissertation.

3.2.1.5 The minimum age requirement for spouses

The Family Reunification Directive provides that ‘[i]n order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her’⁶¹⁸. This provision has been discussed above in the framework of the concept of the family under the Directive but its analysis in this Part of the dissertation is necessary as except for limited the definition of family members, it constitutes a clear condition which may implemented by the Member States.

As regards the minimum age of the spouses, the Commission in its guidance underlines that the provision should be interpreted taking into consideration the aim of the provision which is

⁶¹⁶ See, among others, K. Groenendijk, ‘Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?’ (2011) 13 *European Journal of Migration and Law* 1-30

⁶¹⁷ There is a third case pending before the CJEU regarding integration measures, the C-527/14 *Oruche*. The case concerns the integration measures of the German legislation and their compatibility with the Family Reunification Directive.

⁶¹⁸ Article 4 (5) of the Family Reunification Directive

to prevent forced marriages and ensure better integration⁶¹⁹. In that regard, the Commission notes that Member States must conduct an individual examination of the applications for family reunification and must not set an age limit under which all applications would be rejected. The age of the spouses is only one of the relevant factors which should be taken into account and when the individual assessment shows that the justification grounds are not applicable, Member States should not reject an application for family reunification on the mere ground that the spouses have not reached the minimum age provided for in the national legislation. This may be the case when the spouses have children in common. Furthermore, the Commission notes that in line with the literal interpretation of Article 4 (5) of the Family Reunification Directive, the age limit should be reached by the date of the effective family reunification and not by the date on which the application is lodged.

The CJEU has already ruled on the latter issue in *Noorzia*⁶²⁰. In the present case⁶²¹, Mrs. Noorzia applied for a residence permit in order to reunify with her husband who lived in Austria. Her application was rejected as, although her husband was 21 years old at the time the decision regarding the issue of the residence permit was made, he was under that age at the time Mrs. Noorzia lodged the application for family reunification. Indeed, the Austria law imposed a minimum age requirement for spouses, explicitly providing that both spouses should be at the age of 21 at the time the application is submitted and not at the time the decision regarding family reunification is made. In these circumstances, the CJEU was asked to consider whether this provision of the Austrian immigration law violated Article 4 (5) of the Family Reunification Directive.

Starting up with the AG’s opinion, it should be noticed that the AG based his opinion on a literal, teleological and a systematic interpretation of the said provision of the Directive. According to the literal interpretation, since the spouse may only be ‘able to join’ the sponsor at the time the decision regarding the application for family reunification is made, the age requirement should be fulfilled at that time and not at the time the application is lodged. As regards the teleological interpretation, the AG noted that the aim of the provision is to prevent forced marriages. In that respect, the AG in principle accepted that requiring the spouses to be of a minimum age is a measure that may help in the prevention of forced marriage.

⁶¹⁹ COM(2014) 210 final, at 2.3.

⁶²⁰ Case C-338/13 *Marjan Noorzia v. Bundesministerin für Inneres* (not yet reported)

⁶²¹ For a more detailed analysis of the certain case see G. Milios, ‘Family Reunification for Third-Country Nationals: Minimum Age for Spouses, Integration Measures and the Application of the Individual Assessment. Comments on *Noorzia* and *Dogan*’ (2015) 17 *European Journal of Migration and Law* 127-146

Nevertheless, he noted that the provision should also respect the right of two adults who have conducted a genuine marriage to enjoy family life pursuant to the ECHR and the ECFR. Balancing the two interests, the AG concluded that it is more consistent with the aim of the legislature to require the spouses to be at a minimum age at the time the decision regarding the application for family reunification is made. Lastly, as regards the systematic interpretation, the AG noted that throughout the entire Directive, when the legislature desired the time limit to be set at the date on which the application is submitted, it did so explicitly. Therefore, since no such reference is made in the provision at hand, the legislature’s aim was to set the time limit at the date on which the decision on the application is made.

In its judgment, the CJEU adopted an entirely different approach. In its view, by not specifying on the exact date on which the condition should be met, the EU legislature intended to leave a margin of appreciation to the Member States. Furthermore, the CJEU noted that setting the crucial deadline at the date on which the application is made does not prevent or make the right to family reunification excessively difficult to exercise, is consistent with the purpose of preventing forced marriages and with the principles of equal treatment and legal certainty, as in this way the exercise of the right to family reunification depends on circumstances which relate to the immigrant and not to the length of time that the administration may need in order to make the decision regarding the application. The CJEU concluded that setting the minimum age requirement at the date on which the application is made does not infringe the Family Reunification Directive.

It should be noted that the CJEU’s judgment in *Noorzia* (cited above) is inconsistent with its prior case law and lacks convincing argumentation. To start with, the teleological interpretation made by the CJEU is rather problematic as it merely takes into consideration the aim of preventing forced marriages and does not consider the aim of better integration which is the second of the two aims pursued by the provision. In that respect it should be mentioned that long separations are in fact likely to damage integration instead of strengthening it. In addition, even with regards to the aim of the prevention of forced marriages the CJEU’s approach appears rather one-sided, as it solely takes into account the fact that the spouse who has reached the age of 21 by the date on which the application is made is less likely due to his/her maturity to enter into a forced marriage than a spouse who has reached the same age by the date on which the decision on the application is made. In that respect, it should be mentioned that in its reasoning the CJEU fails to consider the right of young couples who

have contracted a genuine marriage to live together and enjoy family life. Therefore, it should be concluded that the CJEU should have dealt with the question at hand taking all factors into consideration and trying to strike a fair balance between the interests at stake.

Not least, the judgment in *Noorzia* (cited above) is inconsistent with the principles established in the CJEU’s previous case law, namely the finding that the limitations to the right to family reunification should be interpreted strictly and that the provisions of the Family Reunification Directive should be interpreted in light of the fundamental rights and more importantly in the right to respect for family life as guaranteed by Article 8 of the ECHR and Article 7 of the ECFR. Indeed, in the present judgment, the CJEU makes a strict interpretation of a restriction on the right to family reunification provision and does not consider whatsoever to what extent this interpretation is in line with the married couples’ right to family life.

3.2.1.6 Proof of the existence of the family relationship and travel documents

The application for family reunification should be accompanied by ‘documentary evidence of the family relationship (...) as well as certified copies of family member(s)’ travel documents’⁶²². As regards the verification of the existence of the family relationship, all that has been discussed in Chapter 3.1.1 becomes applicable. As regards the travel document, the submission of a valid passport will in all cases be sufficient for this requirement to be fulfilled.

3.2.1.7 The application of the individual assessment and the best interest of the child

It should be mentioned that there are two provisions of the Family Reunification Directive which become particularly relevant in case the third-country national is not able to fulfil some of above mentioned requirements. First, the Directive provides that 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 where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family’⁶²³.

Second, pursuant to Article 5 (5), ‘[w]hen examining an application, the Member States shall have due regard to the best interests of minor children’.

⁶²² Article 5 (2) of the Family Reunification Directive

⁶²³ Article 17 of the Family Reunification Directive

Our opinion with regards to the importance of the application of these provisions is discussed in detail in the conclusions of the dissertation. For the purposes of the present section it is worth highlighting that the Commission in its guidance for the application of the Family Reunification Directive is of the opinion that when Member States require a third-country national to submit evidence for the fulfilment of certain conditions, they should not automatically reject an application on the sole ground that one of the requirements is not fulfilled but should take into account other relevant factors, such as:

‘(...) the nature and solidity of the person’s family relationships; the duration of his/her residence in the MS; the existence of family, cultural and social ties with his/her country of origin; living conditions in the country of origin; the age of the children concerned; the fact that a family member has been born and/or raised in the MS; economic, cultural and social ties in the MS; the dependency of family members; the protection of marriages and/or family relations’⁶²⁴.

3.2.2 The conditions for family reunification in national legislation

3.2.2.1 Spain

In Spain, the general rule is that in order for the sponsor to submit the application for family reunification, s/he shall hold a residence permit of a minimum of one year of duration and should have applied for a permit to reside in Spain for at least one more year⁶²⁵. Nevertheless, the third-country national shall have the status of a long-term resident or be a long-term resident in another EU Member State in order to have his/her ascendants or those of his/her spouse or partner joining him/her⁶²⁶. In particular, the application for family reunification with the ascendants can be submitted, when the third-country national has applied for the long-term residence or the EU long-term residence⁶²⁷.

Next, the sponsor should prove to have sufficient resources in order to be able to cover the needs of his/her family and sickness insurance for his/her family members in case the latter are not covered by the Spanish social security system⁶²⁸. In practice, the sufficient resources are proven through an employment contract. For the calculation of these resources, it is taken into consideration the number of family members that the sponsor wishes to reunify with, as

⁶²⁴ COM(2014) 210 final, at 7.4.

⁶²⁵ Article 18 (1) of the Immigration Act and Article 56 (1) of the Immigration Regulation

⁶²⁶ First subparagraph of Article 18 (1) of the Immigration Act and first subparagraph of Article 56 (1) (a) of the Immigration Regulation

⁶²⁷ Second subparagraph of Article 56 (1) (b) of the Immigration Regulation

⁶²⁸ Article 18 (2) of the Immigration Act and Article 54 of the Immigration Regulation

well as the number of family members that already live with the sponsor in Spain and are dependent on him/her⁶²⁹. Not least, it should be noted that the income deriving from the social assistance system does not count in the calculation of the minimum resources⁶³⁰. However, the income of the spouse or partner, as well as the one of the regularly residing first degree family members in the direct line, can be taken into account, on the condition that the above mentioned family members reside regularly in Spain and live with the sponsor⁶³¹.

On the contrary, it can be assumed that the income of the family members with whom the sponsor wishes to reunite is not taken into account for the calculation of the sufficient resources requirement. This can be deduced by the wording of Article 54 (4) of the Immigration Regulation which refers to the income which is provided by persons who are related to the sponsor. Presumably, the family member’s income is not taken into consideration as the latter is expected to lose this income once s/he leaves the country of origin. Nevertheless, we are of the opinion that public authorities should take into consideration the income that this family member may be expected to receive after family reunification takes place. Examples of this kind of income may be the one deriving from property or a court’s order after a divorce.

The monthly minimum resources should represent the 150% of the IPREM⁶³² in case of family unities of two persons including the sponsor, amount which is increased by 50% of the IPREM for every additional family member. It is noteworthy that the sponsor should not only prove to have the above mentioned financial resources at the moment of the submission of the application but also that there is the perspective of maintenance of these resources for one year starting from the date on which the application is lodged. The assessment of the perspective resources shall be based on the evolution of the resources of the sponsor in the last 6 months before the date on which the application is submitted⁶³³.

The Spanish legislature provides that the minimum resources can be inferior to the ones analysed above in case the family member is a minor and when there are exceptional

⁶²⁹ Article 54 (1) of the Immigration Regulation

⁶³⁰ Articles 18 (2) of the Immigration Act and 54 (4) of the Immigration Regulation

⁶³¹ Article 54 (4) of the Immigration Regulation

⁶³² IPREM (Indicador Público de Renta de Efectos Múltiples) is an official index which indicates a basic income level which is used in Spain as a criterion. The IPREM for 2016 has been set at 532, 51 Euros per month.

⁶³³ First subparagraph of Article 54 (2) of the Immigration Regulation

circumstances that require this deduction on the basis of the best interest of the child⁶³⁴. Likewise, the minimum resources may be inferior to the ones provided for in relation to family reunification with other relatives for humanitarian reasons⁶³⁵. It should be noted that the concept of ‘humanitarian reasons’ is rather vague and leaves a wide discretion to immigration authorities as to its interpretation.

At the moment the application for family reunification is lodged, the sponsor should also prove to have adequate accommodation in order to cover the necessities of his/her family⁶³⁶. The issue of the report which concerns the accommodation is a competence of the Spanish Autonomous Communities or of the Local Corporation of the place where the sponsor resides⁶³⁷. The Autonomous Community or Local Corporation should notify the sponsor within a maximum of 30 days and transfer the report to the competent Immigration Office⁶³⁸. In case the report has not been issued by the competent authority within 30 days, it is possible for the sponsor to prove the accommodation requirement by any means admitted in law⁶³⁹. In any event, the report or the document that is being presented should include the following information: certificate of housing occupancy, number of rooms, intended use of each of the housing units, number of persons that already live in the apartment and housing condition and equipment⁶⁴⁰.

It should be mentioned that according to the Instruction of the General Directorate of Immigration⁶⁴¹, the document which proves the existence of the accommodation may refer to the immigrant who is the sponsor of the right to family reunification or to any other of the family members referred to in Article 17 of the Immigration Act⁶⁴². The above mentioned Instruction clarifies to the right direction the requirement for adequate accommodation, as the crucial point is the existence of an accommodation which would be appropriate for the necessities of the family and not whether this accommodation is in fact rented or owned by the sponsor.

⁶³⁴ Article 54 (3) of the Immigration Regulation

⁶³⁵ Second subparagraph of Article 54 (3) of the Immigration Regulation

⁶³⁶ Article 18 (2) of the Immigration Act and Article 55 of the Immigration Regulation

⁶³⁷ Article 55 (3) of the Immigration Regulation

⁶³⁸ First subparagraph of Article 55 (2) of the Immigration Regulation and second subparagraph of Article 55 (3) of the Immigration Regulation accordingly

⁶³⁹ Article 55 (4) of the Immigration Regulation

⁶⁴⁰ First subparagraph of Article 55 (5) of the Immigration Regulation

⁶⁴¹ Instruction of the General Directorate of Immigration of June 2011 regarding the adequate accommodation in a family reunification procedure-DGI/SGRJ/4/2011

⁶⁴² First provision of the Instruction DGI/SGRJ/4/2011

Lastly, it should be noted that no integration measures to family members or integration conditions to the over 12-year old child has been imposed by the Spanish legislature. The legislation does also not require the spouses to be of a minimum age before reunification may take place.

3.2.2.2 Greece

In Greece, the first of the applicable conditions for family reunification is that the sponsor should hold a residence permit for a period of validity of two years⁶⁴³. In that respect, it is outlined that the Law 4251/2014 has modified as to the stricter the relevant provision of the Presidential Decree 131/2006 which was the applicable legal instrument in cases of family reunification before the adoption of the new Immigration Law and required a residence permit of one-year validity period⁶⁴⁴. Even if more restrictive, the new wording of Article 69 (1) of the Immigration Law does not appear to infringe Article 3 of the Family Reunification Directive which speaks about a residence permit issued for a period of validity of one year or *more*. This condition in practice means that third-country nationals who reside in Greece and hold a residence permit issued for shorter periods are excluded from the right to family reunification. Furthermore, the said residence permit should give reasonable prospects of obtaining the right of permanent residence⁶⁴⁵. The provision excludes third-country nationals who hold residence permits with a renewal limit or others that do not lead to a long-term residence status.

Next, the Greek legislature imposes a requirement of two years of prior lawful residence⁶⁴⁶. The literal interpretation of Article 70 (1) of the Immigration Law brings us to the conclusion that in case the family is established after the third-country national has resided lawfully in Greece for two years, s/he may reunify with his/her family members immediately without the need of passage of another two years, in line with what it has been discussed above in the analysis of the relevant provision of the Directive.

In addition, the sponsor should prove to have stable and regular resources, a sickness insurance that covers all risks for him/her and his/her family members and suitable

⁶⁴³ Article 69 (1) of the Immigration Law

⁶⁴⁴ See Article 3 (1) of the Decree 131/2006

⁶⁴⁵ Article 69 (1) of the Immigration Law

⁶⁴⁶ Article 70 (1) of the Immigration Law

accommodation in order to cover his/her needs and those of his/her family members⁶⁴⁷. As regards the regular and stable resources, these cannot derive from the social assistance system and cannot be inferior to the minimum wage according to the national legislation⁶⁴⁸, being increased by 20% for the spouse and 15% for each one of the children. This increase does not apply in case both spouses reside regularly in Greece. It should certainly be underlined that this amount should be adaptable to the changes to the minimum wages that occur in the Greek labour system. In fact, it is not hard to assume that in the current unstable economic situation, third-country nationals face particular difficulties in satisfying this requirement, especially taking into consideration the minimum wage is increased significantly depending on the number of family members who seek entrance. The flexibility with regards to this requirement is necessary, as otherwise there is a serious risk that reunification becomes in many cases impossible to exercise.

As regards integration measures, the following observations should be made. To start with, it should be noted that the Immigration Law contains a provision which was not provided for in the applicable to family reunification cases legislation before. In particular, Article 70 (1) provides that any possible stay of the family members in the Greek territory before the submission of the application does not constitute an obstacle and the application for the issue of the entry visa is examined in case the family members meet integration conditions. The applicable criteria for the finding that the third-country family members meet the said integration condition are regulated by the Decision 58211/2014 of the Ministries of foreign affairs, home affairs and public order.

In particular, according to this Decision the integration conditions refer to: a) the legal entry to Greece, b) the length of the family member’s residence in Greece, c) the intention of regularising irregular stays, which may be proven by an application to join regularisation programmes, d) special characteristics of the family member such as age, profession or educational level that may help his/her better integration, e) adequate knowledge of the Greek language, f) the fact that the child has been born in Greece, g) the fact that the child has attended school in Greece, h) the nature and solidity of the person’s family relationships, the existence of loose family, cultural and social ties with his/her country of origin and the

⁶⁴⁷ Article 70 (2) of the Immigration Law

⁶⁴⁸ The minimum income which is currently taken into account for the calculation of the sufficient resources is 586,08 Euros per month for sponsors who are older than 25 and 510, 95 Euros per month for sponsors who are younger than 25. See Instructions 41301/2014 of the Ministry of Interior on the application of the Law 4251/2014.

participation in the cultural and social life of the country and i) elements of the sponsor’s professional and economic activity and his/her participation in social activities that constitute indication of integration to the social life of the country, the acceptance of the political, economic and social life of Greece and Europe and the intention to reside permanently in the country. As regards the last point, elements that should be taken into account are: the knowledge of the Greek language, attendance at a Greek school of any educational level, long regular residence in the country, fulfilment of tax and insurance obligations, the acquisition of property, the economic status and the participation in social organisations and collective entities.

It should be noticed that the same decision provides that it is not required that all the above criteria are fulfilled, in case for the application for family reunification to be admitted. The public authorities should make an individual assessment of each case taking into account the importance of each of the requirements which are fulfilled.

It should be noted that at first sight the above discussed provision is a welcomed development as it was established administrative practice before the adoption of the Immigration Law of 2014, to reject applications for family reunification in case the family members had already been in Greece in an irregular administrative situation⁶⁴⁹. It should be clarified that the previous Immigration Law did not provide that an irregular stay may lead to a rejection of the application and therefore it can be assumed that the new provision in fact ‘amends’ an administrative practice rather than a legal provision included in the previous Immigration Law. In any event, it appears that the provision concerns first and foremost the sponsor’s spouses who entered in the past hoping that they would achieve regularisation and after failure to be included in a regularisation program they were denied family reunification as they had entered and stayed irregularly in Greece. It may also become applicable to spouses of regular immigrants who being in an irregular situation themselves, they gave birth to their child in Greece and were later on refused reunification as they had been detected in an irregular situation when they gave birth to the child.

⁶⁴⁹ Θ. Τσιάτσιος, *Δίκαιο Αλλοδαπών: Κατ’ άρθρο ερμηνεία του νόμου 3907/2011 υπό το πρίσμα του Κώδικα Μετανάστευσης και Κοινωνικής Ενταξής (Ν. 4251/2014)* (Αθήνα/Θεσσαλονίκη, Εκδόσεις Σάκκουλας, 2014) (Τ. Tsiatsios, Immigration law: Article interpretation of law 3907/2011 in light of the law on Migration and Social Integration (4251/2014))

Regardless of all the above, the provision is for several reasons problematic as far as its compatibility with Article 7 (2) of the Family Reunification Directive is concerned. First, the Greek legislature has chosen the term ‘condition for integration’ («κριτήρια ένταξης») instead of ‘integration measures’ («μέτρα ένταξης») as provided for by the relevant Directive. Second, the wording of Article 70 (1) of the Immigration Law suggests that the Greek authorities are required to assess whether the family members meet this condition for integration in order for the application for family reunification to be accepted. It becomes apparent that we are speaking about a prerequisite for family reunification which is not compatible with the content of Article 7 (2) of the Family Reunification Directive. Third, the relevant provisions do not take into consideration the individual circumstances of each case, in line with the case law of the CJEU on this issue, and are likely to make family reunification in some cases impossible to exercise.

Lastly, the Greek legislature has imposed a minimum age requirement which is set at 18 and concerns, as mentioned above, only the spouse and not the sponsor.

3.2.2.3 Germany

In Germany, the legislature appears rather favourable with regards to the residence permit which is suitable for family reunification as it merely requires a settlement permit or a residence permit. Indeed, Article 29 (1) of the Residence Act does not provide that the residence permit should be of a certain validity period or that it should give access to permanent residence. This being said, certain third-country nationals who in other Member States would have not been allowed family reunification due to the period of validity of their permit or because they do not have the prospects of obtaining the right of permanent residence, may qualify for the said right in Germany.

As regards the requirement for a prior lawful residence, it should be noted that the applicable rules depend on whether the marriage was concluded before or after the sponsor was admitted to Germany. Indeed, Article 30 (1) 3 d of the Residence Act provides that the sponsor should have held the residence permit for at least two years before s/he is able to exercise the right to family reunion in case the marriage was concluded after his/her admission to Germany. On the contrary, the two-year prior lawful requirement does not apply if the marriage already existed at the time the residence permit was granted and the duration of the sponsor’s stay in

Germany is expected to exceed one year⁶⁵⁰. As far as reunification with minor children is concerned, it should be noted that the sponsor shall only hold a residence permit without being required to fulfil a prior lawful residence requirement⁶⁵¹.

As regards the material conditions, it should first be noted that Germany has implemented all three requirements provided for by the Family Reunification Directive, namely sufficient resources, sickness insurance and accommodation. The first two requirements have their basis on a general provision of the Residence Act which provides that for the issue of a residence permit the foreigner’s subsistence should be secured⁶⁵². According to Article 2 (3) of the Residence Act, a foreigner’s subsistence is considered secure when s/he is able to earn a living, including adequate health insurance coverage, without recourse to public funds. As regards sufficient resources, it should be remarked that Germany has not set a fixed amount of resources with the main requirement being that the sponsor is not reliant on benefits in accordance with Book Two or Book Twelve of the Social Code⁶⁵³. The assessment differs among the different federal states⁶⁵⁴. The age, profession or health situation of the applicant are factors which are normally taken into consideration when assessing whether the sufficient resources requirement is fulfilled in each case⁶⁵⁵. In general, contribution to the household from other family members shall be taken into account for the issuance or renewal of the residence permit⁶⁵⁶.

The ‘German approach’ departs considerably from the one adopted in Spain and Greece but also to the majority of the EU Member States⁶⁵⁷ which require a fixed amount of resources in order for family reunification to take place. In that respect, it should be noted that there is both a positive and a negative aspect regarding the approach adopted in Germany. On the one hand, not setting a fixed amount facilitates a correct and more flexible application of the individual assessment which as seen above is an obligation deriving from the Family Reunification Directive. Indeed, in case there exists in the relevant law a fixed amount of

⁶⁵⁰ See Article 30 (1) 3 e of the Residence Act

⁶⁵¹ See Article 32 (1) of the Residence Act

⁶⁵² Article 5 (1) 1 of the Residence Act

⁶⁵³ Article 27 (3) of the Residence Act

⁶⁵⁴ See K. Groenendijk, R. Fernhout, D. Van Dam, R. Van Oers and T. Strik, *The Family Reunification Directive in EU Member States: The First Year of Implementation* (Nijmegen, WLP, 2007)

⁶⁵⁵ Comparative study on the implementation of the Family Reunification Directive 2003/86/EC in (25) Member States-Germany, Radboud University Nijmegen, Centre for Migration Law (available online at <http://cmr.jur.ru.nl/cmr/qs/family/Germany/>)

⁶⁵⁶ See Article 2 (3) of the Residence Act

⁶⁵⁷ See K. Groenendijk, R. Fernhout, D. Van Dam, R. Van Oers and T. Strik, *The Family Reunification Directive in EU Member States: The First Year of Implementation* (Nijmegen, WLP, 2007)

resources, public authorities often use it as a threshold and reject all applications for family reunification that do not reach this threshold. On the contrary, the ‘German system’ may encourage immigration authorities to conduct the individual assessment in a more comprehensive way and give the factors of Article 17 of the Family Reunification Directive an appropriate weight. On the other hand, the same system may provoke uncertainty to third-country nationals who wish to exercise their family reunion right and/or give public authorities excessive discretion to evaluate whether the requirement is fulfilled. These arguments are analysed in greater detail in the conclusions of the dissertation.

As for the condition of suitable accommodation, it is mentioned that Article 29 (1) 2 of the Residence Act provides that the sponsor should have sufficient living space. Furthermore, pursuant to Article 2 (4) of the Residence Act, ‘sufficient living space’ is considered:

‘[t]he space which is required to accommodate a person in need of accommodation in state-subsidised welfare housing (...). Living space which does not comply with the statutory provisions for Germans with regard to condition and occupancy shall not be adequate for foreigners. Children up to the age of two shall not be included in calculation of the sufficient living space for the accommodation of families’.

Furthermore, spouses are required under Article 30 (1) 2 of the Residence Act to prove that they are able to communicate in the German language on a basic level. The German language certificate which is required is that of A1 level. The German State does not organise courses or examinations in the country of origin but spouses are merely required to hand in a certificate from the Goethe Institute or any other accredited organisation⁶⁵⁸. In case there are no such institutes in the area, an official in the German Embassy should be responsible to verify whether the spouse has the required language skills⁶⁵⁹. This being said, it becomes evident that the officials in the corresponding German Embassies enjoy certain discretion with regards to the assessment of whether the language requirement is fulfilled.

It should be clarified that although the German legislature does not distinguish between integration measures and integration conditions, it clearly imposes a condition which in case not met the relevant entry visa may not be issued. The only situation under which this requirement may be waived is that of the spouse being unable to provide such evidence on

⁶⁵⁸ Y. Pascouau and H. Labayle, *Conditions for Family Reunification Under Strain: A Comparative Study in Nine EU Member States* (Brussels, European Policy Centre, 2011)

⁶⁵⁹ Y. Pascouau and H. Labayle, *Conditions for Family Reunification Under Strain: A Comparative Study in Nine EU Member States* (Brussels, European Policy Centre, 2011)

account of a physical, mental or psychological illness⁶⁶⁰. This exception is particularly problematic for two main reasons. First, its concept is narrow and does not include other significant and relevant circumstances such as for instance illiteracy, educational level, gender or age. Second, the provision does not call for an individual assessment of the application which is submitted and nor does it call for the application of a proportionality test. The entire integration measures requirement may also be criticised for slowing down the process. It should be noted that the German courts⁶⁶¹ have repeatedly held that the language requirement for spouses is in line with existing law⁶⁶². Nonetheless, following the CJEU’s judgment in *K. and A.* (cited above), the German legislature is expected to reconsider the provision that concerns integration measures.

Given that the language test is linked to the issue of the visa, nationals of countries who do not need a visa in order to enter Germany are exempted from the integration measures⁶⁶³. These are Australia, Canada, Israel, Japan, New Zealand, the Republic of Korea and the United States of America⁶⁶⁴. It should be remarked that Germany does not exempt Turkish nationals from the obligation to comply with integration measures. Following the CJEU’s judgment in *Dogan* (cited above), Germany is expected to reform its legislation concerning integration measures at least as regards Turkish nationals. It is noted that spouses whose need for integration is minimal or who would not be eligible for integration course pursuant to Article 44 of the Residence Act after entering Germany are also exempted from complying with integration measures⁶⁶⁵.

The next requirement for family reunification is the one applicable to the child who is aged 16 and 17 and arrives independently from his/her parents to Germany. In particular, the minor unmarried child between 16 and 18 years who arrives to Germany independently from his/her parents is granted a residence permit only in case s/he is able to prove beforehand that s/he speaks German and it appears on the basis of his/her education and way of life that s/he will

⁶⁶⁰ See Article 30 (1) of the Residence Act

⁶⁶¹ See, among others, judgment of the Higher Administrative Court of Berlin-Brandenburg of 28 April 2009 and most importantly the judgment of the Federal Administrative Court of 30 March 2010 and the judgment of the Federal Constitutional Court of 25 March 2011

⁶⁶² On the way German Courts have dealt with this issue see C. Carlitz, ‘Language Skills as a Requirement for Family Reunification of Spouses in Germany: Respecting Respect for Family Life?’ In S. Morano-Foadi and M. Malena, *Integration for Third-Country Nationals in the European Union: The Equality Challenge* (Cheltenham/Northampton, Edward Elgar, 2012)

⁶⁶³ See Article 30 (1) of the Residence Act

⁶⁶⁴ See http://www.auswaertigesamt.de/EN/EinreiseUndAufenthalt/StaatenlisteVisumpflicht_node.html/

⁶⁶⁵ See Article 30 (1) of the Residence Act

be able to integrate in the German society⁶⁶⁶. It is noticeable that although the Directive speaks about the over 12-years old child, the German legislature has raised the age limit to 16.

There is no doubt that in this case we are also speaking about a pre-requirement which in case not fulfilled the relevant entry visa for family reunification is not issued. Unlike it is the case with the integration measures applicable to spouses, the language requirement applied to the over 16-year child does not seem to infringe the Family Reunification Directive which clearly speaks about ‘a condition for integration’. It should be emphasised that the child is required to have a particularly high level of German equivalent to level C1 of the Common European Reference Framework for Languages unless s/he is able to demonstrate on the basis of his/her education that s/he is capable of integrating into the German society⁶⁶⁷.

Next, the spouses should be at the age of 18 in order for family reunification to take place. Interestingly, unlike in it the case in Greece, the requirement does not concern only spouses who seek entrance to Germany as the German law explicitly provides that both the sponsor and the spouse should be at the age of 18. According to the German doctrine, the minimum age has been set by the German legislature for the purpose of the prevention of forced marriages⁶⁶⁸.

3.2.2.4 Tendencies in the rest of the EU countries and ‘MIPEX countries’

According to the Commission’s implementation report on the Family Reunification Directive, most Member States require the sponsor to comply with accommodation conditions⁶⁶⁹. The requirement for sickness insurance is imposed by half of Member States, while all Member States make use of the criterion for stable and regular resources. Some Member States have introduced an integration measure into national legislation, with Netherlands, Germany and France using it before admission⁶⁷⁰. Among the countries that apply integration measures before admission, in Germany and in the Netherlands the issue of the visa is made conditional

⁶⁶⁶ See Article 30 (2) of the Residence Act

⁶⁶⁷ See General Instructions on the application of the Residence Act, 2009, No. 32.2.1

⁶⁶⁸ H.G. Maaßen, ‘Zum Stand der Umsetzung von elf aufenthalts- und asylrechtlichen Richtlinien der Europäischen Union’ (2006) 26 (5-6) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 161-171 p. 163 and C. Hillgruber, ‘Mindestalter und sprachliche Integrationsvorleistung. Verfassungsgemäße Voraussetzungen des Ehegattennachzugs?’ (2006) 26 (9) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 304-317 p. 307-315

⁶⁶⁹ Apart from Finland, Netherlands, Slovenia and Sweden

⁶⁷⁰ See also L. Block and S. Bonjour, ‘Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands’ (2013) 15 *European Journal of Migration and Law* 203-224

upon the successful outcome of the examination⁶⁷¹. It is noteworthy that among all Member States, only Austria has applied the derogation of the second subparagraph of Article 8. It should be mentioned that Austria has modified its legislation so that the residence permit is granted after the three-year waiting period regardless of the applicable quota⁶⁷². As regards the results of the MIPEX study, in 27 countries the sponsor may hold most of the types of temporary residents and may apply for family reunification either immediately, as it is the case in 14 countries, or after 1 year, as provided for in 10 countries. As far as the requirement for stable resources is concerned, in 22 countries sponsors may use any legal source in order to prove compliance with the requirement, though the level of income is in many cases higher than the one applicable to national families. Lastly, as regards the pre-entry integration tests, the MIPEX study indicates that this is applicable to 8 participant countries.

3.3 The family reunification procedure

3.3.1 The family reunification procedure under the Directive

The Family Reunification Directive does not elaborate on the procedure that Member States should follow when examining an application for family reunification. Chapter III of the Directive, which is titled ‘submission and examination of the application’, gives some general guidance but the exact procedure to be followed is left to the discretion of the Member States.

In short, Article 5 (1) of the Family Reunification Directive provides that the application may be submitted either by the sponsor or the family members, whereas according to Article 5 (4) the competent authorities of the Member States shall adopt a decision on family reunification as soon as possible and in any case no later than nine months from the date on which the application is submitted. Nevertheless, the second subparagraph of Article 5 (4) provides that this time limit may ‘in exceptional circumstances linked to the complexity of the examination of the application’ be extended. Regrettably, the Family Reunification Directive does not provide for a maximum limit but it makes clear that the nine-month time limit may be extended only for reasons that concern the application which is examined. In any event, the decision should be written and justified. It should be underlined that although the Directive may be criticised for not dealing with crucial procedural issues, the fact that it establishes a

⁶⁷¹ See Y. Pascouau and H. Labayle, *Conditions for Family Reunification Under Strain: A Comparative Study in Nine EU Member States* (Brussels, European Policy Centre, 2011)

⁶⁷² See COM(2008) 610 final, at 4.3.5.

deadline for the adoption of the decision and the fact that it obliges Member States to give reasons for the decision rejecting the application are two welcomed developments. Indeed, pursuant to these provisions, Member States may not deny to adopt a decision or reject applications without a solid justification ground. This observation is without prejudice to the fact the 9-month period may be in some cases particularly long.

Furthermore, the Family Reunification Directive refers to the possibility of in-country applications, issue which we consider to be one of the most important throughout the family reunification procedure. In that respect, the Directive establishes the general rule that the applications shall be submitted and examined when the family members reside outside the territory of the Member State⁶⁷³ but leaves open the issue of in-country applications providing that ‘[b]y way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory’⁶⁷⁴.

It should be noted that the Commission in its guidance for the application of the Family Reunification Directive clarifies on issues regarding the submission of the application as well⁶⁷⁵. As regards the issue of the in-country applications, the Commission notes that Member States enjoy a wide margin of appreciation concerning the interpretation of the ‘appropriate circumstances’ referred to in this provision. Not least, the fee of the application should be reasonable and should not constitute an obstacle to the exercise of the right to family reunification. These fees should be comparable to the analogous fees applied to nationals of each of the Member States but special attention should be given to the fact that these persons are not in identical situations. As for the length of the procedures, the Commission underlines that the 9-month limit provided for in Article 5 (4) of the Family Reunification Directive should be calculated from the date on which the application is submitted and not from the moment of notification of receipt of the application by the Member State. Furthermore, the exceptional circumstances of Article 5 (4) which may extend the 9 months’ time limit do not refer to administration capacity issues but to issues related to the complexity of a certain case. In any event, in the Commission’s view, Member States may make limited use of this exception and must justify any possible delay on a case by case basis.

⁶⁷³ Article 5 (3) of the Family Reunification Directive

⁶⁷⁴ Second subparagraph of Article 5 (3) of the Family Reunification Directive

⁶⁷⁵ COM(2014) 210 final, at 3.1.

3.3.2 The family reunification procedure in national legislation

3.3.2.1 Spain

The family reunification in the Spanish legal system follows a three-phase procedure. The application is lodged and examined when the family members still reside outside the territory of Spain. The first phase concerns the application for family reunification and is initiated by the immigrant who resides in Spain and is the holder of the right. The second phase concerns the visa application which should be performed by the family member in the country of origin. Finally, the third phase regards the family member’s entry to Spain and the steps that s/he should follow after his/her entry.

In particular, the third-country national who wishes to exercise the right to family reunification should apply personally for a residence permit for his/her family members in the competent Immigration Office⁶⁷⁶ presenting the required documentation. In principle, the documentation should include copies of identification documents of both the sponsor and the family members, evidence that s/he fulfils the requirements of sufficient resources and accommodation, copy of evidence of the existence of the family relation with the persons with who the sponsor wishes to reunify, and if applicable the age and the dependency, and, in case of reunification with a spouse or partner, the sponsor should submit a declaration that the s/he does not reside in Spain with another spouse of partner⁶⁷⁷.

In a period of two months from the notification to the sponsor that the residence permit has been granted, the family member should apply personally for a visa to the Spanish embassy or the competent authority in the area where s/he resides⁶⁷⁸. The documentation that should accompany the application for a visa are the family member’s passport, a certificate of criminal records or an equivalent document, the original document which proves the existence of the family relation with the persons with who the sponsor wishes to reunify, and if applicable the age and the dependency, and a medical certificate demonstrating that the person who applies for the visa does not suffer from a sickness which constitutes a threat to public health, in accordance with the International Health Regulation of 2005⁶⁷⁹. The competent diplomatic authority should notify the applicant about the grant of the visa in a

⁶⁷⁶ First subparagraph of Article 56 (2) of the Immigration Regulation

⁶⁷⁷ Article 56 of the Immigration Regulation

⁶⁷⁸ Article 57 (1) of the Immigration Regulation

⁶⁷⁹ See Article 57 (2) of the Immigration Regulation

period of maximum two months⁶⁸⁰. Lastly, it should be mentioned that the diplomatic authority may refuse to issue a visa in case the requirements are not fulfilled, in case the applicant has submitted fraudulent or false documents or in case there is a reason of inadmissibility which was not detected when the application was lodged⁶⁸¹.

As regards the entry to the Spanish territory, the Regulation provides that once the visa is issued the family member should enter Spain within a period of time which by no means shall be longer than 3 months, whereas within a month from the entry s/he should apply personally for the Immigrant’s Identity Card.

In conclusion, it should be highlighted that the Immigration Regulation does not set a deadline for the decision regarding the initial application for the residence permit made by the sponsor. Thus, it is not possible to calculate the exact period that the entire procedure may last. Nevertheless, given that the period between the decision on the initial application and the entry may not be longer than seven months⁶⁸² and considering that the decision on the initial application for the residence permit is notified to the applicant in about two months, the entire procedure is not likely to last longer than the maximum of nine months provided for by the Family Reunification Directive. As regards the possibility of an in-country application, this is possible only for the sponsor’s child. This possibility is analysed in greater detail in Chapter 6.2.1.2.

3.3.2.2 Greece

The procedure in the Greek legal system is also three-phased. The application for family reunification is lodged and examined when the sponsor’s family members still reside outside the territory of Greece. The family reunification procedure is initiated by the third-country national who resides in Greece and fulfils the requirements that have been described above. At this point, it should be noted that Article 70 of the Immigration Law recognises family reunification as the sponsor’s and not his/her family members’ right and that is the reason why the entire procedure begins with his/her own initiate.

At the first phase of the procedure, the sponsor submits the application to the relevant public authority and hands in the supporting documentation that proves that s/he meets the

⁶⁸⁰ Article 57 (4) of the Immigration Regulation

⁶⁸¹ Article 57 (3) of the Immigration Regulation

⁶⁸² Articles 56-58 of the Immigration Regulation

conditions for family reunification⁶⁸³. The competent authority shall then consult the police authority regarding issues of public policy and security of the country, as well as the relevant consulate for the verification of the existence of the family relationship⁶⁸⁴, the possibility of integration and the consideration of public health risks. The police authority and the relevant consular authority should answer within a three-month period. The competent authority examines whether the requirements for family reunification are fulfilled, taking into consideration the best interest of the child and the above mentioned opinions of the police authority and the Greek consulates and adopts a decision regarding the application⁶⁸⁵.

The second phase of the procedure concerns the issue of the entry visa from the Greek consular authority in the country where the family member resides. In particular, in case the outcome of the application that has been lodged by the sponsor is positive, the competent authority that has examined the application transmits the decision to the relevant consulate which subsequently issues the special visas on the condition that the rest of the entrance requirements are fulfilled⁶⁸⁶. It is important to underline that the issue of the visa is not made conditional upon the compliance with any integration measures, as those provided for in Article 7 (2) of the Family Reunification Directive, except in the cases described in Chapter 3.2.2.2.

The third and final phase concerns the issue of the residence permit. At this phase, the family member has already entered Greece with a visa which has been issued for the purposes of family reunification and s/he is expected to apply for a residence permit after the entrance to Greece and before the expiry of the visa. As far as the minor child is concerned, the relevant application is submitted by the person who exercises their custody⁶⁸⁷. It should be noted that the entire family reunification procedure shall be concluded within nine months from the submission of the initial application, deadline which may be extended for three further months for exceptional reasons⁶⁸⁸.

⁶⁸³ Article 71 (1) of the Immigration Law

⁶⁸⁴ It should be noted that according to the case law of the Greek Courts, in case the relevant consular authority gives a negative answer as to the existence of the family relationships, it should fully justify its decision by indicating the certificates that have been required and those have been presented, the exact deficiencies that occurred and in case the family member has been invited for an interview, the reason why the interview was not successful. See, for instance, Judgment of the Regional Administrative Court of Athens 5442/2009.

⁶⁸⁵ Article 71 (2) of the Immigration Law

⁶⁸⁶ Article 71 (3) of the Immigration Law

⁶⁸⁷ Article 72 (1) of the Immigration Law

⁶⁸⁸ Article 72 (3) of the Immigration Law

As regards the possibility of an application being lodged when the family member is already present in Greece, this is merely possible in marriages between third-country nationals who reside regularly in Greece. In particular, Article 80 (1) of the Immigration Law provides that one of the two spouses, as well as the members of his/her family that already reside regularly in Greece may be granted a residence permit for family reunification. Furthermore, Article 80 (2) of the Immigration Law provides that the minor child of the regular third-country national who is born in Greece is covered by the permit of the parent until an application for him/her is submitted.

3.3.2.3 Germany

The procedure in the German legislation is two-phased. In Germany, the family reunification procedure is initiated by the family member who resides outside the federal territory. This constitutes a significant difference between Germany and the other two states which are examined in this study. In the German system, the family member who resides in the country of origin should file an application at the corresponding German consular authority which subsequently examines whether the family members fulfil the requirements for reunification and grants a visa for the purpose of family reunification. It should be highlighted that among the relevant documentation, the consular authorities should examine whether the family members comply with the integration measures pursuant to all that have been discussed in Chapter 3.2.2.3. Subsequently, the family member shall enter Germany with the visa and apply to the public authorities for the residence permit. The above procedure is based on the general provisions of the Residence Act⁶⁸⁹ and is not elaborated in the section that concerns family reunion.

As regards the relevant deadlines that should be met, the relevant Chapter of the Residence Act does not set any time limit within which the decision on the application should be made. Germany applies general deadlines applicable to all decision made by the administration. Nonetheless, it should be noted that according to comparative studies⁶⁹⁰ which have been

⁶⁸⁹ Article 4 and 5 of the Residence Act

⁶⁹⁰ See H. Labayle and Y. Pascouau, Directive 2003/86/EC on the Right to Family Reunification Synthesis Report, Odysseus Network Study on the ‘Conformity Checking of the Transposition by Member States of 10 EC Directives in the Sector of Asylum and Immigration’ done for DG JLS of the European Commission end 2007 (Contract JLS/B4/200603) (available online at <http://odysseus-network.eu/wp-content/uploads/2015/03/2003-86-Family-reunification-Synthesis-.pdf>)

carried out, the decisions are made within the 9-month deadline provided for in the Family Reunification Directive.

As far as the possibility of an in-country application is concerned, it should be noticed that Germany appears rather rigid with regards to the requirement that the family member should hold a visa for the purpose of family reunification in order to apply for the relevant residence permit. The only exception concerns EU citizens, EEA citizens, Swiss nationals or nationals of Australia, Canada, Israel, Japan, New Zealand, the Republic of Korea and the United States of America⁶⁹¹. In case the family member holds one of the above mentioned nationalities, s/he is exempted from applying for an entry visa and may enter Germany with his/her passport and apply subsequently for the residence permit in the relevant public authorities. Not least, reunification may also be allowed when the family member is already present in Germany when it appears unreasonable to require the family member to go back to the country of origin in order to follow the regular procedure⁶⁹².

Lastly, the regular family reunification procedure is also not followed as regards the child of the regular migrant who is born in the federal territory pursuant to Article 33 of the Residence Act. In particular, the child who is born in Germany *may* be granted a residence permit if one of his/her parents holds a residence permit, a settlement permit or an EU long-term residence permit, whereas s/he *shall* be granted a residence permit if both parents or the parent who has exclusive custody hold one of the above mentioned residence titles. Not least, in case the child is born in Germany from a parent who holds a visa or is allowed to stay in Germany without a visa, s/he shall have the right to stay in the federal territory until the visa or the period of stay without visa expires⁶⁹³. It should be noticed that in the above mentioned cases there is no need for proof that the material conditions otherwise applicable to a family reunification procedure are met.

3.3.2.4 Tendencies in the rest of the EU countries

According to the Commission’s implementation report on the Family Reunification Directive, Member States are split as regards the issue on whether the procedure should be initiated by the sponsor or the family member⁶⁹⁴. At some Member States it is the sponsor who shall

⁶⁹¹ See http://www.auswaertigesamt.de/EN/EinreiseUndAufenthalt/StaatenlisteVisumpflicht_node.html/

⁶⁹² Article 5 (2) of the Residence Act

⁶⁹³ See Article 33 of the Residence Act

⁶⁹⁴ COM(2008) 610 final, at 4.4.1.

initiate the procedure, at some others the family member may also be the applicant whereas only in two Member States⁶⁹⁵ the applicant may only be the family member. As regards the length of the procedure, the Commission in its implementation report indicates that fourteen Member States extent the nine-month period in exception cases in accordance with the second subparagraph of Article 5 (4) of the Family Reunification Directive⁶⁹⁶. Lastly, as regards the place of application⁶⁹⁷, five Member States⁶⁹⁸ do not require family members to reside outside their territory when the application is lodged, whereas the rest of the Member States adopt the general rule that family members should reside outside their territory permitting an application if the family member is already in the Member State in an exceptional way. In some Member States the exception is based on humanitarian grounds⁶⁹⁹, some others require the family member to reside lawfully in their territory whereas some others accept the application if the applicant’s return to the country of origin is not reasonable⁷⁰⁰.

3.4 The rights of family members of third-country nationals

3.4.1 The rights of family members of third-country nationals in EU law

3.4.1.1 Overview of the family members’ rights in the Directive

The Family Reunification Directive does not deal extensively with the actual rights that the family members should acquire once accepted in the Member State, giving great leeway to Member States to regulate their status after admission. Nevertheless, there are certain issues which are regulated by the Family Reunification Directive. Firstly, family members have the right of residence in the host Member State. Once the sponsor and his/her family members fulfil all requirements for family reunification, Member States shall grant family members facilities for obtaining visas and a first residence permit of at least one year’s duration and renewable⁷⁰¹. Article 13 (3) of the Family Reunification Directive provides that the duration of the residence permit of the family members shall not exceed the date of expiry of the permit of the sponsor. This being said, the family members and the sponsor’s permits are renewed jointly.

⁶⁹⁵ Austria and Hungary

⁶⁹⁶ COM(2008) 610 final, at 4.4.2.

⁶⁹⁷ COM(2008) 610 final, at 4.4.1.

⁶⁹⁸ Czech Republic, Finland, Hungary, Poland, Portugal

⁶⁹⁹ Austria

⁷⁰⁰ Germany

⁷⁰¹ Articles 13 (1) and 13 (2) of the Family Reunification Directive

Secondly, pursuant to Article 14 of the Family Reunification Directive family members have the right to access to education, access to employment and self-employed activity and access to vocational guidance, initial and further training and retraining. Notably, the Family Reunification Directive does not speak about equal treatment but rather provides that Member State may decide the circumstances under which family members shall exercise their right to employment or self-employment. The only condition seems to be that family members should be entitled to access to employment in the same way as the sponsor. Therefore, depending on the legal regime applied to third-country nationals in each of the Member States, the family members’ right to access to employment may be subject to severe conditions.

The Family Reunification Directive further provides Member States with the possibility of restricting family members’ access to employment or self-employment for a maximum of 12 months⁷⁰². It should be underlined that this restriction should be based on a labour market test. Member States which has not specified the latter element, merely providing for a 12 month restriction infringe the Directive. We believe that this derogation has important implications and is tightly connected to the requirement for sufficient resources which was analysed above, as in case a Member State implements such derogation sponsors are in fact required to have sufficient resources for up to twelve months in order to maintain their family in the host Member State. Furthermore, according to Article 14 (3) of the Family Reunification Directive, Member States may restrict access to employment or self-employment to the persons referred to in Article 4 (2) of the same legal instrument.

3.4.1.2 Restrictions of the family members’ rights

Member States may reject an application for family reunification and withdraw or refuse to renew a family member’s residence permit on grounds of public policy, public security or public health⁷⁰³. The second subparagraph of Article 6 (2) of the Family Reunification Directive gives guidance on how this decision should be made, stating that Member States shall consider Article 17 of the Directive but also ‘(...) the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person’. As regards public health, the Family Reunification Directive provides that renewal of the residence permit and expulsion from the territory of a Member State may not be ordered on the mere ground of illness or disability which occurred after the

⁷⁰² Article 14 (2) of the Family Reunification Directive

⁷⁰³ Articles 6 (1) and 6 (2) of the Family Reunification Directive

issue of the residence permit⁷⁰⁴. Not least, a recital in the preamble of the Directive⁷⁰⁵ gives some insight on what constitutes ‘public policy’ and ‘public security’ providing that:

‘[t]he notion of public policy may cover a conviction for committing a serious crime. In this context it has to be noted that the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations’.

In addition to this, the Commission in its implementation report on the Family Reunification Directive⁷⁰⁶ states that:

‘(...) it is left to Member States to set their standards in line with the general principle of proportionality and the horizontal Article 17 obliging them to take account of the nature and solidity of the persons’ relationship and duration of residence, weighing it against the severity and type of offence against public policy or security’.

Furthermore, Article 16 of the Family Reunification Directive contains several more specific circumstances under which Member States may reject the application and withdraw or refuse to renew a family member’s residence permit. These are: a) where the conditions set out in the Directive are not or no longer fulfilled. In that respect, the Directive provides that Member States shall take into consideration the contributions of the family members’ to the household income, in case the condition which is not fulfilled in the renewal of a residence permit is that of the regular and stable resources, b) where the sponsor and his/her family members do not or no longer live in a real marital or family relationship, c) where it is found that the sponsor or the unmarried partner is married or is in a stable long-term relationship with another person, d) where fraud was committed, e) where the marriage, partnership or adoption was contracted merely for immigration purposes⁷⁰⁷. In that respect, the Directive provides that ‘(...) Member States may have regard in particular to the fact that the marriage, partnership or adoption was contracted after the sponsor had been issued his/her residence permit’ and f) where the sponsor’s residence comes to an end and the family member has not acquired an independent right of residence. As regards the verification of the existence of one of the above mentioned circumstances, the Directive rather vaguely provides that Member States may conduct ‘specific checks’ and ‘inspections’⁷⁰⁸.

⁷⁰⁴ Article 6 (3) of the Family Reunification Directive

⁷⁰⁵ Recital No. 14 of the Family Reunification Directive

⁷⁰⁶ See COM(2008) 610 final, at 4.3.6.

⁷⁰⁷ Article 16 of the Family Reunification Directive

⁷⁰⁸ Article 16 (4) of the Family Reunification Directive

3.4.2 The rights of family members of third-country nationals in national legislation

3.4.2.1 Spain

In Spain, the validity of the family members’ residence permit should be extended until the expiry date of the permit held by the sponsor at the moment of the family member’s entrance to Spain⁷⁰⁹. In case the sponsor holds the long-term residence card or the EU long-term residence card, the first permit of the family member should be extended until the expiry date of the sponsor’s card at the moment of the family member’s entrance to Spain, whereas the next permit of the family member should be a long-term residence permit⁷¹⁰. It should be mentioned that the permit given to the spouse or partner and the child is for residence and work in Spain⁷¹¹. This work permit should be issued without any additional administration procedure and should be valid for employment or self-employment in any part of the country and for any occupation or activity⁷¹². It should be noted that the Spanish legislature has not implemented the derogation of Article 14 (2) of the Family Reunification Directive regarding the restriction on the access to the labour market. Nevertheless, it did make use of the derogation of Article 14 (3) of the Family Reunification Directive as the right to employment is restricted for the third-country nationals’ ascendants⁷¹³.

The Spanish legislature appears particularly elaborate in relation to the renewal of the residence permits of family members. In particular, the renewal should be requested within the last 60 days before the permit’s expiry⁷¹⁴ but it can also be requested within 90 days after its expiry, without prejudice to a possible initiation of a sanctioning procedure. The renewal can be requested by the sponsor’s spouse or partner for the descendants or ascendants in case this spouse or partner forms part of the same family unity and the original sponsor does not meet the conditions for the renewal of the permit for family reunification.

As for the requirements for the renewal of the permit, Article 61 (3) of the Immigration Regulation distinguishes between requirements that concern the family member and those that concern the sponsor. The family member should hold a valid residence permit for family

⁷⁰⁹ First subparagraph of Article 58 (3) of the Immigration Regulation

⁷¹⁰ Second subparagraph of Article 58 (3) of the Immigration Regulation

⁷¹¹ In case the latter are in an age suitable for work as provided for by the relevant legislation

⁷¹² Article 58 (4) of the Immigration Regulation

⁷¹³ See Article 58 (4) of the Immigration Regulation

⁷¹⁴ Article 61 (1) of the Immigration Regulation

reunification or should be within the 90 days after the expiry of the residence permit, s/he should maintain the family relation, s/he should have his/her children enrolled at the educational system when the latter are at compulsory education age and s/he should pay the corresponding tax.

As regards the sponsor, s/he should hold a valid residence permit or should be within the 90 days after the expiry of the residence permit, s/he should be employed and/or have sufficient resources in order to cover the necessities of his/her family, including a sickness insurance in case this is not covered by the social security system, in a quantity that represents monthly a 100% of the IPREM and s/he should have an adequate accommodation⁷¹⁵. It is noteworthy that in the case of renewal of the residence permit, the income deriving from the social assistance system may be taken into account⁷¹⁶. In addition, at the moment of the decision with regards to the renewal of the permit, the public authorities may take into consideration the effort of integration which can be proven by a report issued by the Autonomous Community⁷¹⁷. This report may be invoked by the immigrant in case s/he does not fulfil one of the requirements for the renewal of the permit.

It becomes apparent that the requirements for the renewal of the residence permit for family members who have entered Spain with the procedure for family reunification are slightly more flexible in comparison to the ones covering the initial entry. This is reasonable if we consider that no renewal of the residence permit may lead to a possible expulsion, action which is considered for various reasons a lot more complicated than a rejection of an application for initial entry. As regards the requirement for sufficient resources in particular, it should be noted that the Supreme Court has in several judgments held that the economic requirements cannot be used in order to restrain or reject the rights of immigrants that already reside regularly in Spain⁷¹⁸. It should also be noted that the applications for renewal of the sponsor and his/her family members should be lodged and examined together, unless there are special reasons which justify a different treatment⁷¹⁹ and that the residence permit of the

⁷¹⁵ According to the third provision of the DGI/SGRJ/4/2011, the document which proves the existence of the accommodation in the renewal procedure may refer to the immigrant who is the sponsor of the right to family reunification or to any other of the family members which are referred to in Article 17 of the Immigration Act.

⁷¹⁶ Second subparagraph of Article 61 (3) (b) 2o of the Immigration Regulation. It is recalled that this income is not taken into consideration as regards the requirement of sufficient resources when the sponsor initially applies for family reunification. See Article 54 (4) of the Immigration Regulation.

⁷¹⁷ Article 61 (7) of the Immigration Regulation

⁷¹⁸ See, among others, the judgments of the Supreme Court of 28 December 1998 and of 26 February 2000.

⁷¹⁹ Article 61 (8) of the Immigration Regulation

family member will be extended until the date of expiry of the residence permit of the sponsor⁷²⁰.

Lastly, that the rights of family members may be restricted for reasons of public policy, national security and public health. It is worth mentioning that the restrictions are not included in the part of the relevant legislation that deals with family reunification but derive from general provisions of the Immigration Act which become applicable to all third-country nationals in Spain⁷²¹.

3.4.2.2 Greece

In Greece, family members are granted an initial residence permit with the same expiry date as the one held by the sponsor and they depend on the latter for the renewal. When the sponsor acquires the long-term residence status, the residence permit of his/her family members is renewed every three years whereas in case the sponsor has already acquired this status at the moment of the family reunification, the initial residence permit issued to his/her family members is of two years of validity and is renewed every three years⁷²². For the renewal of the family members’ residence permits, the sponsor should prove that the family relationship continues to exist and that s/he has fulfilled his/her tax and social security obligations⁷²³.

Family members of third-country nationals are entitled in the same way as the latter to access to education, employment, services and work provision, vocational guidance, initial and further training and retraining. It should be noted that the right to employment is restricted for family members until the first renewal of the residence permit in line with the derogation provided for by the Family Reunification Directive. It should also be noted that the Greek legislature speaks about provision of services or work whereas the Family Reunification Directive refers to self-employed activity, concept which is broader than the one provided for by the Greek legislation.

⁷²⁰ Article 61 (11) of the Immigration Regulation

⁷²¹ It should be noted that in case of expulsion the Immigration Act also provides for an entry ban which may in principle be of five years long, whereas in case the immigrant constitutes an imperative threat for public policy, national security or public health the entry ban may be of ten-year duration. See Article 58 (2) of the Immigration Act.

⁷²² Article 73 (1) of the Immigration Law

⁷²³ Article 73 (2) of the Immigration Law

In addition, the wording adopted by the Greek legislature is rather problematic and ambiguous as instead of setting a twelve month time limit, it refers to the first renewal of the residence permit. This approach may result in certain cases family members being refused access to employment for more than twelve months. In case, for instance, the sponsor already holds the long-term residence status, the initial residence permit issued for his/her family members, is of two-year duration. Therefore, these family members will not be able to access to the labour market for two years, period which exceeds the twelve months which is provided for by the Directive. We suggest that the provision of Article 75 (2) of the Immigration Law should be reworded in order for a more accurate transposition of Article 14 (2) of the Family Reunification Directive to be achieved.

The residence permit may be rejected, withdrawn or may not be renewed in the following cases: a) for reasons of public policy and public security, b) for reasons of public health, c) when the sponsor and his/her family members no longer lead a real spousal or family life, d) in case of fraud and e) in case it is proven that the family relationship has been concluded in order for the family member to achieve entry or residence in Greece or in case the sponsor’s residence is terminated and the family member does not hold an autonomous right of residence in Greece⁷²⁴.

In case of withdrawal or refusal to renew for reasons of public policy, public security or public health, public authorities examine the nature of the crime committed and the potential risks arising from the person⁷²⁵. Not least, Article 74 (4) of the Immigration Law provides that for the rejection, withdrawal, refusal to renew of a residence permit or in case of a removal order against the sponsor or his/her family members, public authorities should take into account the nature and solidity of the person’s family relationships, the duration of his/her residence in Greece and the existence of family, cultural and social ties with his/her country of origin.

3.4.2.3 Germany

In Germany, family member are granted a residence permit which shall not exceed the period of validity of the residence permit held by the sponsor, nor the period of validity of the

⁷²⁴ Article 74 (1) of the Immigration Law

⁷²⁵ Article 74 (2) of the Immigration Law

passport that this family member holds. Otherwise, the residence permit is issued for a period of at least one year⁷²⁶.

As regards access to employment, it should be mentioned that pursuant to Article 27 (5) of the Residence Act ‘[r]esidence titles (...) shall entitle their holders to pursue an economic activity’. The provision does not specify on the exact conditions under which the family members shall pursue the economic activity. Nevertheless, the most rational interpretation of the provision would suggest that the family members are entitled to pursue the economic activity in the same way as the sponsor. Therefore, if the sponsor has limited access to economic activity, his/her family member will enjoy limited access as well whereas in cases that the sponsor enjoys full access, the same will apply to his/her family members. It should be underlined that Germany does not make use of the possibility to restrict the access to employment provided for in Article 14 (2) or (3) of the Family Reunification Directive.

Furthermore, it should be noted that family members are entitled and in some cases obliged to attend integration courses⁷²⁷. The entitlement applies in principle to all family members, with the exception of children or young adults who take up school education or continue their previous school education in Germany, when the need for integration is discernibly minimal or when the family member already has a sufficient command of German. The attendance to the language course becomes obligatory in case the family member is unable to communicate on a basic level in German or s/he does not have a sufficient command of German at the time the residence permit is issued under Article 30 of the Residence Act.

Next, Part 6 of the Residence Act does not make any reference to public policy, public security and public health, as grounds for rejection or refusal to renew of the family members’ residence permit. Nevertheless, Article 5 of the Residence Act, which constitutes a provision that applies with regards to the issue of all residence permits, provides that for the granting of the residence permit no reason for expulsion shall apply. Both Articles 53 and 54 of the Residence Act which deal with mandatory and regular expulsions accordingly contain several public order grounds for expulsion mainly related to the commitment of crimes which shall analogously apply to reunification cases⁷²⁸.

⁷²⁶ See Article 27 (4) of the Residence Act

⁷²⁷ See Article 44 (1) 1 b of the Residence Act

⁷²⁸ For details see K. Hailbronner, *Ausländerrecht Kommentar* (Heidelberg, Müller, 2006)

Not least, pursuant to Article 27 (1a) of the Residence Act, reunification may also be rejected:

‘1. if it is established that the marriage has been entered into or kinship established solely for the purpose of enabling the subsequently immigrating persons to enter and stay in the federal territory or

2. if there are concrete indications that one of the spouses has been forced into marriage’.

3.4.2.4 Tendencies in the rest of the EU countries

As regards the right to access to employment⁷²⁹, the Commission’s implementation report on the Family Reunification Directive distinguishes between Member States⁷³⁰ that have limited the family members’ access to what is required by the Family Reunification Directive and others⁷³¹ that impose no restrictions on labour market access. Furthermore, the optional clause of Article 14 (2) has been used by seven Member States⁷³². Nevertheless, in three Member States⁷³³, Article 14 (2) has not been implemented correctly as the national law provides for an absolute restriction for the first twelve months whereas, as mentioned above, the Directive provides that the exclusion should be on the basis of a labour market test. The Commission concludes that ‘[g]enerally, it appears that transposition of the Directive has resulted in national legislation giving admitted family members easier access to employment’⁷³⁴.

3.5 The family members’ autonomous right of residence

3.5.1 The family members’ autonomous right of residence in the Directive

Before analysing the family members’ independent right of residence under the Family Reunification Directive, we should be make a distinction between ‘independent’ or ‘autonomous’ residence and ‘permanent’ residence, as the concepts are often confused. In that respect, the right to an independent residence means that the residence is not anymore dependent on the residence of the sponsor. Nevertheless, the residence remains a temporary one which implies that it needs to be renewed pursuant to what is provided for in national legislation. On the contrary, the permanent residence which is normally acquired after five years of residence in a Member State is a residence that gives the family member various

⁷²⁹ COM(2008) 610 final, at 4.5.2.

⁷³⁰ Austria, Netherlands, Malta, Germany

⁷³¹ Estonia, Finland, France, Lithuania, Luxembourg

⁷³² Austria, Cyprus, Germany, Greece, Hungary, Slovenia, Slovakia

⁷³³ Germany, Hungary, Slovenia

⁷³⁴ COM(2008) 610 final, at 4.5.2.

advantages and most importantly the significant loosening of the renewal procedures. The present section of the thesis is concerned with the first type of residence.

Following this clarification, it should be noted that the right to an independent right of residence is also described briefly in the Directive. It constitutes another area that Member States are practical left free to regulate and impose the standards they desire. The Family Reunification Directive provides that the spouse or unmarried partner and the child who has reached majority shall acquire an autonomous right of residence no later than after five years of residence in the host Member State⁷³⁵. However, according to the second subparagraph of Article 15 (1), Member States may limit the granting of the autonomous right to the spouse or unmarried partner in cases of family breakdown. Furthermore, pursuant to Article 15 (3), an autonomous residence permit may be granted in the event of widowhood, divorce, separation or death of first-degree relatives in the direct ascending or descending line, to persons who have entered the host Member State with the family reunification proceedings. This however remains an option and the Family Reunification Directive only obliges Member States to grant autonomous residence permits in ‘particularly difficult circumstances’ which however are not defined in the Directive⁷³⁶.

3.5.2 The family members’ autonomous right of residence in national legislation

3.5.2.1 Spain

In Spain, the persons who have entered the territory of Spain for the purposes of family reunification may acquire an independent right of residence under certain circumstances which differ depending on whether the family member is the spouse or partner, the child or the ascendants⁷³⁷. Notably, the situation of the partner or spouse is described in the law in a more detailed way⁷³⁸.

In particular, the spouse or partner may obtain a residence and work permit, independent of that of the sponsor: a) in case s/he has sufficient resources for the grant of a residence permit of no lucrative character, b) in case s/he has one or several employment contracts of a minimum duration of one year from the moment of the application and the remuneration is not

⁷³⁵ Article 15 (1) of the Family Reunification Directive

⁷³⁶ Article 15 (3) of the Family Reunification Directive

⁷³⁷ Article 19 (2) of the Immigration Act and Article 59 of the Immigration Regulation

⁷³⁸ Article 59 (1) and (2) of the Immigration Regulation

less than the monthly minimum wage in a full time job, and c) in case s/he fulfils the requirements for the acquisition of a residence and work permit for self-employment⁷³⁹.

Furthermore, the spouse or partner can obtain an independent residence and work permit in case of separation, divorce, cancellation of the partnership or termination of the living as a couple, provided that: a) the spouse or partner had lived with the sponsor in Spain for a minimum period of two years, b) in case the spouse or partner has been a victim of gender violence or of violence in the family environment⁷⁴⁰, and c) in case of death of the sponsor⁷⁴¹. It should be noted that in the above described cases, if in addition to the spouse or partner, the spouse has been reunified with other family members, these family members will retain their residence permit and will depend for the renewal of their permits on the family members with whom they live⁷⁴².

The sponsor’s minor children may acquire an independent permit when they reach the age of adulthood and fulfil one of the requirements provided for in Article 59 (1) of the Immigration Regulation or when they reach the age of majority and have lived in Spain for five years⁷⁴³. As for the sponsor’s ascendants, they can obtain an independent from the sponsor residence permit when they have been granted a work permit, without prejudice to the fact that for exercising the right to family reunification they should obtain the long-term residence status⁷⁴⁴.

3.5.2.2 Greece

In Greece, family members of third-country nationals may acquire an independent right of residence in the following cases: a) in case they have lived for five years in Greece and provided that they have not been granted a residence permit for reasons other than family reunification, b) in case they reach the age of adulthood⁷⁴⁵, c) in case of death of the sponsor if the family member had lived for one year in Greece before the death and d) in case of divorce, cancellation of the marriage or separation if the marriage lasted for three years, including one

⁷³⁹ Article 59 (1) of the Immigration Regulation

⁷⁴⁰ The second subparagraph of Article 59 (2) (b) of the Immigration Regulation provides that in these cases the independent residence and work permit will have a duration of five years

⁷⁴¹ Article 59 (2) of the Immigration Regulation

⁷⁴² Article 59 (3) of the Immigration Regulation

⁷⁴³ Article 59 (4) of the Immigration Regulation

⁷⁴⁴ Article 59 (5) of the Immigration Regulation

⁷⁴⁵ Article 76 (1) of the Immigration Law

year in Greece or if the family members has been a victim of domestic violence during the marriage⁷⁴⁶.

3.5.2.3 Germany

In Germany, spouses may accede to an independent right of residence in case of termination of the marital cohabitation if marital cohabitation has existed in Germany for at least three years or if the sponsor died while marital cohabitation existed in the federal territory⁷⁴⁷. In addition to the above mentioned requirements, the family member should be in possession of a residence permit, settlement permit or EU long-term residence permit at the point of time of the termination of the marital cohabitation, unless if s/he was not able to apply for an extension for reasons beyond his/her control⁷⁴⁸.

Furthermore, pursuant to Article 31 (2) of the Residence Act, the requirement for three years of residence will in some cases not be applicable in order for particular hardship to be avoided.

‘Particular hardship shall be deemed to apply if the obligation to return to the country of origin resulting from the termination of marital cohabitation threatens to substantially harm the foreigner’s legitimate interests, or if the continuation of marital cohabitation is unreasonable due to the harm to the foreigner’s legitimate interests; in particular this is to be assumed where the spouse is the victim of domestic violence. Such legitimate interests shall also include the well-being of a child living with the spouse as part of a family unit. In order to avoid abuse, extension of the residence permit may be refused if the spouse is reliant on benefits in accordance with Book Two or Book Twelve of the Social Code for reasons for which he or she is responsible’.

The sponsor’s children may accede to an independent right of residence in case they reach the age of 16 and they have been in possession of a residence permit for five years or in case they reach the age of majority and they have been in possession of a residence permit for five years, they have a sufficient command of the German language and their subsistence is ensured or they are undergoing studies which lead to an official qualification⁷⁴⁹. The child may not be granted the independent residence permit in case a reason for expulsion applies, s/he has committed certain type of offences or s/he is reliant on social benefits. The last case does not apply when the child undergoes education⁷⁵⁰. Lastly, it should be noted that the requirement for sufficient command of the German language and the one regarding the subsistence of the

⁷⁴⁶ Article 76 (2) of the Immigration Law

⁷⁴⁷ Article 31 (1) of the Residence Act

⁷⁴⁸ Article 31 (1) of the Residence Act

⁷⁴⁹ Article 35 (1) of the Residence Act

⁷⁵⁰ Article 35 (3) of the Residence Act

child are not applicable if the latter is not able to fulfil them due to physical, mental or psychological illness or disability⁷⁵¹.

3.5.2.4 Tendencies in the rest of the EU countries

According to the Commission’s the implementation report⁷⁵² on the Family Reunification Directive, twenty of the EU Member States use the maximum of five years provided for by the Directive in order to grant the autonomous right of residence to family members. Only in four Member States⁷⁵³ the required period is three years. As regards the family breakdown, eleven Member States limit the grant of the autonomous right of residence whereas sixteen Member States use the optional provision of granting the autonomous right of residence in case of divorce, separation, death or widowhood.

3.6 Main implementation problems of the Directive in Spain, Greece and Germany

3.6.1 Spain

The most controversial provisions of the implementing legislation of the family reunification Directive in Spain are those regarding the sponsor’s first degree ascendants and, in particular, the fact that the Spanish legislation provides that the sponsor may reunify with his/her first degree ascendants only after acquiring the long-term residence status and with the requirement that the ascendants are older than 65 years. Furthermore, the Spanish legislation provides that once admitted to Spain, the first degree direct ascendants merely have the right to reside in Spain and not the right to work.

To start with, it has already been mentioned that the Family Reunification Directive is a minimum harmonisation Directive. This becomes apparent from Article 3 (5) which provides that ‘[t]his Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions’. Therefore, Member States are only bound as for the minimum level of protection that they give to the persons covered by the Directive. In the case of the definition of ‘family members’ this means that Member States are obliged to give third-country nationals a right to family reunification with the spouse and the minor child over

⁷⁵¹ Article 35 (4) of the Residence Act

⁷⁵² The issue of the access to an autonomous right of residence is discussed in Chapter 3.5.1 of Part III

⁷⁵³ Belgium, Czech Republic, Netherlands, France

which they have exclusive custody, but they are free to grant a right to family reunification with other persons, in case they so desire, without infringing any obligation deriving from EU law. A Member State, following pro-immigrant policies, may grant to third-country nationals a right to family reunification with siblings, grandchildren, nephews, nieces etc. In case a Member State decides to do so, it is in theory not bound by the Family Reunification Directive and may decide on the exact conditions that the family reunification may take place.

Having said that, it appears rather peculiar that the Directive in its Article 4 (2) provides that Member States ‘may, by law or regulation, authorise the entry and residence’ of first degree relatives in the ascending line and of adult unmarried children, as according to the rules of EU law which were discussed right above, Member States may in any case decide to grant third-country nationals the right to family reunification with any additional to the ones referred to in Article 4 (1) persons. Following this line of reasoning, the question that arises is why the EU legislature decided to adopt these ‘may’ provisions which according to what has been discussed above appear rather redundant. We believe that the answer to this question is that the EU legislature implies that in case Member States decide to implement these ‘may’ provisions, they are obliged to apply the entire Directive when they regulate the legal status of the persons referred to therein. On the contrary, Member States which decide to grant family reunification with persons falling entirely outside the Directive may impose any requirements they desire. It should be added that the approach adopted in the present study is, as discussed above, in line with the Commission’s guidance on the application of the Family Reunification Directive as well.

Returning to the Spanish legislation it should be noted that the Spanish legislature decided to include first degree relatives in the ascending line among the persons with whom the third-country national could be reunified. However, by requiring the sponsor to have acquired the long-term residence status before family reunification is possible, by setting the 65 years age limit and the requirement that there should be reasons who justify the necessity of their residence in Spain⁷⁵⁴, the Spanish legislature is directly infringing Article 3 (1), Article 8 and Article 4 (2) (a) of the Family Reunification Directive, introducing requirements which are not provided for by the latter⁷⁵⁵. It should be noted that the refusal to grant to these persons a

⁷⁵⁴ It is recalled that Article 4 (2) (a) of the Family Reunification Directive speaks about first-degree relatives in the direct ascending line who ‘(...) do not enjoy proper family support in the country of origin’.

⁷⁵⁵ The concern that the additional requirements with regards to the ascendants might not be in line with the Family Reunification Directive have been raised by various authors. See, for example, D. Marín Consarnau ‘Las

right to employment may be accepted under the Family Reunification Directive due to the derogation of Article 14 (3) which was discussed above.

Next, it has been extensively discussed in this study that the Family Reunification Directive calls for an individual assessment of the application for family reunification, as well as for the application for renewal of the residence permits which has been granted for this purpose and provides that Member States shall have due regard to the best interest of minor children, when examining the application. Both provisions are absent in the Spanish implementing law, the overall reading of which gives the impression that no compliance with the requirements directly leads to a rejection of the application for family reunification or the application for renewal of the residence permit. As regards the latter case, Article 61 (7) of the Immigration Regulation merely provides that the relevant authorities should take into account the attempt of the immigrant to integrate taking part in culture and history courses, element that could substitute a requirement which is not being fulfilled at the moment the application for renewal is lodged. However, this provision merely offers an alternative way of obtaining the renewal of the residence permit and does not introduce an individual assessment system.

3.6.2 Greece

The overall impression is that the Greek legislature has implemented correctly the Family Reunification Directive. This means that in general terms the Greek legislation does not offer less protection for the third-country national than the one provided for by the Directive. Nonetheless, at the same time hardly ever does it go beyond the minimum standards of protection set out in the Directive. Given that these standards have been repeatedly criticised in this study for being low, the Greek legislation can be characterised as rather restrictive towards the third-country national. The most controversial provisions of the law are the ones concerning the definition of family members, the requirement for a residence permit of two-year validity, the requirement for a two-year prior lawful residence and the condition for integration, which is also not in line with the Directive. Not least, it should be noted that Greece is the only country of the three that participate in the comparative study that has implemented the derogation which limits the access to the labour market for family members

autorizaciones de residencia por motivos familiares: La residencia temporal por reagrupación familiar y la residencia del hijo del residente’ in D. Boza Martínez, F.J. Donaire Villa and D. Moya Malapeira, *La nueva regulación de la inmigración y la extranjería en España, régimen jurídico tras la LO 2/2009, el Real Decreto 557/2011 y la Ley 12/2009* (Valencia, Tirant lo Blanch, 2012)

and the one regarding the children that the sponsor has with a further spouse in case of a polygamous marriage.

Nonetheless, the Family Reunification Directive has had positive effects on the Greek law on family reunification as well. Unlike it is the case in Spain, the Greek legislature implements Article 17 of the Directive⁷⁵⁶ introducing the ‘individual assessment’ system of the applications for family reunion. The Greek authorities are therefore required to examine each case individually and exceptionally accept certain applications even if some of the requirements for family reunion are not fulfilled. Not least, the provision of Article 5 (5) of the Family Reunification Directive regarding the best interests of minor children has also been implemented in the Greek legislation and therefore the public authorities shall thoroughly consider the best interest of the child in cases the application concerns directly or indirectly minor children.

3.6.3 Germany

Even though the Commission in its implementation report on the Family Reunification Directive found no particular infringements of the Family Reunification Directive from the German implementing laws, there is indeed a provision of the Residence Act that raise concerns of compatibility with the Directive and the case law of the CJEU. Before proceeding to analyse the said provision, it should be highlighted that the present section will not be concerned with the compatibility of the integration measures with the Family Reunification Directive as the issue has been discussed in detail above.

This being said, the provision that we consider incompatible with the Directive is that one regarding the requirement for a prior lawful residence⁷⁵⁷. It is recalled that the German legislature distinguishes between family formation and family reunification when applying the said requirement. In that respect, it should be reminded that already the definition of ‘family reunification’ given by the Family Reunification Directive implies that no distinction between family formation and family reunification is allowed under the Directive. Not least, as mentioned in the relevant Chapter of this study, the CJEU in *Chakroun* (cited above) hold that a distinction between relationships which arose before entry to the host Member State and those which arose after is not accepted under the Family Reunification Directive. This being

⁷⁵⁶ See Article 74 (4) of the Immigration Law

⁷⁵⁷ Article 30 (1) of the Residence Act

said, we are of the view that Article 30 of the Residence Act infringes the Family Reunification Directive to the extent that it imposes on the sponsor a two-year prior lawful residence requirement if the marriage or the registered partnership was concluded after his/her entry to Germany, whereas no such requirement is imposed in cases that these relationships predated the sponsor’s first entry.

Lastly, it should be noted that the transposition of the Family Reunification Directive in Germany is also incomplete as regards the two particularly important provisions of Article 17 and 5 (5), regarding the application of the individual assessment and the obligation to take due regard to the best interest of the child accordingly. In that respect, the critique made to the Spanish legislation right above, becomes applicable to the German one as well.

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Chapter 4: Special regimes of family reunification for third-country nationals

4.1 Family members of Blue Card holders

4.1.1 The Blue Card Directive

4.1.1.1 Overview of the Directive

With the purpose of making the EU more attractive to highly-qualified workers from around the world and sustain its competitiveness and economic growth⁷⁵⁸, the Council adopted Directive 2009/50/EC⁷⁵⁹, which is known as the Blue Card Directive⁷⁶⁰. The Directive was adopted without prejudice to the competence of Member States to maintain or introduce national residence permits for the purpose of highly-skilled employment or any kind of employment⁷⁶¹. In fact, several Member States have national policies for attracting highly-skilled workers besides the EU Blue Card regime. It should be noted that the European Commission has recently reported⁷⁶² various problems on the implementation of the Directive. It should also be underlined that the Blue Card Directive is currently under review at EU level.

The Blue Card Directive defines the concept of ‘highly qualified employment’ as the employment of a person who ‘(...) in the Member State concerned, is protected as an employee under national employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else’ ‘is paid’ and ‘has the required adequate and specific competence, as proven by higher professional qualifications’⁷⁶³. It should be noted that self-employed persons are excluded from the scope of the Blue Card Directive. Furthermore, for the purposes of the Directive:

⁷⁵⁸ See the preamble of the Blue Card Directive

⁷⁵⁹ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment

⁷⁶⁰ For the way the Blue Card Directive was welcomed by different Member States see Y.K. Gümüs, ‘EU Blue Card Scheme: The Right Step in the Right Direction?’ (2010) 12 *European Journal of Migration and Law* 435-453

⁷⁶¹ Article 3 (4) of the Blue Card Directive

⁷⁶² Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment published on 22 May 2014, COM(2014) 287 final. Hereinafter, ‘the Commission’s implementation report on the Blue Card Directive’.

⁷⁶³ Article 2 (b) of the Blue Card Directive

“higher professional qualifications’ means qualifications attested by evidence of higher education qualifications or, by way of derogation, when provided for by national law, attested by at least five years of professional experience of a level comparable to higher education qualifications and which is relevant in the profession or sector specified in the work contract or binding job offer’⁷⁶⁴.

For the first two years, the employment of the Blue Card holder is restricted to the employment which meets the conditions of admission pursuant to the Directive. After the initial two years, Member States may grant to the Blue Card holders equal treatment with regards to the access to highly qualified employment⁷⁶⁵. Furthermore, any change in employment during the first two years or later on in case the concerned Member State has not granted the right to equal treatment provided for in 12 (1), should be communicated to and authorised by the competent authorities of the host Member State. Moreover, unemployment does not in itself constitute a reason for withdrawal of the Blue Card unless, pursuant to Article 13 of the Blue Card Directive, unless it lasts for more than three months or it occurs more than once during the period of validity of the Blue Card. In any event, Blue Card holders shall enjoy equal treatment with the nationals of the host Member State in several fields described in Article 14 of the Blue Card Directive such as working conditions, education and vocational training, and recognition of diplomas.

4.1.1.2 Family reunification of Blue Card holders

Blue Card holders enjoy a favourable status as far as family reunification is concerned. The Blue Card Directive provides for several derogations from the Family Reunification Directive in an attempt to make the EU more attractive for highly-qualified third-country nationals. The applicable legal instrument with regards to family reunification of Blue Card holders is the Family Reunification Directive⁷⁶⁶ which is combined with the provision of Article 15 of the Blue Card Directive.

In particular, Article 15 of the Blue Card Directive provides for the following derogations: First, family reunification shall not be made dependent on a prior minimum period of residence or reasonable prospects of obtaining the right of permanent residence as it is the case in the ordinary family reunification procedure⁷⁶⁷. Second, the integration conditions and

⁷⁶⁴ Article 2 (g) of the Blue Card Directive

⁷⁶⁵ Article 12 of the Blue Card Directive

⁷⁶⁶ See Article 15 (1) but also Article 2 (f) of the Blue Card Directive which provides that ‘family members’ means third-country nationals as defined in Article 4 (1) of the Family Reunification Directive

⁷⁶⁷ Article 15 (2) of the Blue Card Directive

measures referred to in the last paragraph of Article 4 (1) and Article 7 (2) of the Family Reunification Directive may be applied only after the family members concerned have been admitted to the territory of the Member State⁷⁶⁸. It follows that the preamble of the Blue Card Directive which provides that Member States may maintain or introduce integration conditions and measures such as language learning for the family members of an EU Blue Card holder should be read in conjunction with the above mentioned provision.

Third, residence permits for family members shall be granted at the latest within six months from the date on which the application is lodged and not within nine months as it is provided for in Article 5 (4) of the Family Reunification Directive⁷⁶⁹ and shall have a duration of validity identical to the one indicated in the residence permit of the EU Blue Card holder⁷⁷⁰. Forth, Member States shall not apply any time limit as regards the access to the labour market as the one provided for in the second sentence of Article 14 (2) of the Family Reunification Directive⁷⁷¹. Fifth, according to Article 15 (7) and (8) of the Blue Card Directive, for the calculation of the five years of residence which is required for the acquisition of an autonomous right of residence, residence in different Member States may be cumulated and in case Member States recourse to this option, the provisions set out in Article 16 of the Blue Card Directive shall apply *mutatis mutandis*.

Taking into consideration all of the above, it can be concluded that the mere requirements that are left for Member States to apply to Blue Card holders are those of Article 7 of the Family Reunification Directive which concern the evidence of appropriate accommodation, sickness insurance and stable and regular resources, as well as the minimum age requirement for spouses. Given that the EU Blue Card holders enter a Member State in order to work on a highly qualified employment, it seems hard to think of a situation where the material requirements will not be met by the sponsors⁷⁷². In that respect, the position of EU Blue Card holders with regards to family reunification is comparable, although with notable differences,

⁷⁶⁸ Article 15 (3) of the Blue Card Directive

⁷⁶⁹ Article 15 (4) of the Blue Card Directive

⁷⁷⁰ Article 15 (5) of the Blue Card Directive- Derogation from Articles 13 (2) and (3) of the Family Reunification Directive

⁷⁷¹ Article 15 (6) of the Blue Card Directive

⁷⁷² On this criticism see also Δ. Χοτούρας, ‘Η καθιέρωση της ευρωπαϊκής Μπλε κάρτας διαμονής στα πλαίσια της εφαρμογής του Ν 4071/2012 (Ερμηνευτική προσέγγιση και συγκριτικές παρατηρήσεις)’ (2012) 2 *Επιθεώρηση Μεταναστευτικού Δικαίου*, 143-150 (D. Chotouras, The European Blue Card in the framework of the implementation of Law 4071/2012 (interpretative approach and comparative observations)) where the author makes a reference to the French system where no requirement for sufficient resources is imposed on Blue Card holders in order to have their family members accompanying or joining them in France.

to that of the EU citizens. It is important to bear in mind that the definition of ‘family members’ applied to the case of Blue Card holders is that of Article 4 (1) of the Family Reunification Directive⁷⁷³ and not the more enhanced one which concerns EU citizens. Finally, it should be mentioned that the deadline for the implementation of the Directive in the Member States has expired on 19 June 2011 and that according to the Commission’s implementation report on the Blue Card Directive several Member States implemented the Directive after the expiry of the said deadline⁷⁷⁴.

4.1.1.3 EU Blue Card holders from other EU Member States

On the same grounds of making the EU attractive to highly qualified employees, the Blue Card Directive provides for certain derogations from Directive 2003/109/EC⁷⁷⁵ and the possibility for Blue Card holders to move to another Member State. In particular, by way of derogation from the Long-Term Residence Directive, Blue Card holders are allowed to cumulate periods of residence in different Member States for the calculation of the time period required for the acquisition of the long-term resident status⁷⁷⁶. Furthermore, it should be mentioned that Article 18 of the Blue Card Directive provides that:

‘[a]fter eighteen months of legal residence in the first Member State as an EU Blue Card holder, the person concerned and his family members may move to a Member State other than the first Member State for the purpose of highly qualified employment under the conditions set out in this Article’.

Not least, pursuant to Article 19 (1), when the Blue Card holder moves to another Member State and when the family was already constituted in the first Member State, his/her family members shall be authorised to join him/her. Furthermore, within one month after the entry into the second Member State, the family member or the EU Blue card holder shall apply to the competent authorities of the concerned Member State for a residence permit as a family member⁷⁷⁷.

⁷⁷³ Article 2 (f) of the EU Blue Card Directive

⁷⁷⁴ It is worth noting that according to the preamble of the implementation report on the Blue Card Directive, the Commission had launched infringing proceedings against 20 Member States for not having implemented the Directive on time. See COM(2014) 287 final, at preamble.

⁷⁷⁵ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. Hereinafter, ‘the Long-Term Residence Directive’.

⁷⁷⁶ Article 16 of the Blue Card Directive

⁷⁷⁷ Article 19 (2) of the Blue Card Directive

In the proceeding for the issue of the residence permit in the second Member State, family members may be required to present with their application: a) their residence permits in the first Member State, travel documents and visas, b) evidence that they have resided as family members in the first Member State and c) evidence that they or the EU Blue Card holder possess a sickness insurance⁷⁷⁸. In addition, the second Member State may require the EU Blue Card holder to present evidence that: a) s/he has adequate accommodation and that b) s/he has stable and regular resources for him and his family members⁷⁷⁹. Lastly, Article 19 (6) of the Blue Card Directive concerns the EU Card holder’s right to family reunification for the first time in the second Member State and provides that in cases the family was not already constituted in the first Member State, the derogations of Article 15 of the Blue Card Directive shall apply.

4.1.2 Family reunification of Blue Card holders in national legislation

4.1.2.1 Spain

In Spain, the family reunification regime for Blue Card holders is regulated by Article 94 of the Immigration Regulation. In short, in line with what has been mentioned above, the Spanish legislature exempts the sponsor from the obligation to ‘wait’ until the first renewal of his/her permit in order to have his/her family members joining him/her, providing that the sponsor or the employer⁷⁸⁰ may apply for the initial residence permit of the highly qualified worker and his/her family members simultaneously⁷⁸¹. This being said, family reunification may take place in case the Blue Card holder proves to have sufficient resources, sickness insurance and adequate accommodation. Given that Spain does not impose integration measures or conditions on family members, or minimum age requirement to spouses in its ‘general regime’ for family reunion, these conditions are logically also not applicable to Blue Card holders.

⁷⁷⁸ Article 19 (3) of the Blue Card Directive

⁷⁷⁹ Article 19 (4) of the Blue Card Directive

⁷⁸⁰ See Article 94 (4) of the Immigration Regulation

⁷⁸¹ Article 94 (1) of the Immigration Regulation. See also Article 56 (1) (b) of the Immigration Regulation, according to which third-country nationals who have obtained the long-term residence status in another EU Member State, Blue Card holders and beneficiaries of the special regime for researchers, are exempted from the obligation to have resided in Spain for one year before they can apply for family reunification.

Next, the Immigration Regulation contains a provision which concerns family members of a holder of a Blue Card that has been issued in another EU Member State⁷⁸². In particular, the highly qualified worker who holds a Blue Card from another EU Member State may apply for a residence permit for his/her family members who resided with him/her in the Member State that issued the Blue Card at the same time s/he applies for his/her own residence permit in Spain. The application should be made at any moment before the entrance to Spain or at the latest within one month after entrance. The documents which should be presented are a copy of the passport or valid travelling document recognised in Spain for every one of the family members, copy of the residence permit in another EU Member State, proof that s/he has lived there as a family member of an Blue Card holder and proof that the EU Blue Card holder has adequate accommodation and sufficient resources⁷⁸³. Pursuant to Article 96 (4) of the Immigration Regulation, in case the sponsor wishes to reunify with members of his/her family who did not form part of the established family in the other Member State, then Article 94 of the Immigration Regulation is applicable.

4.1.2.2 Greece

In Greece, the provisions regarding family members of Blue Card holders are Articles 120 and 123 of the Immigration Law. According to Article 120, family members of Blue Card holders may accompany or join the sponsor in Greece in case the latter has sufficient resources in order to cover his/her needs and those of his/her family members⁷⁸⁴. The two-year prior lawful residence requirement is not imposed on Blue Card holders and no restriction on labour market access is imposed on family members of Blue Card holders, as the one applicable to a regular family reunification case⁷⁸⁵. Next, the Greek legislature has also implemented the derogations of the Blue Card Directive regarding the deadline for the issue of the residence permit within six, instead of nine, months⁷⁸⁶ and that the residence permit should have the same duration as that of the sponsor⁷⁸⁷. It can be assumed that the minimum age requirement for the spouse, normally applicable to reunification cases, is applied to the spouses of Blue Card holders as well. As regards EU Blue Card holders from another EU Member State who move to Greece, these may also be accompanied or joined by their family members in

⁷⁸² Article 96 of the Immigration Regulation

⁷⁸³ Article 96 (2) of the Immigration Regulation

⁷⁸⁴ Article 120 (1) of the Immigration Law

⁷⁸⁵ Article 120 (4) of the Immigration Law

⁷⁸⁶ Article 120 (2) of the Immigration Law

⁷⁸⁷ Article 120 (3) of the Immigration Law

accordance with what is laid down in Article 123 of the Immigration Law which is in line with the Blue Card Directive.

4.1.2.3 Germany

Before analysing the family reunion regime for Blue Card holders, it is worth noticing that Germany constitutes by far the EU Member State which issues the highest number of EU Blue Cards among all EU Member States. According to the Commission’s implementation report on the Blue Card Directive, among 15.261 Blue Cards granted in 2013 in all Member States, Germany granted 14.197⁷⁸⁸. As regards the statistics with respect to family members, the same report mentions that in 2013 at least 1.421 spouses and 899 children joined an EU Blue Card holder in Germany⁷⁸⁹. This number is relatively small in comparison to the number of Blue Card holders who were admitted in the same year. Nevertheless, it is at least partly justified by the fact that the 75,56% of the Blue Card holders admitted to Germany the same year was under 35 years old and may not have yet founded their own family⁷⁹⁰.

As regards the conditions for family reunion, Blue Card holders do not need to have been residing lawfully for a certain period in the German territory before they are able to have their family members joining them, regardless of whether the marriage was concluded before or after the third-country national’s admission to Germany⁷⁹¹. In addition, the sponsors and their spouses are exempted from the minimum age requirement for spouses⁷⁹², the spouses do not need to prove that they are able to communicate in German on a basic level⁷⁹³ and the integration conditions are not applicable to the over 16-year old child of the third-country Blue Card holder⁷⁹⁴. It follows that Blue Card holders should merely prove to comply with the material conditions in order to have their family members joining them in Germany. The same is true for EU Blue Card holders from other EU Member States.

⁷⁸⁸ COM(2014) 287 final, at 1.1.

⁷⁸⁹ COM(2014) 287 final, at 2.8.

⁷⁹⁰ COM(2014) 287 final, at 2.8.

⁷⁹¹ Article 30 (1) 3 g of the Residence Act

⁷⁹² Article 30 (1) of the Residence Act

⁷⁹³ Article 30 (1) of the Residence Act

⁷⁹⁴ Article 32 (1) 2 of the Residence Act

4.2 Family members of researchers

4.2.1 The Researchers Directive

4.2.1.1 Overview of the Directive

The Directive regulating the procedures for admitting third-country nationals for the purposes of carrying out research in the EU is Directive 2005/71/EC⁷⁹⁵. It should be underlined that a new Directive on researchers was agreed by the EU Council and Parliament on 20 November 2015⁷⁹⁶. The present thesis will in principle deal with Directive 2005/71/EC as this will be in force for the next two years. Nevertheless, in the end of Chapter 4.2.1.2, we will comment on the important changes that the new Directive brings to the field of family reunification of researchers.

According to Article 1, the purpose of the Researchers Directive is to lay down ‘(...) the conditions for admission of third-country researchers to the Member States for more than three months for the purposes of carrying out a research project under hosting agreements with research organisations’. Furthermore, Article 2 contains the definitions of ‘research’⁷⁹⁷, ‘research organisation’ and ‘researcher’. Interestingly, the preamble in conjunction with Article 3 (2) (b) of the Researchers Directive make clear that doctoral students are excluded from the scope of this Directive and are covered by Directive 2004/114/EC⁷⁹⁸ which will be analysed below. Therefore, the researcher should be a third-country national who is selected by a research organisation on a basis of a hosting agreement in order to carry out a research project and not a PhD student who is enrolled at a postgraduate university program that leads to the acquisition of a doctoral degree.

⁷⁹⁵ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research. Hereinafter, ‘the Researchers Directive’.

⁷⁹⁶ The new Directive has not yet been in force and is likely to leave Member States a two-year deadline for implementation into domestic law. The most important of the changes that it brings concern the fact that researchers will now have the right to stay for nine months after having completed their studies in order to search for employment and the right to family reunification (this issue is analysed more in detail below). Not least, the mobility in the EU is facilitated with the period of mobility being increased to six months. The new Directive will also confer an enhanced right to equal treatment.

⁷⁹⁷ The definition of ‘research’ implies that the researcher can carry out research on social sciences as well, as the definition speaks about ‘knowledge of man, culture and society’ but in any case there should be some practical application of this knowledge as the provision provides for ‘use of this stock of knowledge to devise new applications’(see Article 2 (b) of the Researchers Directive).

⁷⁹⁸ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. Hereinafter, ‘the Students Directive’.

The hosting agreement may be conducted only in case the research project has been approved by the organisation and the third-country researcher has sufficient resources and sickness insurance covering all the risks normally covered for nationals of the Member State concerned⁷⁹⁹. The Researchers Directive does not require the research agreement to provide for some kind of remuneration for the researcher without however prohibiting it as it provides that it is for the hosting agreement to specify the legal relationship and working conditions of the researcher⁸⁰⁰. Furthermore, Chapter IV sets out the researchers’ rights. First, pursuant to Article 11 of the Researchers Directive, researchers may teach in accordance with the national legislation but Member States may set a maximum number of hours or days for teaching per month. Second, third-country researchers have the right to equal treatment with the nationals of the concerned Member State as regards recognition of diplomas, certificates and other professional qualifications, working conditions, including pay and dismissal, branches of social security, tax benefits and access to goods and services⁸⁰¹. Third, the researchers have the right to move to another Member State in order to carry out part of their research project under the conditions provided for in Article 13 of the Researchers Directive.

Moreover, it should be mentioned that the Researchers Directive provides that the application should be submitted when the third-country researcher who wishes to enter a Member State is residing outside the territory of that state⁸⁰². However, Member States may accept applications in accordance with their legislation from third-country nationals already residing in their territory⁸⁰³. Lastly, as regards withdrawal or refusal to renew the residence permit of a third-country researcher, the Directive provides that Member States may withdraw or refuse to renew the residence permit in case it was acquired fraudulently or whenever it appears that the conditions provided for in the Researchers Directive were not met or are no longer met⁸⁰⁴. Furthermore, Member States may withdraw or refuse to renew the residence permit of a third-country researcher on grounds of public policy, public security and public health⁸⁰⁵.

⁷⁹⁹ Article 6 (2) (a) (b) and (c) of the Researchers Directive

⁸⁰⁰ Article 6 (2) (d) of the Researchers Directive

⁸⁰¹ Article 12 of the Researcher Directive

⁸⁰² Article 14 (2) of the Researchers Directive

⁸⁰³ Article 14 (3) of the Researchers Directive

⁸⁰⁴ Article 10 (1) of the Researchers Directive

⁸⁰⁵ Article 10 (2) of the Researchers Directive

4.2.1.2 Family reunification of researchers

As regards family members of researchers, it should be noted that the Researchers Directive does not provide for a right to family reunification, as was the case with EU Blue Card holders. However, the preamble of the Directive encourages the admission of family members stating that:

‘[s]pecial attention should be paid to the facilitation and support of the preservation of the unity of family members of the researchers, according to the Council Recommendation of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community’⁸⁰⁶.

The preamble seems to further encourage the mobility of family members in another Member State in order to join the researchers who move to another Member State for the purposes of their research⁸⁰⁷.

Nonetheless, these recitals in the preamble do not grant an explicit right of admission to family members. It is undisputable that the absence of a right to family reunification in the Researchers Directive will discourage some of the best researchers of the world to come to the EU⁸⁰⁸ especially if Member States decide to apply the particularly low standards for family reunification of the Family Reunification Directive. The argument that researchers are normally of a young age and they have therefore not yet established their own family can be accepted but only to a certain extent as it overlooks the fact that in many countries of origin third-country nationals establish their own families at a particularly young age. It could even be argued that the Family Reunification Directive cannot apply in case of researchers as it requires a ‘reasonable prospect of obtaining the right of permanent residence’ and as long as it remains unclear whether the Long-Term Residence Directive applies to researchers⁸⁰⁹, it is left to the exclusive discretion of Member States to even ban the entry of any family member or set very low standards. In that respect, we believe that the Directives should be

⁸⁰⁶ Recital No. 18 of the Researchers Directive

⁸⁰⁷ See Recital No. 19 of the Researchers Directive which reads as follows: ‘In order to preserve family unity and enable mobility, family members should be able to join the researcher in another Member State under the conditions determined by the national law of such Member State, including its obligations arising from bilateral or multilateral agreements’.

⁸⁰⁸ The Commission’s implementation report on the Researchers Directive already shows that the Directive has had little effect on attracting the most qualified researchers to the EU. See Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research published on 22 December 2011, COM(2011) 901 final.

⁸⁰⁹ S. Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford, Oxford University Press, 2011)

implemented and interpreted by the Member States in such a way as to reflect their spirit and their purposes as appear in the preambles.

Next, it should not escape our attention that the Researchers Directive contains a provision which concerns family members⁸¹⁰ which apparently becomes applicable in case a Member State decides to admit family members of researchers. According to this article, the duration of validity of the residence permit of the family members shall be the same as that of the residence permit of the researcher. However, according to the same provision, ‘[i]n duly justified cases, the duration of the residence permit of the family member of the researcher may be shortened’⁸¹¹. Furthermore, pursuant to Article 9 (2) of the Researchers Directive, the issue of a residence permit for a family member shall not be dependent upon a requirement of a minimum period of residence of the researcher.

All of the above will soon be of little importance as the concerns that the absence of a right to family reunification is likely to make the EU less attractive for researchers seems to have been shared by the EU legislature and the new Directive on researchers ultimately confers a right to family reunification to researchers. Indeed, according to the text of the new Directive which has already been agreed by the EU institutions, the Family Reunification Directive becomes explicitly applicable to researchers with several conditions being waived. These are the requirement for a prior lawful residence, the pre-entry integration measures and the requirement that they should have reasonable prospects of obtaining the right of permanent residence. Not least, the decision on the application should be made within 90 days and the derogation of Article 14 (2) of the Family Reunification Directive regarding the time limit in respect of access to the labour market shall only be applied in exceptional circumstances such as high unemployment rates. It should be noted that the fact the EU legislature decided to grant a right to family reunification to researchers is highly welcomed. It is possible that the recast of the Directive in that respect will help the EU become more attractive in the future for third-country researchers.

⁸¹⁰ Article 9 of the Researchers Directive

⁸¹¹ Article 9 (1) of the Researchers Directive

4.2.2 Family reunification of researchers in national legislation

4.2.2.1 Spain

In Spain, the legislation provides for a more favourable, in comparison to the one applicable to a ‘regular’ family reunification case, legal status for third-country nationals who enter Spain in order to work as researchers. The reunification regime which applies to them is similar to the one applicable to Blue Card holders and is regulated by the provision of Article 83 of the Immigration Regulation. This being said, in case the conditions for sufficient resources, sickness insurance and adequate accommodation⁸¹² are met, the family member is being granted a residence permit for reasons of family reunification. The sponsor does not need to ‘wait’ until the first renewal of his/her permit in order to have his/her family members joining him/her as the sponsor or the research centre⁸¹³ may apply for the initial residence permit of the researcher and his/her family members simultaneously⁸¹⁴. In addition, no minimum age requirement or integration measures are applicable for spouses or other family members. As regards researchers who have been granted this status from another EU Member States, these can enter Spain pursuant to Article 84 of the Immigration Regulation but no special provision has been adopted by the Spanish legislature with regards to their family members.

4.2.2.2 Greece

The Greek legislature gives researchers a favourable right to family reunification which resembles to the one applicable to Blue Card holders. In particular, the status of researchers and their family members in Greece is regulated in the Immigration Law by Articles 57-68. As regards family members, Article 61 (4) of the Immigration Law provides that researchers may be accompanied or followed by their family members in Greece. The same is true for family members of researchers who have been granted this status in another EU Member State and wish to enter Greece for research purposes, in case these family members hold a residence permit as family members in that other EU Member State⁸¹⁵. The two above mentioned

⁸¹² Article 83 (3) of the Immigration Regulation

⁸¹³ See Article 83 (4) of the Immigration Regulation

⁸¹⁴ Article 83 (1) of the Immigration Regulation. See also Article 56 (1) (b) of the Immigration Regulation, according to which third-country nationals who have obtained the long-term residence status in another EU Member State, Blue Card holders and beneficiaries of the special regime for researchers, are exempted from the obligation to have resided in Spain for one year before they can apply for family reunification.

⁸¹⁵ Article 64 (7) of the Immigration Law

provisions imply that the two years of lawful residence requirement applicable to a regular family reunification procedure does not apply in case of researchers. On the contrary, the minimum age requirement for the spouse shall be applicable to the spouse of researchers, as well as the sponsor’s obligation to comply with material conditions. Furthermore, Article 63 of the Immigration Law provides that family members should be granted a residence permit which should have the same expiry date as the one of the researcher.

4.2.2.3 Germany

The German legislature provides for a right to family reunification for researchers which may take place under a more favourable regime than the ‘regular’ one, without however being as favourable as the one applicable to Blue Card holders. The main difference concerns the integration condition which is imposed on the 16 years child of the researchers but not on the child of the Blue Card holder⁸¹⁶. Researchers are also not exempted from complying with material conditions. As to the rest of the requirements, third-country researchers are not required to have been residing lawfully for a certain period in Germany before they are able to have their family members joining them, regardless of whether the marriage was concluded before or after the third-country national’s admission to Germany⁸¹⁷. Lastly, spouses are exempted from the minimum age requirement and from the obligation to prove that they are able to communicate in German on a basic level⁸¹⁸. The same legal framework applies to family members of researchers who have been granted this status from another EU Member State and wish to enter Germany for research purposes.

4.3 Family members of non-economic immigrants: students, pupils, trainees, volunteers

4.3.1 The Students Directive

4.3.1.1 Overview of the Directive

In December 2004, the EU legislature adopted the Students Directive which regulates the conditions of admission of third-country students, pupils, unremunerated trainees and volunteers. It should be underlined that a new Directive on students was agreed by the EU

⁸¹⁶ Article 32 (2) of the Residence Act

⁸¹⁷ Article 30 (1) 3 c of the Residence Act

⁸¹⁸ Article 30 (1) of the Residence Act

Council and the Parliament on 20 November 2015⁸¹⁹. Nonetheless, the present thesis will in principle deal with Directive 2004/114/EC as this will be in force for the next two years. As it is highlighted in Chapter 4.3.1.2, the new Directive does not significantly change the third-country students’ rights with respect to family reunification.

The Directive covers stays longer than three months and its implementation is obligatory only with regards to students. The application of the Directive to pupils, trainees and volunteers is left to the Member States’ discretion⁸²⁰. Article 2 of the Students Directive contains a definition of the crucial concepts of the Directive such as ‘student’, ‘school pupil’, ‘unremunerated trainee’, ‘establishment’ and ‘voluntary service scheme’. It should be mentioned that according to the preamble of the Directive, unremunerated trainees and volunteers who, pursuant to the kind of compensation or remuneration received, are considered as workers under national legislation are not covered by the Directive.

Furthermore, according to Article 3 (2), the Directive does not apply to asylum seekers, persons on subsidiary forms of protection, persons on temporary protection schemes, third-country nationals whose expulsion has been suspended, family members of EU citizens, third-country nationals holding the long-term resident status and workers or self-employed persons. It should be born in mind that none of the persons who enter a Member State on the basis of this Directive can acquire the long-term resident status as the Long-Term Residence Directive contains an explicit provision which excludes third-country nationals who are students or pursue vocational training in one of the EU Member States⁸²¹.

Moreover, Article 6 of the Students Directive defines the general conditions of admission for all persons covered by the Directive which are: a) a valid travel document (it can be required that the duration of validity of this document should cover the duration of the planned stay), b) authorisation for the stay in case the third-country national is a minor, c) sickness insurance covering all risks, d) that the third-country national has paid the fees of Article 20 in case applicable and e) that s/he does not constitute a threat to public policy, public security or

⁸¹⁹ The Directive has not yet been in force and is likely to leave Member States a two-year deadline for implementation into domestic law. The most important of the changes that it brings concern the fact that students will now have the right to stay for nine months after having completed their studies in order to search for employment. Not least, mobility within the EU is facilitated whereas the hours per week that they may be employed increase from 10 to 15 hours. The new Directive does not confer a right to family reunification for students.

⁸²⁰ Article 3 (1) of the Students Directive

⁸²¹ Article 3 (2) (a) of the Long-Term Residence Directive

public health. Moreover, Articles 7, 9, 10 and 11 of the Students Directive provide for the additional conditions for the admission of students, school pupils, unremunerated trainees and volunteers accordingly. It is noteworthy that students shall have the right to be employed or exercise some self-employed economic activity outside their study time which shall not be less than 10 hours per week⁸²². However, the provision regarding the economic activity of students is ambiguous as it leaves a wide margin of appreciation to the Member States providing that ‘[t]he situation of the labour market in the host Member State may be taken into account’⁸²³ and that ‘[e]ach Member State shall determine the maximum number of hours per week or days or months per year allowed for such an activity, which shall not be less than 10 hours per week, or the equivalent in days or months per year’⁸²⁴.

4.3.1.2 Family reunification of students, pupils, trainees, volunteers

The Students Directive does not contain any provision with regards to family reunification. In that respect, it should be mentioned that the Long-Term Residence Directive explicitly excludes from its scope third-country students and persons who pursue vocational training. As a result, the Family Reunification Directive cannot be in principle applicable as the requirement for ‘reasonable prospects of obtaining the right of permanent residence’ cannot be fulfilled by third-country students. Consequently, the issue of family reunification of students remains to the explicit competence of the national legislatures who are left discretion to apply very low standards or even refuse a right to family reunification to third-country students. It appears that this discretion is wider than the one left to Member States in the case of researchers, as the Students Directive does not contain any ‘guidelines’ in its preamble concerning family reunification or family related rights as it is the case in the Researchers Directive but remains totally silent with regards to this issue.

The strict approach of the EU legislature who has in fact ignored the students’ need for emotional support might result in less students deciding to choose the EU for pursuing academic studies in either undergraduate or postgraduate level. The situation seems to influence particularly the doctorate students who are excluded from the scope of the Researchers Directive and are treated as regular students in the sense of the Students Directive. Given that this kind of studies may last for a long period of time and that they are pursued by

⁸²² Article 17 of the Students Directive

⁸²³ Article 17 (1) of the Students Directive

⁸²⁴ Article 17 (2) of the Students Directive

students who may be at an older age and therefore the possibility of having created their own family is higher, the approach of the Directive in this issue is likely to discourage some of the most qualified third-country PhD students to access to the Universities of the EU countries for pursuing their doctoral studies⁸²⁵. Regrettably, the new Students Directive does not change the above described situation as third-country students are not granted a right to family reunification under this legal instrument either.

4.3.2 Family reunification of students in national legislation

4.3.2.1 Spain

In Spain, the provisions that deal with the legal status of third-country nationals who wish to enter the Spanish territory as students, pupils, trainees or volunteers are Articles 37-44 of the Immigration Regulation. The provision that regulates the status of the family members of these persons is Article 41 of the Immigration Regulation. The definition of family adopted in their case is narrower as the term ‘family members’ merely refers to the spouse or partner and the children who are younger than 18 or they are not objectively unable to provide for their own needs on account of their state of health⁸²⁶.

The requirements for the acquisition of the visa for the above mentioned family members are that: a) the sponsor should have the right to remain in Spain in accordance with the articles concerning students, pupils, trainees and volunteers, b) s/he should have sufficient resources in order to sustain the family unity and c) s/he should provide evidence for the existence of the family relation. Family members can apply for the corresponding visa in order to enter and remain regularly in Spain for the same period as the sponsor, without the requirement that the sponsor has remained already in Spain for a certain period of time⁸²⁷. In any event, family members may remain in Spain under the same circumstances as the sponsor and in case their stay exceeds six months, they should apply for the Immigrant’s Identity Card⁸²⁸. It should be emphasised that family members of students do not have the right to work in Spain⁸²⁹ but

⁸²⁵ The Commission’s implementation report on the Students Directive already shows that the Directive has had little effect on attracting the most qualified students to the EU. See Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service published on 28 September 2011, COM(2011) 587 final.

⁸²⁶ Article 41 (2) of the Immigration Regulation

⁸²⁷ Article 41 (1) of the Immigration Regulation

⁸²⁸ Article 41 (3) of the Immigration Regulation

⁸²⁹ Article 41 (4) of the Immigration Regulation

merely a right to remain in the territory, situation which is entirely different from the family members of third-country nationals who enter Spain under the ‘general regime’ for family reunification.

4.3.2.2 Greece

The situation is rather different in Greece as third-country students who enter Greece for studying purposes do not have the right to reunify or be accompanied or joined by their family members. The Greek legislature has not exercised his/her discretion with regards to this issue in favour of the third-country national who enters Greece for studying purposes⁸³⁰. Nevertheless, there are two exceptions in the above mentioned rule. First, the student’s child who is born in Greece during the studying period is granted a residence permit as a family member of a student. This permit shall have the same expiration date as the one of the sponsor⁸³¹. Second, in case the third-country national has been accepted as a trainee specialist doctor by a medical institution, s/he may be accompanied by his/her family members who are granted a residence permit which expires at the same date as that of the sponsor⁸³².

4.3.2.3 Germany

In Germany, the relevant provisions of the Residence Act that deal with residence permits for study purposes are Articles 16-17. Family members of third-country national students follow the regular family reunification procedure which applies to all third-country nationals and has been described in detail above. They are not excluded from the right to family reunification, as it is the case in Greece, but they are also not granted particular benefits as it is the case with researchers and highly-skilled workers.

4.4 Family members of long-term residents

4.4.1 The Long-Term Residence Directive

4.4.1.1 Overview of the Directive

Third-country nationals who have been residing in a Member State for a long period are granted a more stable legal status. The right to a long-term resident status is regulated at EU

⁸³⁰ The relevant provisions of the Immigration Law which implement the Students Directive are Articles 31 to 48.

⁸³¹ Article 43 (1) of the Immigration Law

⁸³² Article 47 (2) of the Immigration Law

level by the Long-Term Residence Directive. According to the Directive, third-country nationals qualify for the long-term resident status in case they fulfil two specific requirements. First, they should have resided regularly and continuously in the territory of a Member State for a period of five years⁸³³ and second, they should prove to have stable and regular resources sufficient to maintain themselves and their family members⁸³⁴ and sickness insurance for all risks normally covered for the nationals of the concerned Member State⁸³⁵. Furthermore, Member States may require third-country nationals to comply with integration conditions⁸³⁶. The latter was subject to a preliminary ruling question in the case *P. and S*⁸³⁷. In short, the CJEU found that Member States may require a third-country national to pass an integration examination even if s/he already acquires long-term resident status provided that the implementation of this obligation does not ‘(...) jeopardise the achievement of the objectives pursued by that Directive’⁸³⁸.

It should be noticed that initially the Long-Term Residence Directive⁸³⁹ provided that students, beneficiaries or seekers of temporary protection, beneficiaries or seekers of subsidiary protection, refugees and asylum seekers, persons residing solely on temporary grounds and those enjoying a status governed by the conventions of Article 2 (f) of the Directive were excluded from its scope. However, Article 3 (2) has been amended⁸⁴⁰ in order to include in the scope of the Directive persons enjoying international protection. Therefore, beneficiaries of subsidiary protection and refugees may now qualify for the long-term resident status and they consequently have the same rights as the rest of the long-term residents including movement rights in the EU and all that will be discussed below regarding family related rights.

The Long-Term Residence Directive provides that Member States may refuse to grant long-term resident status to third-country nationals who otherwise fulfil the requirements, on grounds of public policy and public security⁸⁴¹. The decision to refuse an application on these

⁸³³ Article 4 (1) of the Long-Term Residence Directive

⁸³⁴ Article 5 (1) (a) of the Long-Term Residence Directive

⁸³⁵ Article 5 (1) (b) of the Long-Term Residence Directive

⁸³⁶ Article 5 (2) of the Long-Term Residence Directive

⁸³⁷ Case C-579/13 *P. and S.* (not yet reported)

⁸³⁸ §56 of the judgment. Concerns in that respect have been raised from the doctrine as well. In A. Böcker and T. Strik, ‘Language and Knowledge Tests for Permanent Residence Rights: Help or Hindrance for Integration?’ (2011) 13 *European Journal of Migration and Law* 157-184 the scholars claim that depending on their accessibility and difficulty, these tests are likely to undermine the objective of the Directive.

⁸³⁹ Article 3 (2) of the Long-Term Residence Directive

⁸⁴⁰ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection

⁸⁴¹ Article 6 (1) of the Long-Term Residence Directive

grounds should not be made to serve economic considerations pursuant to Article 6 (2) of the Directive. Moreover, Article 9 of the Long-Term Residence Directive contains the circumstances under which the long-term resident status may be withdrawn or lost. In particular, third-country long-term residents shall lose their status if the latter had been acquired fraudulently, if they are expelled on grounds of public policy or public security or in case they are absent from the Union for twelve consecutive months (the application of the latter remains in the discretion of the Member States pursuant to Article 9 (2)).

Beneficiaries of long-term resident status acquire various rights in the territory of the Member State of their residence⁸⁴². First, they enjoy the right of permanent residence in the Member State which has granted them the long-term resident status. Article 12 provides that long-term residents may be expelled only if they constitute ‘an actual and sufficiently serious threat to public policy or public security’ and that a decision for expulsion shall not serve economic considerations.

Second, long-term residents shall enjoy equal treatment⁸⁴³ with nationals of the Member State concerned with regards to access to employment and self-employment, education and vocational training, including study grants, recognition of professional diplomas, social security, social assistance and social protection, tax benefits, access to goods and services, freedom of association and affiliation and they shall also enjoy free access to the entire territory of the Member State. Nevertheless, it should be noted that Article 11 (3) (a) of the Long-Term Residence Directive authorises Member States to restrict the right to equal treatment, in case they so desire, in particular when employment and self-employment activities are reserved to nationals, EU or EEA citizens. Member States may further limit equal treatment with regards to social assistance and social protection to core benefits⁸⁴⁴ but they are also left discretion to grant the right to equal treatment with regards to areas not covered in Article 11 (1)⁸⁴⁵.

Third, long-term residents have the right of residence in another EU Member State. The provisions regulating the rights of long-term residents in a second Member State are referred

⁸⁴² For a detailed analysis of the rights and legal status of long-term residents pursuant to the Directive see also S. Peers, ‘Implementing Equality? The Directive on Long Term Resident Third Country Nationals’ (2004) 29(4) *European Law Review* 437-460 and D. Acosta, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship: An Analysis of Directive 2003/109* (Leiden/Boston, Brill, 2011)

⁸⁴³ Article 11 of the Long-Term Residence Directive

⁸⁴⁴ Article 11 (4) of the Long-Term Residence Directive

⁸⁴⁵ Article 11 (5) of the Long-Term Residence Directive

to in Chapter III of the Long-Term Residence Directive and constitute one of the most complex issues of the Directive. In any event, once third-country nationals are granted the long-term resident status, they have the right to move to another Member State in order to exercise employment or self-employment activity, for studying purposes or for other purposes as provided for in Article 14 of the Long-Term Residence Directive.

Long-term residents may be required to meet certain conditions in order to be granted residence rights in the second Member States⁸⁴⁶. These conditions are identical to the ones required by the first Member State in order to grant the long-term resident status (stable and regular resources, sickness insurance and compliance with integration measures). However, the second Member State may only impose ‘integration measures’ in case third-country nationals have not been required to comply with ‘integration conditions’ at the procedures for the acquisition of the long-term resident status in the first Member State⁸⁴⁷. In any event the use of the term ‘integration measures’ in Article 15 (3) makes clear that the second Member State may ask the third-country national to attend a language course but cannot make the acceptance conditional upon the positive outcome of an examination⁸⁴⁸. It should be noted that the second Member State may deny the admission of third-country nationals who have acquired the long-term resident status in another Member State on grounds of public policy, public security⁸⁴⁹ and public health⁸⁵⁰.

4.4.1.2 Family members of long-term residents and long-term residents in another EU Member State

To begin with, long-term residents have the right to family reunification in the Member State that has granted them the long-term residence status. In fact, they acquire this right already when the long-term resident status is reasonably expected and before it is actually granted. The right to family reunification is covered by the Family Reunification Directive and it has been analysed in detail in Chapter 3 of Part III. For the purposes of the present Chapter it is worth highlighting that there seems to be a particularly tight connection between the Long-Term Residence Directive and the Family Reunification Directive. This is due to the fact that

⁸⁴⁶ Article 15 (2) and (3) of the Long-Term Residence Directive

⁸⁴⁷ Second subparagraph of Article 15 (3) of the Long-Term Residence Directive

⁸⁴⁸ On the differences between ‘integration measures’ and ‘integration conditions’, see above the discussion made in the framework of the Family Reunification Directive.

⁸⁴⁹ Article 17 of the Long-Term Residence Directive

⁸⁵⁰ Article 18 of the Long-Term Residence Directive

Article 3 of the Family Reunification Directive requires third-country nationals to have ‘reasonable prospects of obtaining the right of permanent residence’ in order to have a right to family reunification. Therefore, persons who are excluded from the scope of the Long-Term Residence Directive are also excluded from the right to family reunification as the above mentioned requirement for prospects of achieving permanent residence cannot be met.

In any event, it should be mentioned that in case the sponsor already acquires the long-term resident status, Member States are not obliged to grant this status to his/her family members as well, if the latter have not resided for the required period of time in the host Member State. This was recently clarified by the CJEU in *Tahir*⁸⁵¹.

Furthermore, long-term residents who exercise movement to a second Member State have the right to be accompanied or joined by their family members. The provision which regulates this right is that of Article 16 of the Long-Term Residence Directive combined with the preamble of the same Directive which encourages family reunion of long-term residents who move to another Member State⁸⁵². More particularly, Article 16 provides that in case family was already constituted in the first Member State, family members in the sense of Article 4 (1) of the Family Reunification Directive shall be authorised to join the long-term resident in the second Member State⁸⁵³. Furthermore, pursuant to Article 16 (2), in case family was already constituted in the first Member State, other family members than those referred to in Article 4 (1) of the Family Reunification Directive may be authorised to join the long-term resident in the second Member State.

Moreover, family members who wish to accompany or join a long-term resident in another Member State should meet the conditions referred to in Article 16 (4) of the Long-Term Residence Directive. In particular, Member States may require family members to present:

‘(a) their long-term resident's EC residence permit or residence permit and a valid travel document or their certified copies; (b) evidence that they have resided as members of the family of the long-term resident in the first Member State; (c) evidence that they have stable and regular resources which are sufficient to maintain themselves without recourse

⁸⁵¹ Case C-469/13 *Shamim Tahir v. Ministero dell'Interno and Questura di Verona* (not yet reported)

⁸⁵² See Recital No. 20 which provides that ‘[f]amily members should also be able to settle in another Member State with a long-term resident in order to preserve family unity and to avoid hindering the exercise of the long-term resident's right of residence. With regard to the family members who may be authorised to accompany or to join the long-term residents, Member States should pay special attention to the situation of disabled adult children and of first-degree relatives in the direct ascending line who are dependent on them’.

⁸⁵³ Article 16 (1) of the Long-Term Residence Directive

to the social assistance of the Member State concerned or that the long-term resident has such resources and insurance for them, as well as sickness insurance covering all risks in the second Member State. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions’.

Furthermore, Article 16 (5) outlines that all of the above is applicable only in case the family was already constituted in the first Member State as otherwise regular family reunification procedures shall apply. Lastly, the refusal of the application on grounds of public policy, public security⁸⁵⁴ and public health⁸⁵⁵, analysed above with regards to long-term residents who move to another Member State, applies to the family members who accompany or join them as well.

It should be highlighted that the wording of Article 16 implies that no requirement for a prior minimum period of residence can be imposed on long-term residents that exercise some movement within the Union with regards to their right to have their family members joining or accompanying them. In particular, the use of the words ‘accompany’ and ‘join’ are identical to those used in the context of free movement of EU citizens. In that respect it should be mentioned that family reunification of long-term residents who move to another Member State is covered by a rather favourable towards the third-country national regime which might not be identical to the one applicable to EU citizens but is by all means more favourable than the one established by the Family Reunification Directive. It can be argued that family reunion of long-term residents who move to another Member State constitutes a separate family reunification regime added to the commonly known ones regarding EU citizens, third-country nationals and nationals of the Member States.

4.4.2 Family members of long-term residents in national legislation

4.4.2.1 Spain

In Spain, the legal status of third-country nationals who are long-term residents in Spain and that of third-country nationals who have acquired the same status in another EU Member State and wish to move to Spain is regulated by Articles 147-161 of the Immigration Regulation. The most significant provision for the objectives of the present study is that of Article 156 of the Immigration Regulation which concerns family members of third-country nationals who

⁸⁵⁴ Article 17 of the Long-Term Residence Directive

⁸⁵⁵ Article 18 of the Long-Term Residence Directive

have acquired the long-term residence status in another EU Member State. In particular, this provision provides that the family member of a third-country national who resides in Spain on the basis of the long-term residence status obtained in another EU Member State, can apply for a residence permit with the requirement that s/he or the holder of the EU long-term residence permit has sufficient resources and adequate accommodation and provided that s/he formed part of the established family in the other Member State. As ‘family members’ are conceived those referred to in Article 17 of the Immigration Act⁸⁵⁶. It should be noted that there is no need for the EU long-term resident to ‘wait’ until the first renewal of his/her residence permit in order to have his/her family members joining or accompanying him/her.

4.4.2.2 Greece

In Greece holders of a long-term residence permit issued by another EU Member State may be accompanied by or reunified with their family members in Greece in case the family has been already established in this other Member State⁸⁵⁷. On the contrary, in case the family is established after the entrance of the third-country national to Greece, the regular family reunification procedure is applied. It should be noticed that the requirement for a prior lawful residence of two years is not applicable to their case. Residence applications of third-country nationals who have acquired long-term residence status in another EU Member State may in principle be rejected for public policy and public security reasons, whereas certain sicknesses may also justify rejection on grounds of public health⁸⁵⁸. It should be emphasised that for the first twelve months, EU long-term residence holders may not be employed in another sector than the one for which the initial residence permit was issued⁸⁵⁹. Not least, their family members have the same rights and obligations as the family members in a regular family reunification procedure⁸⁶⁰.

4.4.2.3 Germany

In Germany, long-term residents from another EU Member State are exempted from three obligations that otherwise apply to third-country nationals who wish to reunify with their families in Germany for the first time. First they do not need to have resided lawfully for a

⁸⁵⁶ Second subparagraph of Article 156 of the Immigration Regulation

⁸⁵⁷ Article 99 (1) of the Immigration Law

⁸⁵⁸ See Article 99 (3) of the Immigration Law

⁸⁵⁹ Article 101 (2) of the Immigration Law

⁸⁶⁰ See Article 101 (4) which makes reference to Article 75 of the Immigration Law

certain period in Germany before they are able to have their spouses joining them in case marriage already existed in the Member State that granted the long-term residence status⁸⁶¹. Second, the sponsors and their spouses are exempted from the minimum age requirement for spouses and from the integration measures. The integration conditions to the 16 and 17 years old children is still applicable to cases of EU long-term residents but the child should still arrive independently from the parents in order for this condition to apply⁸⁶². It should be mentioned that the fact that Germany does not exempt EU long-term residents’ over 16 years children from the obligation to comply with integration conditions does not raise issues of compatibility with the Long-Term Residence Directive as Article 16 (1) of the said Directive speaks about ‘family members’ who ‘fulfil the conditions referred to in Article 4 (1) of Directive 2003/86/EC’.

⁸⁶¹ Article 30 (1) 3 f of the Residence Act

⁸⁶² Article 32 (2) of the Residence Act

Chapter 5: Family members of seekers and beneficiaries of international protection

5.1 Family members of seekers and beneficiaries of international protection in EU law

5.1.1 Asylum seekers

5.1.1.1 Overview of the Directive on common procedures for granting and withdrawing international protection

The Directive regulating the common procedures applying with regards to applications for international protection is Directive 2013/32/EU⁸⁶³. The Directive applies to all applications for international protection made in the territory of the Union and should have been implemented by 20 July 2015⁸⁶⁴. In particular, the most important procedural safeguards guaranteed by the Common Procedures Directive are the right to an effective access to the procedure⁸⁶⁵, the right to remain in the Member State pending the examination of the application⁸⁶⁶, the right to a personal interview⁸⁶⁷ that on request of the applicant may be conducted by an interviewer of the same sex⁸⁶⁸, the right to receive information in a language that the applicant understands or is reasonably supposed to understand⁸⁶⁹, the right to free legal assistance⁸⁷⁰ and the right to appeal⁸⁷¹. Furthermore, the Common Procedures Directive provides that an application can be made by the applicant on behalf of his/her dependent persons⁸⁷² and that minor applicants shall have the right to lodge the application on their own in case they have the legal capacity to act in procedures according to the law of the concerned Member State, or through their parents, other family members, representative, or other adults responsible for them⁸⁷³. Lastly, Article 7 (4) provides that in case the minor is unaccompanied, Member States shall ensure that the bodies referred to in Article 10 of the Returns Directive

⁸⁶³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. Hereinafter, ‘the Common Procedures Directive’.

⁸⁶⁴ Article 51 (1) of the Common Procedures Directive

⁸⁶⁵ Article 6 of the Common Procedures Directive

⁸⁶⁶ Article 9 of the Common Procedures Directive

⁸⁶⁷ Article 14 of the Common Procedures Directive

⁸⁶⁸ Article 15 (3) (b) of the Common Procedures Directive

⁸⁶⁹ Article 12 (1) (a) of the Common Procedures Directive

⁸⁷⁰ Articles 19 and 20 of the Common Procedures Directive

⁸⁷¹ Article 46 of the Common Procedures Directive

⁸⁷² Article 7 (2) of the Common Procedures Directive

⁸⁷³ Article 7 (3) of the Common Procedures Directive

have the right to make the application on behalf of them⁸⁷⁴. The Common Procedures Directive does not present particular interest with regards to the asylum seekers’ right to family life or family unity⁸⁷⁵.

5.1.1.2 Reception conditions of seekers of international protection

The situation is different with regards to Directive 2013/33/EU⁸⁷⁶ which sets out the minimum standards for the reception of applicants for international protection in the Union. Before proceeding to analyse the provisions that relate to asylum seekers who have families, a short presentation of the key aspects of this Directive is necessary. The main rights granted to applicants for international protection are the right to be informed within a time period not exceeding 15 days after they have lodged their application about the benefits and obligations relating to the reception conditions⁸⁷⁷, the right to be provided with a document issued in their name indicating their status as an applicant for international protection⁸⁷⁸, the right to move freely within the territory of the concerned Member State or within an area assigned to them⁸⁷⁹, the right to health care⁸⁸⁰, the right of minor children to education⁸⁸¹ and the right to employment⁸⁸². The Reception Conditions Directive should have been implemented into the domestic legislation of the Member States by 20 July 2015.

Furthermore, the Reception Conditions Directive contains provisions which concern the applicants’ rights to family life. To start with, a recital in the preamble provides that Member States should respect the principles of the best interest of the child and of family unity in accordance with the ECFR, the ECHR and CRC⁸⁸³. Furthermore, for the purposes of this

⁸⁷⁴ Article 10 (1) reads as follows: ‘Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child’

⁸⁷⁵ For more details on the Directive regulating the common procedures see, S. Peers, V. Moreno-Lax, M. Garlick and E. Guild, *EU Immigration and Asylum Law (Text and Commentary)* (2nd edn, Leiden/Boston, Brill Nijhoff, 2015)

⁸⁷⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Hereinafter, ‘the Reception Conditions Directive’. The Directive presents little difference in comparison to the Directive 2003/09 which was previously in force, with the most important difference being that the Directive 2013/33 extends its scope to applicants of subsidiary protection. See, L. Slingenbergh, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Oxford/ Portland, Oregon, Hart Publishing, 2014)

⁸⁷⁷ Article 5 of the Reception Conditions Directive

⁸⁷⁸ Article 6 of the Reception Conditions Directive

⁸⁷⁹ Article 7 of the Reception Conditions Directive

⁸⁸⁰ Article 19 of the Reception Conditions Directive

⁸⁸¹ Article 14 of the Reception Conditions Directive

⁸⁸² Article 15 of the Reception Conditions Directive

⁸⁸³ Recital No. 9 of the Reception Conditions Directive

Directive, ‘family members’, means: a) the spouse of the applicant or his/her unmarried partner in a stable relationship in case the law of the Member State concerned treats unmarried partners as equivalent to married partners under its law regarding third-country nationals, b) the minor unmarried child of the applicant and c) the father, mother or other adult responsible for the applicant in case the applicant is a minor and unmarried⁸⁸⁴. In any event, it should be born in mind that according to Article 3, the Directive applies to applicants for international protection, as well as to their family members in case the latter are covered by such application under domestic law.

Next, the Directive contains specific provisions with regards to detention of families. In particular, it is provided that detained families should be provided with separate accommodation which would guarantee adequate privacy⁸⁸⁵. Furthermore, the Reception Conditions Directive provides that female applicants should be detained separately from male applicants, unless the persons concerned are family members and on the condition that all individuals involved consent⁸⁸⁶. Not least, the Directive contains rules regarding the issue of communication between the detained applicant and his/her family members who are not detained themselves. In such cases, the latter should be given the possibility to communicate and visit the applicants in conditions of privacy⁸⁸⁷. It should be noted that the criticism regarding detention made below in the framework of the Returns Directive applies with regards to the corresponding provisions of the Reception Conditions Directive as well. This being said, the present Directive is also criticised for letting Member States discretion to detain minor children and families with minor children.

As regards housing, Article 12 of the Reception Conditions Directive provides that ‘[m]ember States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the applicant’s agreement’. Furthermore, pursuant to Article 18 (2), in case housing is provided, the host Member State should make sure that the applicants’ family life is protected, applicants have the possibility of communicating with their relatives and that family members are granted access in order to be able to assist them. Not least, Member States shall ensure that dependent adult applicants are accommodated

⁸⁸⁴ Article 2 (c) of the Reception Conditions Directive

⁸⁸⁵ Article 11 (4) of the Reception Conditions Directive

⁸⁸⁶ Article 11 (5) of the Reception Conditions Directive

⁸⁸⁷ Article 10 (4) of the Reception Conditions Directive

together with close relatives who are already present in the host Member State and are responsible for them by law or practice of that Member State⁸⁸⁸. Lastly, it should be mentioned that Chapter IV of the Directive contains provisions that concern vulnerable persons such as minors or unaccompanied minors with the rule being that Member State should take into serious consideration the best interest of the child when implementing the rules regarding the latter.

The CJEU has recently adopted an interesting judgment regarding accommodation of families. In particular, in *Saciri*⁸⁸⁹, the CJEU gave an expanded interpretation of the provisions of the Reception Conditions Directive regarding accommodation stating that Member States are obliged under this Directive to accommodate members of the same family together even if the accommodation is not provided in kind but in the form of allowances or vouchers. This is a broad interpretation of Article 12 of the Directive which in its literal interpretation only concerns the cases that the accommodation is provided by the Member State. The CJEU further stated that Member States are not obliged to respect the asylum seekers’ choice of accommodation but should ensure that the allowances are sufficient to ensure a dignified standard of living.

5.1.1.3 The Dublin III Regulation

The EU has developed a common system for the determination of the responsible Member State for the examination of an application for international protection that is being lodged in the EU. The EU legal instrument which now regulates this process is Regulation No. 604/2013⁸⁹⁰ which replaced Regulation No. 343/2003⁸⁹¹ and became applicable on 1 January 2014⁸⁹². It should be clarified that the ‘Dublin system’ does not only cover applicants for

⁸⁸⁸ Article 18 (5) of the Reception Conditions Directive

⁸⁸⁹ Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri* (published in the electronic Reports of Cases)

⁸⁹⁰ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. Hereinafter, ‘the Dublin III Regulation’.

⁸⁹¹ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Hereinafter, ‘the Dublin II Regulation’.

⁸⁹² For more details on the ‘Dublin system’ see also, H. O’Nions, *Asylum-A Right Denied: A Critical Analysis of European Asylum Policy* (Farnham, Ashgate, 2014), A. Hurwitz, ‘The 1990 Dublin Convention: A Comprehensive Assessment’ (1999) 11 *International Journal of Refugee Law* 646-677 and S. Peers, V. Moreno-Lax, M. Garlick and E. Guild, *EU Immigration and Asylum Law (Text and Commentary)* (2nd edn, Leiden/Boston, Brill Nijhoff, 2015)

refugee status but also to those who may be granted a subsidiary protection status. The Dublin III Regulation contains a list of criteria for determining the Member State responsible with the main rule being that where no Member State can be designated as responsible on the basis of the criteria listed in Chapter III of the Regulation, the first Member State in which the application was lodged shall be responsible for examining it⁸⁹³. Not least, the second subparagraph of Article 3 (2) provides that:

‘[w]here it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible’.

The provision brings to mind the case *M.S.S. v. Belgium and Greece*⁸⁹⁴, a significant case decided by the ECtHR. In the present case, the ECtHR found that the asylum seekers had been suffered violation of their human rights due to their return back to Greece in accordance with the Dublin rules⁸⁹⁵. A similar position has been adopted by the CJEU in *N. S. v. Secretary of State for the Home Department*⁸⁹⁶.

Before proceeding to analyse the relevant applicable criteria for the determination of the Member State responsible for the examination of the international protection claim, it is worth focusing on the definition of ‘family members’ and ‘relatives’ provided for in the Dublin III Regulation as family links appear to be particularly relevant in the entire Dublin system. In that respect, according to Article 2 (g) and (h):

‘‘family members’ means, insofar as the family already existed in the country of origin, the following members of the applicant’s family who are present on the territory of the Member States:

- the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,

⁸⁹³ Article 3 (2) of the Dublin III Regulation

⁸⁹⁴ *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011

⁸⁹⁵ For an analysis of the judgment see G. Clayton ‘Asylum Seekers in Europe: *M.S.S. v. Belgium and Greece*’ (2011) 11(4) *Human Rights Law Review* 758-773 and V. Moreno-Lax ‘Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*’ (2012) 14 *European Journal of Migration and Law* 1-31

⁸⁹⁶ Joined Cases C-411/10 and C-493/10 *N. S. v. Secretary of State for the Home Department* [2011] ECR I-13905

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- the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
 - when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,
 - when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present
- ‘relative’ means the applicant’s adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law’

It should be noted that according to Article 7, the relevant criteria apply with the order that they appear in Chapter III⁸⁹⁷ and the responsible Member State for the examination of the application should be determined on the basis of the situation obtained when the asylum seeker first lodged the application in the Union⁸⁹⁸.

The first criterion for the determination of the Member State responsible concerns unaccompanied minors⁸⁹⁹. In principle, the Member State responsible for the examination of the application shall be that where there is a regularly residing family member or a sibling of the unaccompanied minor⁹⁰⁰. Furthermore, in case the unaccompanied minor is married and the spouse is not present in the Union, the Member State responsible should be that where the father, mother or other adult responsible for the minor is regularly residing⁹⁰¹. Next, the Regulation provides that in case the unaccompanied minor has a relative present in a Member State, that Member State shall be responsible in case it is ‘in the best interest of the minor’⁹⁰². In addition, according to Article 8 (3) of the Dublin III Regulation, in case there are siblings or relatives residing in different Member States, the Member State responsible should be decided taking into consideration the best interest of the minor. Lastly, in case the

⁸⁹⁷ Article 7 (1) of the Dublin III Regulation

⁸⁹⁸ Article 7 (2) of the Dublin III Regulation

⁸⁹⁹ It should be highlighted that the Commission has made a proposal for amending the Dublin III Regulation as regards unaccompanied minors who have no family members or relatives in a Member State. See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State published on 26 June 2014, COM (2014) 382 final.

⁹⁰⁰ Article 8 (1) of the Dublin III Regulation

⁹⁰¹ Article 8 (1) of the Dublin III Regulation

⁹⁰² Article 8 (2) of the Dublin III Regulation

unaccompanied minor does not have any family members or relatives in another Member State, the Member State where the minor lodged his/her application shall be the responsible one, provided that this is in his/her best interest⁹⁰³. In any event, the Commission may adopt delegated acts concerning the identification of family members, the criteria for establishing the existence of family links and the criteria for assessing the capacity of a relative to take care of the unaccompanied minor⁹⁰⁴.

The provision of Article 8 of the Dublin III Regulation is tightly linked to Article 6 which contains guarantees for minors. In particular, Article 6 provides that in assessing the best interest of the child Member States shall work in close cooperation with each other and take into account: (a) family reunification possibilities, (b) the minor’s well-being and social development, (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking and (d) the views of the minor, in accordance with his/her age and maturity. Furthermore, Member States should take any appropriate action in order to identify family members, siblings and relatives of the unaccompanied minors in the territory of the Member States, including the possibility of Member States being assisted by international organisations. Lastly, the staff that deals with applications of unaccompanied minors shall receive appropriate training concerning the specific needs of minors⁹⁰⁵.

The second criterion concerns applicants who have family members who are already beneficiaries of international protection in one of the EU Member States. In this case, the Member State responsible shall be the one where the family member who is a beneficiary of international protection resides, provided that the persons concerned expressed their desire in writing⁹⁰⁶. It should be noted that this rule applies regardless of whether the family was previously formed in the country of origin or not. Furthermore, according to Article 10 of the Dublin III Regulation, the same principle applies in case the applicant has a family member in another Member State who is a seeker of international protection and whose application in that Member State has not yet been subject to a first decision regarding the substance. The Dublin III Regulation provides that in case where several family members are applying for international protection at the same time or on close dates so that the applications can be examined together, and where the applicable Dublin rules would result in their being

⁹⁰³ Article 8 (4) of the Dublin III Regulation

⁹⁰⁴ Article 8 (5) of the Dublin III Regulation

⁹⁰⁵ Last subparagraph of Article 6 (4) of the Dublin III Regulation

⁹⁰⁶ Article 9 of the Dublin III Regulation

separated, the Member State responsible should be the one which is responsible for taking charge of the largest number of them, and failing that the one that is responsible for examining the application of the oldest of them⁹⁰⁷.

Moreover, the Dublin III Regulation contains provisions for the determination of the responsible Member State where the applicant holds one or more residence documents or visas⁹⁰⁸ and where the applicant enters a Member State in which the obligation of holding a visa has been waived⁹⁰⁹. More significantly, Article 13 provides that when the applicant has crossed irregularly the border of a Member State by land, sea or air, that Member State is responsible for examining the application and that this responsibility shall cease after twelve months from the date of the irregular crossing of the border. Furthermore, when a Member State cannot longer be held responsible according to the above mentioned rule, and when it can be established that the applicant has entered the Union irregularly and has lived in the territory of a Member State for at least five months before lodging the application, that Member State should be responsible for examining the application for international protection. Lastly, the Dublin III Regulation provides that where the application is made in the international transit area of an airport of a Member State, that Member State shall be responsible for examining the application for international protection⁹¹⁰.

Furthermore, the Dublin III Regulation contains a provision regarding the issue of dependency. According to Article 16, the circumstances under which a person may be considered to be dependent on his/her child, sibling or parent are pregnancy, a new-born child, serious illness, severe disability or old age. In these cases, Member States ‘shall normally keep or bring’ the applicant together with the person on whom the latter is dependent ‘(...) provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing’⁹¹¹.

The responsible Member State is in such circumstances the Member State of legal residence of the person on which the applicant is dependent, except if the applicant’s state of health does not allow him/her to travel to that Member State. In this case, the responsible Member State is

⁹⁰⁷ Article 11 of the Dublin III Regulation

⁹⁰⁸ Article 12 of the Dublin III Regulation

⁹⁰⁹ Article 14 of the Dublin III Regulation

⁹¹⁰ Article 15 of the Dublin III Regulation

⁹¹¹ Article 16 (1) of the Dublin III Regulation

the one in which the applicant is present. It should be highlighted that this rule applies independently of the age of the applicant and in practice concerns adult applicants, as minors have anyway the right to be united with the persons referred to in this provision. It should also be emphasised that although the provision might appear to a certain degree discretionary, a CJEU’s judgment⁹¹² on the corresponding provision⁹¹³ of the Dublin II Regulation suggests that there is an obligation deriving from that provision⁹¹⁴. According to the same judgment, this obligation exists even if the responsible under regular Dublin rules Member State did not make a request in that respect.

Not least, even though an applicant does not fulfil any of the conditions laid down in Articles 8-11 and 16, a Member State may request another Member State ‘(...) to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations’⁹¹⁵. It should be underlined that although the above cited provision may appear ‘revolutionary’ for the Dublin standards, it falls under a Chapter titled ‘Dependent persons and discretionary clauses’ and constitutes a ‘may’ provision which does not produce any obligation for Member States to act in accordance with what is provided for therein.

It becomes apparent that the Dublin III Regulation contains various provisions concerning minors and families. In that respect, a brief comparison with the Dublin II Regulation, which constitutes the respective preceding legal instrument, would be useful for the understanding of the evolution in the provisions regarding family life under the Dublin system. To start with, it is important to highlight that Dublin III is applicable to cases of seekers of international protection whereas the Dublin II Regulation was limited to asylum seekers. In that respect the scope of the currently applicable legal instrument is broader. Furthermore, Dublin III obliges Member States to inform the applicants about the Regulation and in particular the rights referred to therein⁹¹⁶. Although it can be assumed that this has anyway been a settled practice by the competent authorities at least in some of the Member States, the right to information was not explicitly provided by Dublin II. Among others, international protection seekers now

⁹¹² Case C-245/11 *K v. Bundesasylamt* (published in the electronic Reports of Cases)

⁹¹³ Article 15 (2) of the Dublin II Regulation, known as ‘humanitarian clause’

⁹¹⁴ For a detailed discussion on the humanitarian clause see S. Morgades-Gil, ‘The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum. What Remains of the Sovereignty and Humanitarian Clauses After the Interpretation of the ECtHR and the CJEU?’ (2015) 27 (3) *International Journal of Refugee Law* 433-456

⁹¹⁵ First subparagraph of Article 17 (2) of the Dublin III Regulation

⁹¹⁶ Article 4 of the Dublin III Regulation

have an explicit right to be informed about the possibility of submitting information about the existence of family members, relatives or other family relations in a Member State and the way that this information can be submitted⁹¹⁷.

Furthermore, Dublin III introduces a broader concept of ‘family’. This becomes apparent already from the comparison of the definition of ‘family members’ in Article 2 (g) and the respective definition given by Article 2 (i) of the previous Regulation. In particular, in Dublin II there was a requirement for minor children to be dependent on the applicant, condition which has been waived in Dublin III. Moreover, as regards the concept of ‘family members’ of a minor applicant, Dublin II spoke about the father, mother or guardian whereas the current Regulation refers to the father, mother and any other adult responsible for the applicant. The wider concept of family is better understood in the applicable criteria for the determination of the responsible Member State and in particular in the rules concerning unaccompanied minors. Under Article 6 of the Dublin II Regulation, the Member State responsible for examining the application of an unaccompanied minor should be that where his/her family is regularly present. On the contrary, pursuant to Article 8 of Dublin III, unaccompanied minors may be reunited with uncles, aunts, grandparents, siblings with the only requirement being that this would be for their best interest⁹¹⁸.

Although the Dublin III Regulation seems to be more concerned with the family life of asylum seekers than the previous legal instruments that regulated the same issue, there is still room for criticism in that respect. This criticism primarily concerns the fact that the Dublin III Regulation provides for an exception to the general applicable Dublin rules only in cases the international protection seeker has family members who are seekers or beneficiaries of international protection in another Member State, excluding family members who reside lawfully in a Member State in different statuses and more importantly regular immigration statuses. Indeed, as mentioned above, the provision of Article 17 (2) which speaks about ‘family relations’ and ‘family considerations’ in general is discretionary and not binding and therefore asylum seekers will often be separated from their family members who reside lawfully in an EU Member State.

⁹¹⁷ Article 4 (1) (c) of the Dublin III Regulation

⁹¹⁸ The rest of the changes introduced in Dublin III concern the possibility to appeal against a Dublin decision, modifications in the rules concerning detention, reduction in the time in which a Dublin transfer can be made and rules about not transferring an applicant to a country where the asylum system has collapsed

We are of the opinion that the EU legislature should consider reforming the Dublin system in order to allow asylum seekers to lodge their application in Member States that they have regularly residing family members of any status, as well as expand the number of family relations that would allow for an application to be examined in another Member State than the one of the ‘first entrance’. This approach will not only be more coherent with the right to respect for family life but will in all probability help towards a fairer distribution of asylum seekers among EU Member States.

Even in that case, the Dublin system is definitely a system with various deficiencies. The present crisis with the Syrian asylum seekers in Europe has demonstrated that the Dublin system is not capable of providing efficient solutions in cases of massive refugee flows and the entire discussion regarding the common European asylum system is currently in the spotlight. For the purposes of this study, it should be mentioned that any discussion regarding the Dublin reform should take into serious consideration the possibility of asylum seekers being exempted from the general distribution rules in order to be able to apply for the international protection in the Member States where family members or relatives reside. The same considerations should apply even in case the EU opts for quota or relocation systems⁹¹⁹.

In any event, even as the Dublin system stands right now, it provides applicants for international protection with a right to be unified with certain persons under certain circumstances. However, this right should be distinguished from an ‘ordinary’ family reunification right in the sense that this has been discussed in previous Chapters of this dissertation. The Dublin III Regulation does not confer applicants for international protection a right to be reunified with their family members left behind in the country of origin but rather a right to have their application examined in the Member State where a member of their ‘core family’, or in some cases extended family, is regularly residing. In that respect, it should be reminded that international protection seekers are excluded from the scope of the Family Reunification Directive.

⁹¹⁹ It should be noted that on 22 September 2015 on a Justice and Home Affairs Council Meeting it was decided that 120.000 people in clear need of international protection should be relocated from Italy and Greece to other EU Member States (See, the meeting’s press release available online at [http://europa.eu/rapid/press-release MEMO-15-5698_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm)). The decision followed a Commission’s proposal for the relocation of the same number of people which was adopted on 9 September 2015 (Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary published on 9 September 2015, COM(2015) 451 final). The decision constitutes derogation of a temporary character from the Dublin system. It is worth noting that the Commission proposed that the Dublin rules should continue to apply to asylum seekers for who the Dublin criteria indicate that, for family reasons, another Member State should be responsible.

Nonetheless, since a positive outcome of the examination of the application for international protection would result in members of the family being united, Articles 8, 9 and 10 of Dublin III should be regarded as conferring a right equivalent to family reunification. In that respect, it is worth highlighting that the relevant provisions of the Dublin III Regulation introduce a rather favourable system for the international protection seeker, allowing ‘reunification’ which might go beyond the strict concept of ‘core family’ and without imposing any particular material requirements. However, the applicant should invoke this right early on in the asylum or subsidiary protection procedure as from the moment the international protection is granted, the applicable legal status with regards to family reunification is the one discussed in the following section.

5.1.2 Refugees

5.1.2.1 Overview of the Qualification Directive and the context of the refugees’ rights

The Directive that sets out the criteria for the qualification of third-country national as refugees and regulates their rights in the EU Member States is the so-called Qualification Directive. The definition of the refugee given by the Qualification Directive is the one of the Geneva Convention which constitutes the main legal document in the field of international refugee law. According to Article 2 (d) of the Directive, refugee is a third-country national who:

‘(...) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or who, not having a nationality and being outside of the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it’.

Furthermore, Article 9 of the Directive defines the concept of ‘prosecution’ whereas Article 10 deals with the notion of race, religion, nationality, membership of a particular social group and political opinion which constitute the reasons of persecution. Next, according to Article 11, a person ceases to be a refugee if s/he:

‘(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or (b) having lost his or her nationality, has voluntarily re-acquired it; or (c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or (d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or (e) can no

longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality; or (f) being a stateless person, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence’.

Chapter VII of the Qualification Directive concerns the content of the rights acquired by the refugee in the host Member State. It should be mentioned that this Chapter applies equally to persons eligible for subsidiary protection⁹²⁰, whose status will be analysed below. Firstly, refugees are protected from *refoulement* according to Article 21. The Qualification Directive does not define the concept of *non-refoulement* but according to the Geneva Convention this principle provides that ‘[n]o Contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’⁹²¹. Nevertheless, the Directive provides that Member States may *refoule* a refugee when:

‘(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State’⁹²².

Next, refugees have the right to be informed with regards to the rights and obligations related to their status, pursuant to Article 22 of the Qualification Directive. This information should be provided to them in a language that they understand or that they are supposed to understand as soon as possible after the refugee status has been granted. Furthermore, Member States are obliged to provide refugees with a residence permit valid for at least three years and renewable except if there are reasons of national security or public order which would justify the issue of a residence permit of a shorter duration⁹²³. Beneficiaries of refugee status shall also have the right to a travel document for the purpose of travelling outside the territory of the host Member State unless there are reasons of national security or public order which would justify an exception to this rule⁹²⁴.

⁹²⁰ Article 20 (2) of the Qualification Directive

⁹²¹ Article 33 of the Qualification Directive

⁹²² Article 21 (2) of the Qualification Directive

⁹²³ Article 24 (1) of the Qualification Directive

⁹²⁴ Article 25 (1) of the Qualification Directive

More importantly, refugees should have access to employment and education according to Articles 26 and 27 of the Qualification Directive. In particular, refugees shall have access to employment and self-employment immediately after the refugee status has been granted and subject to rules applicable to the profession and public service⁹²⁵. The use of the word ‘immediately’ indicates that no initial restriction period may be imposed to refugees depending on the situation of the internal labour market of each Member State. Moreover, Member States shall ensure that refugees have access to employment-related education opportunities for adults, vocational training, including training courses for upgrading skills, practical workplace experience and counselling services afforded by employment offices according to Article 26 of the Qualification Directive. As far as the access to education is concerned, minors granted the refugee status shall have full access to education under the same conditions as the nationals of the Member State, whereas adult refugees shall be granted access to education under the same conditions as third-country nationals regularly residing in the Member State concerned.

Furthermore, beneficiaries of refugee status shall receive the necessary social assistance⁹²⁶, as well as access to healthcare system⁹²⁷:

‘(...) including treatment of mental disorders when needed, to beneficiaries of international protection who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict’⁹²⁸.

It is noteworthy that the access to social welfare and healthcare system shall be granted to beneficiaries of refugee status under the same conditions as nationals of the concerned Member State. Lastly, refugees shall have access without discrimination to accommodation⁹²⁹ and integration programs⁹³⁰ and shall be given the right to free movement within the territory of the Member State⁹³¹, as well as assistance in case they wish to be repatriated⁹³².

⁹²⁵ Article 26 (1) of the Qualification Directive

⁹²⁶ Article 29 (1) of the Qualification Directive

⁹²⁷ Article 30 (1) of the Qualification Directive

⁹²⁸ Article 30 (2) of the Qualification Directive

⁹²⁹ Article 32 of the Qualification Directive

⁹³⁰ Article 34 of the Qualification Directive

⁹³¹ Article 33 of the Qualification Directive

⁹³² Article 35 of the Qualification Directive

5.1.2.2 The right to family reunification and rights related to family unity

The legal status of beneficiaries of refugee protection with regards to family reunification is rather favourable in comparison to the rest of the third-country nationals in the EU. In principle, the applicable legal instrument for the family reunification right of refugees is the Family Reunification Directive. Nevertheless, special attention should be drawn to the favourable rules referred to in Chapter V which concerns refugees⁹³³. It should be highlighted that refugees along with the EU Blue Card holders are the only third-country nationals who are explicitly exempted from the strict rules set out in the Family Reunification Directive. The reason for this treatment is explained to some extent in the preamble of the Family Reunification Directive, where it is stated that:

‘[s]pecial attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification’⁹³⁴.

Therefore, the EU legislature takes into consideration that beneficiaries of refugee protection are persons who were forced to leave their country of origin and they can no longer enjoy family life there out of risk of being persecuted. It becomes apparent that this justification ground departs significantly from the one given by the EU legislature in the case of EU Blue Card holders. Refugees are not given a favourable status because the EU legislature wishes to make EU an attractive place for refugees but rather because it is reasonably taken into consideration that the conditions under which they had to leave their country of origin and their family are particularly vulnerable. In any event, it should be mentioned that the view that the risk of prosecution makes the situation of refugees worthy of special protection is reasonable and the favourable status with regards to family reunification should be welcomed.

Independently of the reasons why refugees are afforded a more privileged status, it is worth elaborating on the derogations regarding family reunification of beneficiaries of refugee status which as mentioned above are covered by Chapter V⁹³⁵ of the Family Reunification Directive. To start with, it should be noted that the particular rules are without prejudice to any rules

⁹³³ According to the Commission’s implementation report on the Family Reunification Directive, among all EU Member States, only Cyprus and Malta have not introduced more favourable conditions for family reunification of refugees, treating them under their regular family reunification regime for third-country nationals. See COM(2008) 610 final, at 4.6.

⁹³⁴ Recital No. 8 of the Family Reunification Directive

⁹³⁵ Articles 9-12 of the Family Reunification Directive

granting refugee status to family members⁹³⁶ as it goes without saying that family members can qualify as refugees themselves. In fact, according to the preamble of the Qualification Directive, ‘[f]amily members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status’⁹³⁷. It follows that the rules set out in Chapter V of the Family Reunification Directive apply only in cases family members have not been granted the refugee status themselves but they merely wish to join the refugee who enjoys a right to family reunification. It should be underlined that pursuant to Article 9 (2), ‘Member States may confine the application of this Chapter to refugees whose family relationships predate their entry’.

Next, the definition of family members of Article 4 of the Family Reunification Directive applies in case of refugees as well with the exception of the derogation regarding children aged over 12 which shall not be applied to the children of refugees⁹³⁸. Interestingly, pursuant to Article 10 (2) of the Family Reunification Directive, Member States may accept other family members which are not referred to in Article 4, in case the latter are dependent on the refugee. Furthermore, the Family Reunification Directive provides that if the refugee is an unaccompanied minor, Member States:

‘(a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4 (2) (a);

(b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced’⁹³⁹.

Moreover, Chapter V of the Family Reunification Directive provides for three more derogations from the general rules applicable to cases of family reunification of third-country nationals. In particular, pursuant to Article 11, in case the refugee cannot provide official documentation of the existence of the family relationship, Member States should take into account other evidence and shall not reject the application solely on the basis of lack of such documentation. Furthermore, beneficiaries of refugee status are exempted from meeting the conditions referred to in Article 7 of the Family Reunification Directive (accommodation, sickness insurance and stable and regular resources) when they apply for reunification with

⁹³⁶ Article 9 (3) of the Family Reunification Directive

⁹³⁷ Recital No. 36 of the Qualification Directive

⁹³⁸ Article 10 (1) of the Family Reunification Directive

⁹³⁹ Article 10 (3) of the Family Reunification Directive

their family members⁹⁴⁰ and Member States may only optionally require refugees to meet these conditions in case the application for family reunification is not made within a period of three months from the granting of the refugee status⁹⁴¹ or where family reunification is possible in a third country with which the sponsor and/or family members have special links⁹⁴². Lastly, refugees are also exempted from the requirement of a minimum period of prior lawful residence provided for in Article 8 of the Family Reunification Directive⁹⁴³.

In its guidance for the application of the Family Reunification Directive, the European Commission notes that Article 12 (1) of the Family Reunification Directive provides that Member States are not allowed to require evidence that the refugee and/or his/her family members meet the conditions referred to in Article 7 of the same Directive. However, according to the second subparagraph of Article 7 (2), integration measures may be applied once the family members have been granted family reunification. The Commission notes that although Article 9 (2) provides that Member States may confine the application of Chapter V to refugees whose family relationships predate their entry, integration measures should be applied after family reunification is granted even to the ‘nuclear family’ founded after the refugee’s entry to a Member State, as the second subparagraph of Article 7 (2) prevails over Article 9 (2). Furthermore, the Commission underlines that Chapter V of the Family Reunification Directive should be read in conjunction with Article 5 (5) and Article 17 of the same Directive. Therefore, Member States are required to make an overall assessment in every case taking into consideration all relevant factors and taking due regard of the best interest of the child⁹⁴⁴.

Not least, the Commission further clarifies on the term ‘other evidence’ referred to in Article 11 (2) of the Family Reunification Directive. Examples of such evidence are, in its view:

‘(...) written and/or oral statements from the applicants, interviews with family members, or investigations carried out on the situation abroad. These statements can then, for instance, be corroborated by supporting evidence such as documents, audio-visual materials, any documents or physical exhibits (e.g. diplomas, proof of money transfers...) or knowledge of specific facts’⁹⁴⁵.

⁹⁴⁰ First subparagraph of Article 12 (1) of the Family Reunification Directive

⁹⁴¹ Third subparagraph of Article 12 (1) of the Family Reunification Directive

⁹⁴² Second subparagraph of Article 12 (1) of the Family Reunification Directive

⁹⁴³ Article 12 (2) of the Family Reunification Directive

⁹⁴⁴ COM(2014) 210 final, at 6.1.

⁹⁴⁵ COM(2014) 210 final, at 6.1.2.

Furthermore, the Commission notes that although the Family Reunification Directive does not prevent Member States from charging refugees or applicants, these fees should be reasonable and should not create an obstacle to family reunification. As a general rule, the Commission encourages Member States to take into account the particular situation of the refugees when charging refugees for DNA tests or other investigations.

As regards the second subparagraph of Article 12 (1) of the Family Reunification Directive which provides that the more favourable conditions may not apply if family reunification is possible in a third country with which the sponsor or the family member has special links, the Commission notes that the third country should be a safe country both for the refugee and for his/her family members and that the term ‘special links’ implies that the sponsor or the family member have family, cultural and social ties with the third country. Moreover, as regards the derogation of the third subparagraph of Article 12 which provides that Member States may require the refugee to meet the conditions laid down in Article 7 if the application is not submitted within the first three months after the refugee status is granted, the Commission considers the fact that most of the Member States do not apply this derogation as the most appropriate solution and states that in cases that the applicant faces objective obstacles in meeting the three-month deadline, Member States should allow a partial application which may be completed as soon as the documents are available⁹⁴⁶.

Next, provisions concerning family members of refugees can be found in the Qualification Directive as well. To begin with, the Directive provides a definition of family members which is found in Article 2 (j). The preamble of the Directive already provides that ‘[i]t is necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and the special attention to be paid to the best interest of the child’⁹⁴⁷. Article 2 (j) reads as follows:

“family members’ means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection: - the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals, - the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless

⁹⁴⁶ COM(2014) 210 final, at 6.1.3.

⁹⁴⁷ Recital No. 19 of the Qualification Directive

of whether they were born in or out of wedlock or adopted as defined under national law, - the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried’.

It is worth mentioning that the definition appears broader than the one provided for in Article 2 (h) of Directive 2004/83/EC⁹⁴⁸ (former Qualification Directive) which did not include the third intent of Article 2 (j) and also provided that the minor child referred to in the second intent should also be ‘dependant’, requirement which was waived from the wording of the new Qualification Directive. Nevertheless, it should not escape our attention that the provision of Article 2 (j) still refers to the family that already existed in the country of origin⁹⁴⁹. In any event, it becomes apparent that there two definitions of family members, one given by the Qualification Directive (Article 2 (j)) and another one which is contained in the Family Reunification Directive (Article 4 in conjunction with Article 10). It seems reasonable to assume that the definition of family members set out in the Family Reunification Directive refers to the persons who have the right of entry in the territory of a Member State for the purposes of family reunification, whereas the definition of family members of Article 2 (j) of the Qualification Directive corresponds to family members who are already present in the territory of a Member State and who are entitled the rights that will be analysed right below.

In particular, Article 23 of the Qualification Directive provides that Member States shall ensure that family life can be maintained⁹⁵⁰. According to the same provision, family members of refugees who are not qualifying for refugee status themselves are entitled to the rights referred to in Articles 24-35⁹⁵¹ (the majority of the rights enjoyed by the refugee himself or herself, such as access to employment, education, social welfare, healthcare etc.), with Member States being left discretion to refuse, reduce or withdraw these benefits for reasons of national security or public order⁹⁵². Moreover, the Qualification Directive provides Member States with the possibility of applying Article 23 to ‘(...) other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were

⁹⁴⁸ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

⁹⁴⁹ For a critique on this issue see, S. Peers, V. Moreno-Lax, M. Garlick and E. Guild, *EU Immigration and Asylum Law (Text and Commentary)* (2nd edn, Leiden/Boston, Brill Nijhoff, 2015) and S. Peers, ‘Legislative Update 2011, EU Immigration and Asylum Law: The Recast Qualification Directive’ (2012) 14 *European Journal of Migration and Law* 199-221

⁹⁵⁰ Article 23 (1) of the Qualification Directive

⁹⁵¹ Article 23 (2) of the Qualification Directive

⁹⁵² Article 23 (4) of the Qualification Directive

wholly or mainly dependent on the beneficiary of international protection at that time⁹⁵³. Lastly, as regards the issue of a residence permit to the family members of a refugee, it should be noted that the second subparagraph of Article 24 (1) provides that the residence permit may be issued with a period of validity of less than three years (which is the period of validity of the residence permit issued for the refugee pursuant to the first subparagraph of Article 24 (1)) and renewable, without prejudice to the obligation of Member States to ensure family unity.

Not least, the Qualification Directive contains some further family life related provisions which concerns unaccompanied minors. In particular, according to Article 31, Member States shall ensure that unaccompanied minors are placed with adult relatives, foster families or suitable accommodation centres, that siblings are kept together and that changes of accommodation of the minors are limited to a minimum⁹⁵⁴. Furthermore, Article 31 (5) provides that Member States should start tracing the parents of an unaccompanied minor as soon as possible after the granting of the refugee protection to an unaccompanied minor or if the tracing procedure has already started, Member States should continue the process taking into consideration the best interest of the child.

5.1.3 Beneficiaries of subsidiary protection

The second form of international protection is the subsidiary protection status⁹⁵⁵. The Directive regulating the legal status of beneficiaries of subsidiary protection is the Qualification Directive, which as analysed above is also applicable to the case of refugees. According to Article 2 (f) of the Qualification Directive:

“‘person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17 (1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country’.

Furthermore, pursuant to Article 15 of the Qualification Directive:

⁹⁵³ Article 23 (5) of the Qualification Directive

⁹⁵⁴ Article 31 (3) and (4) of the Qualification Directive

⁹⁵⁵ See Article 2 (a) of the Qualification Directive which reads as follows: “‘international protection’ means refugee status and subsidiary protection status as defined in points (e) and (g)’

‘[s]erious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.

The only provisions which are explicitly applicable to the case of beneficiaries of subsidiary protection are set out in Chapters V and VI of the Qualification Directive and refer to the cessation, exclusion, revocation and ending or refusal to renew of the subsidiary protection status. The rest of the provisions contained in the Qualification Directive concern both refugees and persons eligible for subsidiary protection. More significantly, the persons eligible for subsidiary protection enjoy the same rights as the refugees in the host Member State, pursuant to Chapter VII of the Directive (right to a travel document, access to employment and education, social welfare and healthcare rights, access to accommodation, family unity etc.). The only exception concerns the residence permit which in the case of beneficiaries of subsidiary protection shall be valid for at least one year and in case of renewal for at least two years, whereas as mentioned above in case of refugees Member States shall issue a residence permit of a three-year duration and renewable.

Regrettably, the EU legal system does not provide for a right to family reunification for beneficiaries of subsidiary protection. The Qualification Directive remains silent with regards to this issue and the Family Reunification Directive does not apply, pursuant to its Article 3 (2) (c), to persons eligible for subsidiary protection. The right to family unity of Article 23 of the Qualification Directive is applicable to the case of beneficiaries of subsidiary protection but this provision does not introduce a right to first admission but refers to the rights of family members that are already present in the territory of a Member State. In this case, family members (in the sense of Article 2 (j) of the same Directive which applies to beneficiaries of subsidiary protection as well) shall enjoy the same rights as the family members of refugees which were analysed above⁹⁵⁶. Furthermore, the rules concerning unaccompanied minors are also applicable to minors who have been granted subsidiary form of protection⁹⁵⁷.

⁹⁵⁶ It is interesting to note that Article 23 of the Qualification Directive which is currently in force has waived the inequalities deriving from Article 23 of the Directive previously in force which placed family members of beneficiaries of subsidiary protection in a worse position in comparison to family members of refugees as regards benefits, providing that: ‘In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits. In these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living’. For a more details on the content of Article 23 of the ‘old Qualification Directive’ see, J. McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’ (2005) 17 *International Journal of Refugee Law* 461-516. Similarly, the Recital No. 29 of the former Qualification Directive which provided that ‘[w]hile the

It appears difficult to assume why the EU legislature treats in a different way beneficiaries of subsidiary protection and refugees with regards to the right to family reunification. As it has been shown above, persons eligible for subsidiary protection were also forced to leave their families for serious reasons and they are undoubtedly in need of a legal status similar to the one granted to refugees. Nevertheless, Member States are left discretion to regulate the admission of family members of beneficiaries of subsidiary protection in the way they desire including the possibility of imposing a ban to the entrance of any family member. It is worth mentioning that according to the Commission’s implementation report⁹⁵⁸ on the Family Reunification Directive, nine Member States have decided to apply the Family Reunification Directive to beneficiaries of subsidiary protection.

In that respect, it should be mentioned that the fact that beneficiaries of international protection now qualify for the long-term residence status⁹⁵⁹ may result in more Member States deciding to apply the Family Reunification Directive to beneficiaries of subsidiary protection or even grant them a more favourable legal status with regards to family reunification, comparable to that of refugees. More appropriately, the EU legislature should consider the possibility of amending the Family Reunification Directive in order to include beneficiaries of subsidiary protection in its scope, given that the latter now meet the condition of ‘reasonable prospects of obtaining the right of permanent residence’ set by the said Directive.

5.1.4 Beneficiaries of temporary protection

In exceptional occasions, due to a mass influx of displaced third-country nationals seeking protection in the EU, Member States may not be able to process the high amount of asylum applications. For these unpredicted and exceptional situations, the EU legislature provides for the acquisition of a temporary protection status which is covered by Directive 2001/55/EC⁹⁶⁰. It should be mentioned that the Temporary Protection Directive has never been activated in

benefits provided to family members of beneficiaries of subsidiary protection status do not necessarily have to be the same as those provided to the qualifying beneficiary, they need to be fair in comparison to those enjoyed by beneficiaries of subsidiary protection status’ has been waived in the recast Directive.

⁹⁵⁷ Article 31 of the Qualification Directive

⁹⁵⁸ See COM(2008) 610 final, at 3.2.

⁹⁵⁹ It is recalled that the Long-Term Residence Directive has been amended in order to include in its scope persons who are beneficiaries of international protection

⁹⁶⁰ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Hereinafter, ‘the Temporary Protection Directive’.

the EU until today. It has also not been invoked as a reaction to the current influx of Syrian refugees⁹⁶¹. Article 1 of the Directive provides that:

‘[t]he purpose of the Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons’.

Furthermore, Article 2 provides the definitions of ‘temporary protection’ and ‘displaced persons’ for the purposes of the Directive.

In particular, ‘temporary protection’ means:

‘(...) a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection’⁹⁶².

In addition, ‘displaced persons’ refers to:

‘(...) third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular: (i) persons who have fled areas of armed conflict or endemic violence; (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights’⁹⁶³.

‘Mass influx’ means:

‘(...) arrival in the Community of a large of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme’⁹⁶⁴.

⁹⁶¹ On this issues see, M. Ineli-Ciger, ‘Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean’ in C. Bauloz, M. Ineli-Ciger, S. Singer and V. Stoyanova, *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Leiden/Boston, Brill Nijhoff, 2015)

⁹⁶² Article 2 (a) of the Temporary Protection Directive

⁹⁶³ Article 2 (c) of the Temporary Protection Directive

⁹⁶⁴ Article 2 (d). On the concept of ‘mass influx of displaced persons’ see, N. Arenas, ‘The Concept of ‘Mass Influx of Displaced Persons’ in the European Directive Establishing the Temporary Protection System’ (2005) 7 *European Journal of Migration and Law* (435-450)

Temporary protection is given in principle for a period of one year which can be extended for one more year according to Article 4 (1) of the Temporary Protection Directive. Furthermore, the same Directive provides that the decision for the existence of a mass influx of displaced persons is made by the Council⁹⁶⁵ and that the temporary protection finishes once the maximum period has been reached or at any time by a Council decision adopted with the adequate procedure⁹⁶⁶. As regards the rights conferred to beneficiaries of temporary protection, the Directive provides, *inter alia*, that they shall have the right to a residence permit valid for the entire duration of the temporary protection⁹⁶⁷, the right to employment and self-employment activity⁹⁶⁸, access to accommodation⁹⁶⁹, social welfare and medical care⁹⁷⁰, education⁹⁷¹ and the right to apply for asylum at any time⁹⁷². As far as the right to employment is concerned, it should be noted that Article 12 provides that the general employment law of the Member State concerned regarding working conditions, remuneration and access to social security is applicable and that Member States may give priority to EU citizens or citizens of the EEA area, as well as third-country nationals who already reside in their territory.

Furthermore, Article 15 of the Temporary Protection Directive concerns family members of beneficiaries of temporary protection. In particular, the provision defines the concept of family for the purposes of the Temporary Protection Directive. According to this definition, family members are considered: a) the sponsor’s spouse or stable partner (in case the relevant legislation of the concerned Member State treats unmarried couples in comparable way to married couples under its legislation concerning third-country nationals), b) the unmarried minor children of the sponsor or of the spouse, including adopted children⁹⁷³, and c) other close relatives who were dependent on the sponsor at the time the event that lead to the mass influx occurred⁹⁷⁴. It should be noted that this definition appears highly similar to the one applicable to cases of beneficiaries of international protection, which were analysed in the relevant section of the present thesis. Furthermore, the provision of Article 15 (2) and (3)

⁹⁶⁵ Article 5 (1) of the Temporary Protection Directive

⁹⁶⁶ Article 6 (1) (a) and (b) of the Temporary Protection Directive

⁹⁶⁷ Article 8 (1) of the Temporary Protection Directive

⁹⁶⁸ Article 12 of the Temporary Protection Directive

⁹⁶⁹ Article 13 (1) of the Temporary Protection Directive

⁹⁷⁰ Article 13 (2) of the Temporary Protection Directive

⁹⁷¹ Article 14 of the Temporary Protection Directive

⁹⁷² Article 17 (1) of the Temporary Protection Directive

⁹⁷³ Article 15 (1) (a) of the Temporary Protection Directive

⁹⁷⁴ Article 15 (1) (b) of the Temporary Protection Directive

provides that Member States shall reunite the sponsor with persons who qualify as family members for the purposes of the Directive, in case the latter enjoy a protection status in another Member State or they are in need of protection but are not yet present in the territory of the Union. In any event, family members who have been reunited pursuant to the rules of this article shall be granted residence permits, documents and other evidence by the Member State where reunification takes place.

It should be highlighted that Article 15 refers to reunification between family members who are all beneficiaries or seekers of a protection status and does not confer a right to family reunification in the usual sense of the term. In fact, persons enjoying temporary protection have no right to family reunification deriving from the Temporary Protection Directive whatsoever and are also excluded from the scope of the Family Reunification Directive⁹⁷⁵. In that respect, the criticism expressed in the case of beneficiaries of subsidiary protection concerning the wide discretion given to Member States to apply low standards in the field of family reunification is particularly relevant with regards to beneficiaries of temporary protection as well. The EU legal system does not provide with any safeguard in that respect and given the temporary nature of protection it is likely that Member States will apply strict rules to regulate family reunification of beneficiaries of temporary protection.

In any event, it should be born in mind that pursuant to Article 4, the temporary protection may be extended for a second year and in special occasions even for a further one reaching the total duration of three years. In this case, the protection cannot be further regarded as temporary in the literal meaning of the term and a regulation in an EU level of a reunification right seems necessary.

Moreover, special reference should be made to the provision of Article 23 (2) of the Temporary Protection Directive according to which, ‘[t]he Member States may allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period’. The provision apparently reflects the legislature’s attempt to take due account of the best interest of the child but it can be criticised for giving merely a possibility to Member States to extent residence permits for reasons of school attendance instead of an obligation to do so. In any event, the provision refers explicitly to the completion of the school period and appears

⁹⁷⁵ Article 3 (2) (b) of the Family Reunification Directive

therefore more concrete in comparison to the relevant provision in the Returns Directive⁹⁷⁶ which more vaguely refers to the need of extension of the voluntary departure period in case there are children attending school.

5.2 Family members of seekers and beneficiaries of international protection in national legislation

5.2.1 Spain

In the field of international protection, the Spanish legislature has adopted a broad definition of ‘family’ that goes beyond the narrow concept of ‘core family’. Family members of a seeker or a beneficiary of international protection are considered: a) the first degree ascendants who are dependants and the minor first degree descendants, b) the spouse or person with whom the sponsor has an analogous relationship of affection and cohabitation, c) the adult responsible for the beneficiary of international protection in case the latter is minor and unmarried and d) other family members who are dependants and lived with the beneficiary of international protection in the country of origin⁹⁷⁷.

It is worth underling that the provision regarding non-marital relationships requires the partners to cohabit in order to qualify as family members, condition which departs from the approach on the issue of partnerships adopted by the Spanish legislature in the ‘general regime’. In addition, the requirement for cohabitation also departs from what the Family Reunification Directive provides for partnerships in the optional provision of Article 4 (3). In this sense, the comments made in Chapter 3.6 of Part III with respect to the transposition of a ‘may’ provision of the Directive applies to the present case as well. Indeed, as long as Article 4 (3) of the Family Reunification Directive does not require the element of cohabitation, Spain has transposed incorrectly the provision at hand.

Not least, it is worth making two further comments with regards to the spouses and/or partners of seekers/beneficiaries of international protection. First, although not stated explicitly, the use of the words ‘spouse’ and ‘person’ in singular reveals that the seeker or beneficiary of international protection may extent his/her status or reunify with only one spouse or partner. In other words, polygamous marriages are not accepted under Spanish law in the field of

⁹⁷⁶ Article 7 (2) of the Returns Directive

⁹⁷⁷ Article 40 (1) of the Law 12/2009

family reunification of seekers or beneficiaries of international protection either. Second, the sponsor cannot reunify with the spouse or partner in case s/he has been granted international protection for reasons of gender violence caused by this spouse or partner⁹⁷⁸.

As far as the descendants of the seekers/beneficiaries of international protection are concerned, it is worth underlining that Article 40 of Law 12/2009 provides that they have the right to reunify with their minor children, namely children who are younger than 18, but excludes reunification with adult dependent children. Furthermore, as regards the ascendants, it is noteworthy that on the one hand the relevant provision does not refer to the ascendants of the spouse or partner of the sponsor but on the other hand it does not provide any minimum age requirement for the parents of the sponsor as the one applicable to the ‘general regime’ for family reunification.

As regards the cases that the sponsor is a minor, it should be noted that the relevant provision provides that the minor child should be unmarried in order to reunify with the person who is responsible for him/her. In that respect, it should be reminded that the corresponding provision⁹⁷⁹ of the Family Reunification Directive speaks about an *unaccompanied minor*⁹⁸⁰ without requiring this minor to be unmarried and therefore the Spanish legislation fails to transpose effectively the said provision as well.

As regards the rights which are associated to the status of a seeker/beneficiary of international protection, it is worth mentioning that the doctrine⁹⁸¹ distinguishes among three different kinds of rights. The first one refers to procedural rights related to the application for international protection, the second, to the reception conditions granted by the Spanish legal system to the international protection seekers, and the third, to the rights which are directly associated to the acquisition of the international protection status. It is noteworthy that this distinction is in line with the three relevant Directives which were discussed above as well.

⁹⁷⁸ Article 40 (1) (b) of the Law 12/2009

⁹⁷⁹ Article 10 (3) of the Family Reunification Directive

⁹⁸⁰ Article 10 (3) provides that ‘[i]f the refugee is an unaccompanied minor, the Member States (a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4 (2) (a); (b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced’.

⁹⁸¹ See, for instance, R. Garcia Mahamut, ‘El nuevo régimen jurídico del derecho de asilo y de la protección subsidiaria en España a la luz de la Ley 12/2009, de 30 de octubre: principales novedades y desafíos’, in R. Garcia Mahamut and J. Galparsoro, *La Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de protección subsidiaria* (Madrid, Centro de Estudios Políticos y Constitucionales, 2010) p. 85

As far as the family related rights are in particular concerned, three different situations may be distinguished. First, Article 39 of the Law 12/2009 deals with the legal status of family members at the period between the application for international protection and the decision on this application. In this case, family members who have not applied for international protection themselves are granted a provisional residence permit which is valid until the resolution of the application for international protection. Second, Article 40 of the Law 12/2009 deals with the issue of the extension of the international protection to the family members which are referred to in the same article and were described in the previous paragraphs. In short, the provision provides that for reasons of family unity the right to asylum or subsidiary protection should be extended to the family members of the beneficiary of the protection. Third, Article 41 of the Law 12/2009 regulates the right to family reunification⁹⁸². In particular, refugees and beneficiaries of international protection may choose to reunify with the family members referred to in Article 40 of the Law 12/2009 even if the latter are already in Spain and not apply for an extension of their protection status. This option becomes obligatory when the family members have different nationality than the beneficiary of international protection. Furthermore, in case of family reunification of beneficiaries of international protection the sponsors and the family members shall not be required to fulfil the requirements applicable to an ordinary family reunification procedure⁹⁸³. Lastly, family members should be granted a residence and work permit analogous to that of the beneficiary of international protection⁹⁸⁴.

It should also be underlined that, as it is the case in family reunification under the ‘general regime’, children of beneficiaries of international protection who are born in Spain may regularise their stay in Spain either through the family extension or family reunification procedure, as described above, or through Article 185 (2) of the Immigration Regulation which concerns the children of beneficiaries of international protection who are born in Spain.

Furthermore, Article 41 (4) of the Law 12/2009 does not allow the so-called ‘reunification in chains’ as it explicitly provides that family reunification may be exercised only once and that the family members who have been granted the right of residence on grounds of family reunification with a beneficiary of international protection cannot reunify with their own

⁹⁸² It is worth mentioning that the right to family reunification was introduced for the first time when the Law 12/2009 came into force as the previous law provided for a right to family extension in all cases.

⁹⁸³ Article 41 (2) of the Law 12/2009

⁹⁸⁴ Article 41 (3) of the Law 12/2009

family members. It should be noted that this approach appears even stricter than the one adopted in the family reunification under the ‘general regime’ with regards to the same issue.

In conclusion, it is important to underline that the concerns raised above regarding the fact that the exclusion of asylum seekers and beneficiaries of subsidiary protection from the scope of the Family Reunification Directive may encourage some Member States to adopt low standards or even ban any family reunification possibility, do not seem to be supported at least in the case of Spain. Indeed, the Spanish legislature, on the one hand, deals with the issue of beneficiaries of international protection without distinguishing between refugees and beneficiaries of subsidiary protection and, on the other hand, provides asylum seekers with the possibility to maintain the unity at least with the members of their family that are in Spain and do not apply for international protection themselves.

5.2.2 Greece

In Greece, even though the concept of family under the ‘general regime’ for family reunification is narrow, the Greek legislature has adopted a significantly broader definition of family in case of refugees. This being said, in addition to the spouse and minor children, a refugee may be reunited with his/her adult unmarried children or those of his /her spouse, in case the latter are objectively unable to provide for their own needs on account of their state of health, his/her parents, where they, on declaration of the refugee, lived together and were dependent on the latter before their arrival to Greece and do not enjoy the necessary family support in the country of origin and his or her unmarried partner with whom s/he is in a duly attested stable long-term relationship⁹⁸⁵. Furthermore, if the refugee is an unaccompanied minor, family reunification shall be allowed with his/her first-degree relatives in the direct ascending line, no matter whether the conditions of dependency and cohabitation are fulfilled and his/her legal guardian or any other member of the family, where the minor has no relatives in the direct ascending line or such relatives cannot be traced⁹⁸⁶.

Refugees who wish to reunify with their family members in Greece are required to submit an application for family reunification to the competent Greek authorities, providing certificates of the family situation officially translated in Greek and certified by a Greek competent authority, which establish the family relationship between the refugee and the family member,

⁹⁸⁵ Article 13 (1) of the Presidential Decree 167/2008

⁹⁸⁶ Article 13 (2) of the Presidential Decree 167/2008

as well as the family members’ age. The Presidential Decree provides that in case the refugee cannot provide these certificates, the competent authorities shall take into account other evidence and shall not reject the application for the mere reason that such certificates are lacking⁹⁸⁷.

In case of family reunification with parents, the refugee is further required to provide that s/he has sickness insurance that covers all risks for himself/herself and his/her parents, stable and regular resources and suitable accommodation⁹⁸⁸, whereas evidence for the existence of the relationship outside marriage are considered to be the existence of a common child, prior living together or any other adequate proof of evidence⁹⁸⁹. In case the application is not submitted within the first three months after refugee status is granted, the requirements concerning family reunification with parents is applied to all cases, except if the refugee is an unaccompanied minor⁹⁹⁰.

As regards the decision on the application, the Decree provides that it shall be notified to the refugee within 9 months from the date on which the application was lodged. This period may be prolonged by two additional months when there are objective difficulties in establishing whether the conditions for family reunification are fulfilled⁹⁹¹. The decision on the application is communicated by the competent Greek authorities to the corresponding consular authority that issues a visa which shall mention the exact reasons of entrance⁹⁹². Family members of refugees shall apply for a residence permit within one month from the date of entry to Greece. The residence permit is in principle issued for an initial period of one year⁹⁹³ but shall not go beyond the date of expiry of the residence permit of the refugee⁹⁹⁴. In case of renewal, the validity of the residence permit of the refugee’s family members shall be the same as that of the refugee. Lastly, family members of refugees shall have the same rights in Greece as the recognised refugee⁹⁹⁵.

In addition to the family reunification procedure which applies to refugees, Presidential Decree 141/2013 which is the legal instrument that implements the Qualification Directive

⁹⁸⁷ Article 14 (1) (b) of the Presidential Decree 167/2008

⁹⁸⁸ Article 14 (1) (d) of the Presidential Decree 167/2008

⁹⁸⁹ Article 14 (2) of the Presidential Decree 167/2008

⁹⁹⁰ Article 14 (3) of the Presidential Decree 167/2008

⁹⁹¹ Article 14 (5) of the Presidential Decree 167/2008

⁹⁹² Article 15 (1) of the Presidential Decree 167/2008

⁹⁹³ Article 15 (2) of the Presidential Decree 167/2008

⁹⁹⁴ Article 15 (3) of the Presidential Decree 167/2008

⁹⁹⁵ Article 16 of the Presidential Decree 167/2008

deals with several aspects concerning the refugee’s family life when the family members are present in the Greek territory. In that respect, ‘family members’ means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection in relation to the application for international protection: a) the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, b) the minor children, on condition that they are dependants and unmarried and regardless of whether they were born in or out of wedlock or adopted, c) the adult children that suffer mental or physical disability and are unable to submit an application themselves and d) the father, mother or another adult responsible for the beneficiary of international protection, when that beneficiary is a minor and unmarried⁹⁹⁶.

As regards seekers of international protection and beneficiaries of subsidiary protection, the Greek legal system does not provide them with a right to family reunification. Nevertheless, Presidential Decree 220/2007 contains some provisions regarding the family of the seeker of international protection in Greece in line with the former Reception Conditions Directive. It is noted that the new Reception Conditions Directive has not yet been implemented. The said Decree considers as family members of an asylum seeker: a) the spouse or unmarried partner in a stable relationship, b) the minor unmarried children of the asylum seeker and/or the spouse or partner, whether born in or outside marriage or they are adopted and c) the applicant’s parents and adult children, who are financially dependent on him/her or suffer from mental or physical disability and are unable to submit an application on their own⁹⁹⁷. Furthermore, Article 7 provides that the competent authorities when providing housing to the applicant shall take appropriate measures for the preservation of the unity of the family which is located in the country, if the applicant so desires.

5.2.3 Germany

In Germany the right to family reunification is granted to refugees and beneficiaries of subsidiary protection, asylum seekers and beneficiaries of temporary protection⁹⁹⁸. As it is the case in the other two countries of the study, the German legislature appears more ‘generous’ towards seekers or beneficiaries of international protection than it is towards immigrants. In

⁹⁹⁶ Article 2 of the Presidential Decree 141/2013

⁹⁹⁷ Article 1 (d) of the Presidential Decree 220/2007

⁹⁹⁸ The right to asylum has its constitutional basis on Article 16a (1) of the Basic Law which provides that persons persecuted on political grounds shall have the right of asylum. The right is subject to the restrictions provided for in the same provision.

that respect, some authors have argued that refugees and persons entitled to asylum are nearly in a similar position with German nationals as regards their right to family reunion⁹⁹⁹.

The concept of family which applies to seekers or beneficiaries of international protection in Germany is that applicable to all third-country nationals. This being said, the family members eligible for reunification are in principle the spouse or registered partner and the minor children¹⁰⁰⁰. Nevertheless, Article 36 (2) of the Residence Act is also applicable to seekers and beneficiaries of international protection and therefore other dependants may also be entitled to family reunification in line with Article 10 (2) of the Family Reunification Directive¹⁰⁰¹. As regards Article 10 (3) of the Family Reunification Directive and the cases where the refugee is an unaccompanied minor, Article 36 (1) of the Residence Act will be applicable as regards the parents of the minor whereas no provision concerning the legal guardian of the case (b) of Article 10 (3) of the Family Reunification Directive has been adopted by the German legislature.

The more privileged treatment is primarily encountered in the several exceptions that are applicable to them with regards to the exercise of the right to family reunion. In particular, refugees, beneficiaries of subsidiary protection and asylum seekers are exempted from the obligation to prove that they have sufficient resources, sickness insurance and appropriate accommodation in case the application for family reunion is filed within the first three months from the recognition of the person as entitled to asylum or the granting of the refugee status and the family cannot live together in a non-EU country to which the foreign has special ties¹⁰⁰². Nevertheless, in case the three-month period lapses, the general material conditions apply. Next, the above mentioned persons are also exempted from the requirement of a prior lawful residence of certain period which otherwise applies for reunification formation with spouses, as Article 30 (1) 3 of the Residence Act provides that the mere possession of a residence permit for reasons of asylum seeker or refugee status is sufficient for family reunion with spouses.

⁹⁹⁹ See K. Hailbronner, *Ausländerrecht Kommentar* (Heidelberg, Müller, 2006)

¹⁰⁰⁰ Article 30 (1) 3 c and 32 (1) of the Residence Act

¹⁰⁰¹ See A. Kreienbrink and S. Rühl, (2007) ‘Family Reunification in Germany: Small Scale Study IV in the Framework of the European Migration Network’ (Working Paper No. 10) *Bundesamt für Migration und Flüchtlinge*

¹⁰⁰² Article 29 (2) of the Residence Act

As regards the requirement for proof of basic command of the German language which otherwise applies to family reunion cases with spouses, the integration condition applicable to the minor over 16 child, as well as the minimum age requirement for spouses, the following observations should be made. According to Article 32 (2) 1 of the Residence Act, the integration conditions which are otherwise applicable to the 16 and 17 years old children of the foreigner do not apply to refugees and persons entitled to asylum. Furthermore, the requirement that the spouse should be able to communicate in the German language on a basic level is applicable only in cases of family formation with the spouse and not in cases that the marriage existed already before the foreigner established his/her residence in Germany¹⁰⁰³. In that respect, it should be observed that Germany makes use of the possibility provided for in Article 9 (2) of the Family Reunification Directive which was discussed above. Lastly, the minimum age requirement of 18 years is applicable both to the sponsor and the spouse regardless of whether the marriage preexisted the sponsor’s first entry in the federal territory or not¹⁰⁰⁴.

¹⁰⁰³ Article 30 (1) of the Residence Act

¹⁰⁰⁴ Article 30 (1) of the Residence Act

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Chapter 6: Family life and irregular migration

6.1 Regularisation procedures in EU law

The issue of regularisation of irregular migration is not regulated at EU level. There are no legal instruments adopted by the EU legislature on regularisation procedures and the regularisation procedures fall entirely under the competence of the EU Member States which may or may not provide for regularisation for irregular immigrants. Nonetheless, it should be noted that Article 6 (4) of the Returns Directive gives the possibility to Member States to regularise the stay of irregular migrants at any time, even after a return decision has been issued. In the latter case, the return decision shall be withdrawn or suspended. Article 6 (4) reads as follows:

‘Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay’.

Not least, Recital No. 12 of the same Directive addresses the issue of persons who cannot be removed stating that such persons should be provided with written confirmation of their situation. The same Recital provides that the conditions of subsistence should be defined under domestic legislation and that Member States enjoy wide discretion with regards to the form and format of the written confirmation. In particular, Recital No. 12 of the Returns Directive reads as follows:

‘The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive’.

It should be noted that the CJEU has recently clarified on these issues in *Mahdi*¹⁰⁰⁵. In particular, the CJEU observed that the purpose of the Returns Directive ‘is not to regulate the conditions of residence on the territory of a Member State of third-country nationals who are

¹⁰⁰⁵ C-146/14 PPU *Bashir Mohamed Ali Mahdi* (published in the electronic Reports of Cases)

staying illegally and in respect of whom it is not, or has not been, possible to implement a return decision¹⁰⁰⁶ and ruled that:

‘(...) Directive 2008/115 must be interpreted as meaning that a Member State cannot be obliged to issue an autonomous residence permit, or other authorisation conferring a right to stay, to a third-country national who has no identity documents and has not obtained such documentation from his country of origin, after a national court has released the person concerned on the ground that there is no longer a reasonable prospect of removal within the meaning of Article 15(4) of that directive. However, that Member State must, in such a case, provide the third-country national with written confirmation of his situation’¹⁰⁰⁷.

It should be added that the Commission in its report on EU Return Policy also addresses the issue stating that it ‘will collect best practice, based on existing best practices at national level, to avoid protracted situations and to ensure that people who cannot be removed are not left indefinitely without basic rights and don’t risk being unlawfully re-detained’¹⁰⁰⁸. All the above constitute particularly important findings which have direct implications on immigrants who have family ties in a Member State and cannot be removed mainly for reasons of human rights. In any event, regardless of the possibility deriving from the Returns Directive with regards to regularisation of irregular third-country nationals in the EU, the research in this field has been focused on the national legislation of the Member States that participate in the comparative study.

6.2 Regularisation procedures in national legislation

6.2.1 Spain

6.2.1.1 ‘Arraigos’

Spain is one of the EU Member States which provides for regularisation procedures on a regular basis. This being said, immigrants who reside in Spain in an irregular administrative situation may regularise their stay with the so-called ‘arraigos’. Trying to give a definition of ‘arraigo’¹⁰⁰⁹, it can be said that an ‘arraigo’ constitutes the bond that links a person with the

¹⁰⁰⁶ §87

¹⁰⁰⁷ §89

¹⁰⁰⁸ Communication from the Commission to the Council and the European Parliament on EU Return Policy published on 28 March 2014, COM(2014) 199 final. Hereinafter, ‘the Commission’s report on EU Return Policy’.

¹⁰⁰⁹ According to the PONS dictionary, ‘arraigo’ can be translated into English as ‘rooting’ (available online at www.es.pons.com/).

place in which s/he resides¹⁰¹⁰. The ‘arriagos’ are regulated by Article 124 Immigration Regulation which forms part of the Chapter ‘Residence for exceptional circumstances’. Nowadays, the ‘arriago’ constitutes by far the most significant among the exceptional circumstances as regards the number of permits issued¹⁰¹¹ but also the most usual way for an irregular immigrant to accede regular residence in Spain.

There are three types of ‘arriagos’, the ‘arraigo laboral’, the ‘arraigo social’ and the ‘arraigo familiar’. In other words, a residence authorisation for ‘arraigo’ may be granted for work, social or family reasons. Given that the authorisation for ‘arraigo laboral’ is granted for reasons that do not relate to the family links of the immigrant, the present study will solely focus on the ‘arraigo social’ and the ‘arraigo familiar’.

6.2.1.1.1 ‘Arraigo social’

In order for an immigrant to acquire a residence permit for ‘arraigo social’, s/he should be continuously living in Spain for a minimum period of three years, s/he should have no criminal record in Spain and in his/her country of origin or any country that s/he has lived in the last 5 years, s/he should have an employment contract signed by him/her and the employer for a period of time which should not be less than one year and, lastly, s/he should have family ties with other regularly residing immigrants or, instead, submit an ‘integration report’ issued by the Autonomous Community¹⁰¹² in which s/he has his/her ordinary residence¹⁰¹³. Interestingly, the Regulation provides that the body which issues this report can recommend that the immigrant should be exempted from the obligation to have a work contract when s/he proves to have sufficient resources. The sufficient resources may derive from self-employed activity.

The term ‘family ties’ set out in the last of the requirements, refers exclusively to the spouse or registered partner and the first degree direct ascendants and descendants¹⁰¹⁴. It is worth mentioning that the concept of ‘family ties’ has been slightly modified in the last reform of the Immigration Regulation in 2011. In the Regulation which was in force before this

¹⁰¹⁰ As regards the concept of ‘arriago’ see also the judgments of the Supreme Court of 27 January 2007, of 20 September 2007 and of 24 June 2008.

¹⁰¹¹ In 2013, for instance, there were 44.022 holders of authorisations for ‘arraigo’ and 4.354 for the rest of the exceptional circumstances (information available online at <http://extranjeros.mtin.es/>).

¹⁰¹² It should be noted that with the Regulation of 2004, the issue of the integration report was a competence of the Municipality.

¹⁰¹³ Article 124 (2) of the Immigration Regulation

¹⁰¹⁴ Article 124 (2) of the Immigration Regulation

reform¹⁰¹⁵, ‘family ties’ referred to the relations with the spouse and the ascendants and descendants in the direct line¹⁰¹⁶. It becomes apparent that the new Immigration Regulation adopts a partly broader and a partly narrower concept of ‘family ties’, as on the one hand it includes register partnerships but on the other hand it limits the relationship with ascendants and descendants introducing the requirement that the latter should be first degree relatives.

In addition, it should be mentioned that the report issued by the competent Autonomous Community may contain information regarding the period of the applicant’s stay in his/her ordinary residence, the economic resources that s/he has, the family ties that s/he has with other immigrants regularly residing in Spain and the integration efforts that have been made through participation in social and cultural programs¹⁰¹⁷. The integration report should be issued within 30 days from the day on which the application is made. In case it has not been issued within the above mentioned time limit, the person concerned may prove that s/he fulfils this requirement by any means admitted in law. Instruction DGI/SGRJ/3/2011¹⁰¹⁸ specifies what is considered ‘means admitted in law’ in this case¹⁰¹⁹.

Not least, Article 124 (4) of the Immigration Regulation provides that the criterion of the national situation of employment may be applied to the applications for residence permits for ‘arraigo social’. This provision is probably one of the most controversial of the entire reform of the Immigration Regulation of 2011 as the application of the said criterion may reduce considerably the issue of residence permits for ‘arraigo social’, especially in a period of economic crisis such as the present one.

From all the above, it becomes apparent that the ‘arraigo social’ does not actually constitute a regularisation based solely on social or family-social reasons. The immigrant is in principle obliged to have an employment contract with duration of no less than one year, requirement which makes some authors speak about an ‘arriago sociolaboral’ rather than ‘social’¹⁰²⁰.

¹⁰¹⁵ Royal Decree 2393/2004

¹⁰¹⁶ Second subparagraph of Article 45 (2) (b) of the Royal Decree 2393/2004

¹⁰¹⁷ Article 124 (2) of the Immigration Regulation

¹⁰¹⁸ Instruction of the General Directorate of Immigration of June 2011 regarding the ‘arraigo’ report-DGI/SGRJ/3/2011

¹⁰¹⁹ For instance, documents establishing the existence of a relation with public institutions, property titles and certificates of participation in courses.

¹⁰²⁰ See, for instance, C. Molina Navarrete, G. Esteban de la Rosa and E. Arce Jiménez, *La inmigración extranjera. Comentario sistemático al Real Decreto 2393/2004, de 30 de diciembre* (Madrid, Centro de Estudios Financieros, 2005)

6.2.1.1.2 ‘Arraigo familiar’

The residence permit for ‘arraigo familiar’ may be granted in two occasions. First, to the father or the mother of a minor who has the Spanish nationality, in case they are responsible for the child and live with him/her fulfilling all parental obligations and second, to the child of a father or a mother who is Spanish of origin¹⁰²¹. It is worth mentioning that, unlike in the ‘arraigo social’ where the immigrant has to meet various conditions, the relevant provision dealing with the ‘arraigo familiar’ does not set any other than the ones described above requirement for the issue of a residence permit. More importantly, the Regulation does not require that the immigrant should prove to have sufficient resources or an employment contract in order to maintain himself/herself and his/her family members.

It should be underlined that the first of the above mentioned cases was introduced by the Immigration Regulation of 2011 as a new way of regularisation for exceptional circumstances. Given that this way of regularisation is tightly connected to the acquisition of the Spanish nationality, it is worth briefly examining the applicable nationality system in Spain. In particular, according to Articles 15 and 17-25 of the Spanish Civil Code, Spanish nationals are those who have parents of Spanish nationality or at least one of the parents is Spanish national. Therefore, in principle the applicable nationality system in Spain is the so-called ‘Jus Sanguinis’¹⁰²².

Having said that, it should be assumed that the ‘arraigo familiar’ covers in principle the situations that the child is born in Spain from two parents who obtain the nationality of a country where the applicable nationality system is the so-called ‘Jus Soli’¹⁰²³. In these cases, the child cannot acquire the nationality of the country of origin and is therefore granted the Spanish nationality in order to not remain stateless in the territory of Spain. The parents of this Spanish child may regularise their stay in Spain with an ‘arraigo familiar’.

¹⁰²¹ Article 124 (3) of the Immigration Regulation

¹⁰²² According to Oxford Reference Dictionary the term ‘Jus Sanguinis’ refers to ‘[t]he principle that the nationality of children is the same as that of their parents, irrespective of their place of birth’ (available online at www.oxfordreference.com/).

¹⁰²³ According to Oxford Reference Dictionary the term ‘Jus Soli’ refers to ‘[t]he rule by which birth in a state is sufficient to confer nationality, irrespective of the nationality of one's parents’ (available online at www.oxfordreference.com/). Example of countries where the applicable nationality system is ‘Jus Soli’ are Colombia, Peru, Argentina, Paraguay, Costa Rica, Cuba and Honduras.

Furthermore, according to the nationality rules in the Spanish legal system, every child who is born in Spain may acquire the Spanish nationality after residing in Spain for one year¹⁰²⁴. Therefore, the ‘*arraigo familiar*’ may also be applied to parents who are nationals of a country where the nationality system is ‘*Jus Sanguinis*’¹⁰²⁵, in case they give birth to a child in Spain and the latter resides in Spain for one year. It should be kept in mind that Article 22 (2) of the Civil Code requires one year of regular residence and in principle the new born child may only reside regularly in Spain if his/her parents also do so. Therefore, the above mentioned example will mostly be relevant in two occasions. First, in case one of the parents resides regularly during this year and the other one irregularly. In this case, the parent who resides irregularly may regularise his/her stay as a parent of a child who has the Spanish nationality. Second, in case the parents of the child have been residing regularly during the first year since the birth of their child in Spain but they are not able to renew their permit later on.

It can be assumed that the Spanish legislature intended through the ‘*arraigo familiar*’ to harmonise the Spanish legislation with the *Ruiz Zambrano* judgment (cited above) of the CJEU. It should be noted that before the reform of the Immigration Regulation in 2011, the parents of a child of Spanish nationality could not be expelled pursuant to the Supreme Court’s case law but there was no particular way of regularisation and therefore they were most often staying in Spain in an irregular situation¹⁰²⁶. The Immigration Regulation gives a solution in this rather peculiar situation, adapting at the same time to the evolution in the field of EU law.

Nevertheless, it should be stressed that the concerns which were raised at the relevant Chapter of the present study regarding the exact legal status of family members of an EU child who resides in the territory of the Member State of his/her own nationality appear supported by the way the legislature harmonises the Spanish legislation with the *Ruiz Zambrano* judgment (cited above). Indeed, according to the rules on ‘*arraigo familiar*’, the parents of a Spanish national are granted a residence and work permit for an initial period of one year and do not enjoy the more favourable ‘community regime’. In principle, this approach is in line with the

¹⁰²⁴ See Article 22 (2) (a) of the Spanish Civil Code

¹⁰²⁵ Examples of countries where the applicable nationality system is ‘*Jus Sanguinis*’ are Bolivia, Ecuador, Venezuela, Nicaragua, Mexico, Chile and Uruguay.

¹⁰²⁶ See I. Garcia Vitoria, ‘Residencia por circunstancias excepcionales. El *arraigo*’ in D. Boza Martínez, F.J. Donaire Villa and D. Moya Malapeira, *La nueva regulación de la inmigración y la extranjería en España, régimen jurídico tras la LO 2/2009, el Real Decreto 557/2011 y la Ley 12/2009* (Valencia, Tirant lo Blanch, 2012)

judgment of the CJEU as the latter merely stated that the ascendants of an EU child who resides in his/her own Member State should be provided with a residence and work permit and did not specify as to whether this permit should be equivalent to the one granted to family members of EU citizens under the Citizenship Directive. The future case law of the CJEU may shed light on this issue and the Spanish legislature may be found obliged to amend the relevant provision regarding parents of Spanish children.

As regards the case of Article 123 (3) (b) Immigration Regulation, namely the one regarding the children of a mother or a father who are Spanish of origin, it should be mentioned that the legislature refers in principle to the children of Spanish nationals who have recently acquired the Spanish nationality for historical reasons. In particular, these persons have been granted the Spanish nationality for being grandchildren of Spanish nationals who migrated during the Spanish civil war and the dictatorship¹⁰²⁷. These ‘new Spanish nationals’ may regularise the residence of their children in Spain through an ‘arriago familiar’¹⁰²⁸.

6.2.1.2 The child of a regular immigrant

In addition to the ‘arraigos’, there is another procedure in the Spanish Immigration legislation which amounts to a kind of ‘regularisation’. It concerns the issue of the residence permit to the child of an immigrant who is regularly residing in Spain and is regulated by Articles 185 and 186 of the Immigration Regulation. The Regulation makes a distinction between children who have been born in Spain and those that have been born in another country but reside in Spain. In any of the two cases, we may either speak about ‘family reunification’ between parents and children in a procedure that does not require the child to move to the country of origin in order to follow the ordinary family reunification procedure or we may speak, especially in the case that the child is born in another country, about a regularisation procedure.

6.2.1.2.1 Child born in Spain

In case the child is born in Spain, the exception from the rule that the family member should apply for a visa in the country of origin in order to reunify with his/her parents has been

¹⁰²⁷ Their right to accede the Spanish nationality has been regulated by the law 52/2007 of 26 December (the so-called law of historical memory).

¹⁰²⁸ See also Instruction of the General Directorate of Immigration of December 2008 regarding authorisations for exceptional situations in case of children of a mother or father who Spanish of origin-DGI/SGRJ/10/2008

adopted for obvious reasons. It would be rather bizarre to require the child who is born in Spain from immigrants who reside regularly in the country to move to the country of origin in order to follow the ordinary family reunification procedure. Therefore, the Immigration Regulation¹⁰²⁹ provides that the immigrant’s child acquires automatically the same residence permit as the one of either of his/her parents¹⁰³⁰. The parents should apply for the child’s residence permit right after the child is born or right after one of the two acquires a residence permit, submitting the birth certificate.

In case of a child of an immigrant who holds a residence permit on grounds of family reunification as a descendant of another immigrant who was the sponsor of the right to family reunification, this will acquire a residence permit for family reunification dependent on his/her parent¹⁰³¹. For the renewal of this residence permit, it should be taken into account in addition to the accommodation and the resources of the parent, those of the initial sponsor in case the parent of the minor child continues to hold a residence permit for reasons of family reunification¹⁰³². It should be noted that this is the only case that ‘family reunification’ may be exercised by a person who has entered Spain with the procedure for family reunification and does not hold an independent right of residence.

In general terms, the applicable rules with regards to the renewal of the residence permits of the persons who follow the present procedure are those concerning family members who have entered Spain with the ordinary family reunification procedure¹⁰³³. In that respect, it should be mentioned that given that the initial residence permit to the child born in Spain is granted without a requirement for sufficient resources under the procedure established by Article 185 Immigration Regulation, there is a high possibility that the sponsor does not dispose sufficient resources for the entire family at the time on which s/he applies for a renewal of their residence permits. In any event, it should be added that when the child, who has been granted a residence permit through the above mentioned procedure, reaches the age suitable for work s/he should have a right to work without the necessity of any administrative process¹⁰³⁴.

¹⁰²⁹ Article 185 of the Immigration Regulation

¹⁰³⁰ First subparagraph of Article 185 (1) of the Immigration Regulation

¹⁰³¹ First subparagraph of Article 185 (3) of the Immigration Regulation

¹⁰³² Second subparagraph of Article 185 (3) of the Immigration Regulation

¹⁰³³ Article 185 (4) of the Immigration Regulation

¹⁰³⁴ Article 185 (5) of the Immigration Regulation

The above described regime strictly applies to the child born in Spain from parents who are regularly residing there. The child born in Spain from parents who are irregularly staying in the country cannot accede to the regular residence and in fact is going to remain in an irregular situation at least until s/he reaches the suitable for work age in case his/her parents do not until that moment regularise their stay in Spain. This being said, pregnant women who enter irregularly the territory of Spain cannot rely on the birth of the child for the acquisition of a regular residence for themselves or their children. The only exception to this rule is the one described above regarding children who are born in Spain and cannot acquire the nationality of their parents.

Furthermore, it should be added that the child who is born in Spain from a parent who is regularly residing there, is not only facilitated a residence permit since s/he is born but is also treated in a favourable way as regards several other aspects. First, s/he may acquire the long-term residence status when s/he reaches the age of majority and has lived in Spain for 3 years¹⁰³⁵, instead of 5 years which constitutes the general rule. Second, s/he enjoys a more protective status as regards expulsions¹⁰³⁶. Third, in the acquisition of the work authorisation, the competent authorities shall not take into consideration the national situation of employment¹⁰³⁷. Nevertheless, it should be reminded that according to the applicable nationality rules in the Spanish legal system, the child born in Spain may acquire the Spanish nationality after one year of regular residence there. As a result, it can be assumed that all the above become applicable merely in cases that the child has not, for any reason, applied for the acquisition of the Spanish nationality.

6.2.1.2.2 Child born abroad

The regular immigrant’s child that has been born in another country but lives in Spain can acquire a residence permit when s/he has lived for a continuous period of a minimum of two years in Spain and the parent fulfils the requirements of accommodation and sufficient resources established in the regulation for the cases of family reunification¹⁰³⁸. Furthermore, when the child is at a schooling age, in addition to the above mentioned conditions, the parents should submit proof that the child attends school during his/her stay in Spain. As

¹⁰³⁵ Article 148 (3) (c) of the Immigration Regulation

¹⁰³⁶ Article 57 (5) (a) of the Immigration Act

¹⁰³⁷ Article 40 (1) (g) of the Immigration Act

¹⁰³⁸ Article 186 of the Immigration Regulation

regards the renewal of the residence permits and the grant of a work permit, the applicable rules are those analysed with regards to the child who is born in Spain¹⁰³⁹.

It should be noted that Article 186 of the Immigration Regulation provides that the child should be living in Spain for a minimum period of two years before the issue of the residence permit, whereas in an ordinary family reunification procedure the sponsor has the right to reunify with his/her family member at the moment of the first renewal of his/her residence permit, namely after one year of residence in Spain. Therefore, in principle, the ordinary family reunification procedure appears to be a faster procedure for the acquisition of the residence permit for the child.

However, this is not an absolute conclusion as in many cases the faster way for the child to acquire the residence permit will depend on the exact circumstances of the case. For instance, if the family lives in Spain in an irregular situation for a period of two years and at the beginning of the third year one of the parents is granted his/her initial residence permit, the child will be able to acquire the residence permit directly at the moment of the grant of the initial residence permit to the parent, as s/he would have already lived in Spain for two years. On the contrary, in case of an ordinary family reunification, in the same circumstances, s/he should wait for a further year until the parent is granted the first renewal of his/her residence permit. Not least, the Article 186 procedure is a ‘safer option’ as the immigrant avoids possible problems that may arise in the issue of the visa that may delay or hinder family reunification.

6.2.2 Greece

The issue of the regularisation of the irregular immigrant’s stay in Greece is regulated by Article 19 of the Immigration Law. Given that the immigrant’s family relations reasonably appear among the factors that are taken into account in the regularisation procedure, the relevant provision is deemed suitable for an analysis in the present study. The procedure presents several similarities but also differences with the corresponding procedures of ‘arriagos’ in the Spanish system.

¹⁰³⁹ See Article 186 (4) and (5) which reads identically as the Article 185 (4) and (5) of the Immigration Regulation

The Greek legislature uses the usual ‘strong ties’ criterion in order to grant a residence permit of an one-year duration to immigrants who are present in Greece in an irregular situation¹⁰⁴⁰. Nevertheless, the fact that the third-country national proves to have developed strong ties in the country is not in itself sufficient for the regularisation as the Greek legislature has introduced further requirements. In particular, the application is examined only if the person concerned presents a visa which has been issued by a Greek consular authority at least three years before the submission of the application or a residence permit even if it has expired and a valid passport. It becomes evident that in principle the regularisation procedure concerns persons who have either entered Greece in a regular way or they have resided there also in a regular way for a certain period in the past and they have not managed to renew their residence permits.

Nonetheless, in exceptional circumstances the third-country national may not present a visa or a residence permit in case s/he proves the actual fact of residence in the Greek territory for ten consecutive years¹⁰⁴¹. In other words, the Greek legislature substitutes the requirement of a prior regular entrance or residence with the draconian condition of ten consecutive year of presence in the Greek territory. It should be underlined that the ten-year presence in Greece merely substitutes the requirement for prior regular residence or entry and does not in itself prove that the third-country national has developed strong ties in Greece. This being said, even though the immigrant meets this condition, s/he should still provide evidence of the existence of strong ties with the country. It should also be mentioned that the third-country national may be exempted from presenting a valid passport in case s/he is unable for objective reasons to be provided with any travel document¹⁰⁴².

In any event, for the finding of strong ties with the country, public authorities should take into account: the very good knowledge of the Greek language, the applicant’s or his/her children’s attendance at a Greek elementary or secondary school, the duration of the applicant’s residence in Greece and especially of the regular residence, the period of the insurance in a primary insurance organisation and the fulfilment of tax obligations and the family ties with Greek nationals or expatriates¹⁰⁴³.

¹⁰⁴⁰ Article 19 (1) of the Immigration Law

¹⁰⁴¹ Third subparagraph of Article 19 (1) of the Immigration Law

¹⁰⁴² Fourth subparagraph of Article 19 (1) of the Immigration Law

¹⁰⁴³ Last subparagraph of Article 19 (1) of the Immigration Law

What attracts our attention in the above mentioned criteria is with no doubt the fact the Greek legislature considers as an indication that the immigrant has developed strong ties with the country the existence of family ties with a Greek national or a Greek expatriate and does not make a reference to family ties that the third-country national may have with other third-country nationals residing in Greece. This approach is problematic and arbitrary as there is no doubt that family relations with other immigrants who reside in Greece strengthen the ties that the immigrant who wishes to regularise his/her stay has in the host country. It is not surprising that other countries, such as Spain, have included family ties with other regular immigrants in the criteria for the finding of the existence of ‘strong ties’ in regularisation procedures. Nevertheless, this is not the only difference in the regularisation systems of Spain and Greece. The ‘arraigo social’ in the Spanish legal system is tightly connected to the existence of a labour contract whereas such requirement is not provided for in the Greek regularisation system. Another difference lies in the fact that in Spain the regularisation is not dependent upon a prior lawful residence or entry, fact which makes regularisation much more accessible to a large number of immigrants who enter the country in an irregular way and have never managed to accede to regular residence in the country.

In any case, the above described residence permit gives a right to employment and service provision but not to a self-employed activity. The right to self-employed activity is given only in case the person concerned held a residence permit which gave him/her access to self-employed activity and this activity still exists¹⁰⁴⁴.

Finally, a residence permit for exceptional reasons may be granted for reasons of public interest which may result from bilateral agreements or in particular circumstances regarding certain areas of foreign policy, defence, internal security, economy and development, investment, education and culture¹⁰⁴⁵. The residence permit is granted for an initial period of one year and is renewed for an equal period. Third-country nationals may in that case be accompanied by their family members who are granted an individual residence permit which has the same expiry date as the one of the sponsor.

¹⁰⁴⁴ Article 19 (3) of the Immigration Law

¹⁰⁴⁵ Article 19 (7) of the Immigration Law

6.2.3 Germany

In Germany, the situation regarding regularisation differs considerably in comparison to the other two countries of the present study. Germany has been characterised as an opponent to massive regularisation for fear that such a policy would constitute a pull effect for irregular migration¹⁰⁴⁶. Instead, it grants ‘toleration situation’ (‘Duldung’) to migrants who cannot be removed for ‘humanitarian’ reasons. Nevertheless, Germany used several regularisation programmes and mechanisms in the past years especially as regards persons who were in a long-term ‘toleration status’. At this point, it should be noted that it is questionable that the fact that a country offers a regularisation procedure plays a crucial role in the decision of an immigrant with regards to the country of destination. We believe that other factors such as the employment possibilities or possible family ties are more decisive in that respect. In any event, given that there is no ‘permanent’ regularisation procedure in German legislation, we consider it important to further analyse the most important of the regularisation programmes which was set up in 2006.

In particular, in 2006, the ministers of home affairs of several states of the federal republic decided to grant a residence permit on several irregular immigrants whose residence in Germany was ‘tolerated’ as they could not be expelled for several reasons. The residence permits which were issued were based on Articles 104 a (1), 104 a (2) and 104 b (1) in conjunction with Article 23 (1) of the Residence Act. In particular, Article 104 a (1) provides that a foreigner whose deportation has been suspended shall be granted a residence permit if by 1 July 2007 s/he had been living in Germany for eight continuous years or six years if in addition s/he lives together with a minor unmarried child as a family unity and 1) has sufficient living space, 2) has sufficient command of the spoken German language (level A2 of the Common European Framework of Reference for Languages), 3) provides evidence that the children actually attend school, 4) has not deceived the authorities in relation to their residence status, 5) does not have any links to extremist or terrorist organisations and 6) has not been convicted of an offence committed in Germany (except in cases of fines up to 50 daily rates or up to 90 daily rates in the case of offences which, in accordance with the Residence Act or the Asylum Procedure Act, can only be committed by foreigners).

¹⁰⁴⁶ M. Baldwin-Edwards and A. Kraler, ‘Regularisations in Europe: Study Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU’, (2009) Ref. JLS/B4/2007/05, ICMPD

Article 104a (2) of the Residence Act provides that:

‘An adult unmarried child whose deportation has been suspended, who is the child of a foreigner whose deportation has been suspended and who has been continuously resident in the federal territory for at least eight years on 1 July 2007, or, if he or she lives together with one or several minor, unmarried children as a family unit, where he or she has been continuously resident in the federal territory for at least six years on the said date, by virtue of his or her deportation having been suspended, his or her residence being permitted (pending asylum procedures) or a residence permit having been issued on humanitarian grounds, may be granted a residence permit pursuant to Section 23 (1), sentence 1 where said child was a minor at the time of entering the federal territory and where it appears, on the basis of the child’s education and way of life to date, that he or she is capable of integrating into the way of life which prevails in the Federal Republic of Germany. The same shall apply to a foreigner who has been continuously resident in the federal territory for at least six years as an unaccompanied minor by virtue of his or her deportation having been suspended, his or her residence being permitted (pending asylum procedures) or a residence permit having been issued on humanitarian grounds, where it appears, on the basis of the child's education and way of life to date, that he or she is capable of integrating into the way of life which prevails in the Federal Republic of Germany’.

Finally, 104 (b) of the Residence Act provides that:

‘By way of derogation from Section 5 (1), no. 1, (2) and Section 10 (3), sentence 1, a minor, unmarried child may be granted a residence permit in his or her own right pursuant to Section 23 (1), sentence 1 if the said child’s parents or the parent possessing the sole right of care and custody are not granted a residence permit or an extension of the same pursuant to Section 104a and leaving the federal territory, where

1. the child has reached the age of 14 on 1 July 2007,
2. the child has been lawfully resident in Germany or resident in Germany by virtue of suspended deportation for at least six years,
3. the child has a good command of the German language,
4. on the basis of the child’s education and way of life to date, he or she has integrated into the prevailing way of life in the Federal Republic of Germany and it is ensured that the child will remain integrated in this way of life in the future and
5. care and custody of the child are ensured’.

6.3 The Returns Directive

6.3.1 Overview of the Directive

For harmonising the rules and the conditions regarding return of irregular immigrants in the EU, the EU legislature adopted in 2008 the Returns Directive¹⁰⁴⁷. The Directive applies to all third-country nationals who are residing irregularly in the territory of a Member State and sets out common standards to be applied in Member States for returning irregularly staying third-country nationals¹⁰⁴⁸.

The definition on ‘irregular migration’ (also named ‘illegal’, ‘unlawful’, ‘undocumented’ or ‘unauthorised’) adopted by the Returns Directive is the following:

“‘illegal stay’ means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State’¹⁰⁴⁹.

The above definition is broad and includes all types of unlawful stays. Third-country nationals, for instance, whose unlawful stay is tolerated by the public authorities, are included in the definition provided for in the Returns Directive. Similarly, the Directive speaks about third-country nationals who ‘no longer’ fulfil the conditions of residence without making any reference to the reason that led to the unlawful residence in their case. It should be noted that

¹⁰⁴⁷ It is interesting to notice that the CJEU has already been asked to interpret various provisions of the Returns Directive. See cases C-357/09 PPU *Said Shamilovich Kadzoev* [2009] ECR I-11189, C-61/11 PPU *Hassen El Dridi, alias Soufi Karim* [2011] ECR I-3015, C-329/11 *Alexandre Achughbabian v. Préfet du Val-de-Marne* [2011] ECR I-12659, C-430/11 *Md Sagor* (published in the electronic Reports of Cases), C-534/11 *Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie* (published in the electronic Reports of Cases), C-297/12 *Gjoko Filev, Adnan Osmani* (not yet reported), C-166/13 *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis* (not yet reported), C-249/13 *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques* (not yet reported), C-383/13 PPU *M. G., N. R. v. Staatssecretaris van Veiligheid en Justitie* (not yet reported), Joined Cases C-473/13 and C-514/13 *Adala Bero v. Regierungspräsidium Kassel and Ettayebi Bouzalmate v. Kreisverwaltung Kleve* (not yet reported), C-474/13 *Thi Ly Pham v. Stadt Schweinfurt, Amt für Meldewesen und Statistik* (not yet reported), C-562/13 *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v. Moussa Abdida* (not yet reported), C-146/14 PPU *Bashir Mohamed Ali Mahdi* (cited above), Case C-38/14 *Subdelegación del Gobierno en Gipuzkoa — Extranjería v. Samir Zaizoune* (not yet reported), Case C-554/13 *Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v. I. O.* (not yet reported) and Case C-290/14 *Skerdjan Celaj* (not yet reported).

¹⁰⁴⁸ Article 1 of the Returns Directive

¹⁰⁴⁹ See Article 3 (2) of the Returns Directive. The same definition of ‘illegal stay’ has been adopted in other EU legal instruments such as, for example, the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

Member States are left discretion to adopt a different definition of what they consider to be ‘irregular’ or, following the terminology adopted by the EU legislature, ‘illegal stay’.

The Returns Directive provides for a period for ‘voluntary departure’ which may be between 7 and 30 days, without excluding the possibility for the irregular immigrant to depart earlier¹⁰⁵⁰. Member States may provide in their national legislation that the period for a voluntary departure should be given to the third-country national only following an application and in this case Member States are obliged to inform the third-country national about this possibility. Furthermore, in case no period for voluntary departure is granted or in case the third-country national has not departed voluntarily until the expiry of this period, Member States shall take all necessary measures, including coercive measures¹⁰⁵¹, to enforce the return decision¹⁰⁵². The Directive further provides that return decisions shall be accompanied by an entry ban that shall not in principle exceed five years¹⁰⁵³.

More controversially, the third-country national who is to be returned can also be detained in order for Member States to prepare the return and/or carry out the removal process. However, detention can be imposed only in case other less coercive measures are not effective in a particular case and only in the circumstances described in Article 15 (1) (a) and (b). Lastly, the Returns Directive provides that the period of detention shall not exceed 6 months¹⁰⁵⁴ (or a further 12 months if the return procedure lasts longer due to the reasons described in Article 15 (6))¹⁰⁵⁵. It should be noticed that the European Commission’s report on EU Return Policy, which was published in 2014, indicates that after the transposition of the Directive the time limits of detention have increased in eight Member States while they have decreased in twelve Member States. It should also be noted that although the CJEU has, as mentioned above, already ruled on detention issues under the Directive, several issues still remain in the discretion of Member States¹⁰⁵⁶.

¹⁰⁵⁰ Article 7 (1) of the Returns Directive

¹⁰⁵¹ Article 8 (4) of the Returns Directive

¹⁰⁵² Article 8 of the Returns Directive

¹⁰⁵³ Article 11 (1) and (2) of the Returns Directive

¹⁰⁵⁴ Article 15 (5) of the Returns Directive

¹⁰⁵⁵ For a criticism on Article 15 see also N. Hatzis, ‘Detention of Irregular Migrants and the European Public Order’ (2013) 38(2) *European Law Review* 259-276

¹⁰⁵⁶ See M. Basilien-Gainche, ‘Immigration Detention under the Return Directive: The CJEU Shadowed Lights’ (2015) 17 *European Journal of Migration and Law* 104-126

6.3.2 Family life and return of irregular immigrants under the Directive

To begin with, it should be noted that the preamble of the Returns Directive provides that family life should be a ‘primary consideration’ when Member States implement the provisions of the Directive and that the Directive respects the fundamental rights recognised by the ECHR. Furthermore, pursuant to Article 5 of the same Directive, when implementing the Directive, Member States shall take due account of: a) the best interests of the child and b) family life. In addition to the general provisions which refer to family life, the Returns Directive contains further provisions which concern third-country nationals who have family in the territory of the Member State that has issued the return decision or they are unaccompanied minors at the period of the issue of the return decision.

The Directive provides that Member States should extend the period for voluntary departure taking into account ‘(...) the specific circumstances of the individual case, such as the length of the stay, the existence of children attending school and the existence of other family and social links’¹⁰⁵⁷. In other words, the provision prohibits expulsions which will result in the unforeseen removal of children from school classes. The national immigration authorities should postpone the date of expiry of the voluntary departure assumedly until the latter finish the course that they attend. Furthermore, the Directive speaks about ‘other family and social links’ which should be taken into account for the extension of the period for the voluntary departure but does not further elaborate on their concept. In any event, during the period for voluntary departure, Member States shall ensure that ‘as far as possible’ family unity with family members present in their territory is maintained¹⁰⁵⁸.

Next, Article 10 concerns the return of unaccompanied children. The provision reads as follows:

‘1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child. 2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return’.

¹⁰⁵⁷ Article 7 (2) of the Returns Directive

¹⁰⁵⁸ Article 14 of the Returns Directive. The provision makes an exception for the situation of detention covered in Articles 16 and 17 of the Returns Directive.

Lastly, the Returns Directive provides for the application of special rules regarding detention of families and unaccompanied children and of third-country nationals who have family members in the Member State who are not being returned themselves. First, according to Article 16 (2), detained third-country nationals shall be allowed to establish contact with their family members. Second, Article 17 reads as follows:

‘1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time. 2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy. 3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education. 4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. 5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal’.

It should be concluded that whatever the value and the practical effect of the undoubtedly few provisions concerning families and the protection of the right to family life of third-country nationals, the most important criticism concerning the Directive is still focused on the fact that the latter allows families to split up. The Directive provides that Member States should take ‘due account of’ family life and that the latter should be their ‘primary consideration’ when implementing the Directive but fails to establish a solid provision which would discourage Member States from separating members of a family for reasons of human rights. Furthermore, the Returns Directive is also criticised for the fact that it allows minors and families with minor children to be detained¹⁰⁵⁹. Even if it is provided that the detention of unaccompanied minors or families with minors shall only be a measure of last resort and that minors shall be given access to activities and education, there is a fear that in practice most of the Member States will not provide for such detention conditions¹⁰⁶⁰ and minors will end up being detained separately from their families and in conditions inappropriate for their status as minors¹⁰⁶¹. In any event, the reference to the ECHR should be welcomed especially given that, as analysed above, the case law of the ECtHR is more favourable with regards to expulsion than family reunification cases.

¹⁰⁵⁹ See A. Triandafyllidou, ‘Disentangling the Migration and Asylum Knot. Dealing with Crisis Situations and Avoiding Detention’ Robert Schuman Centre for Advanced Studies Policy Paper 2013/19

¹⁰⁶⁰ See, for instance, D. Angeli and A. Triandafyllidou, ‘Is the indiscriminate detention of irregular migrants a cost-effective policy tool?: A case-study of the Amygdaleza Pre-Removal Center’ Global Governance Programme, Midas Policy Brief, May 2014

¹⁰⁶¹ Several authors have expressed concerns about the standards of detention of immigrants in different Member States. See, among others, A. Baldaccini, ‘The Return and Removal of Irregular Migrants Under EU Law: An Analysis of the Returns Directive’ (2009) 11 *European Journal of Migration and Law* 1-17

6.4 Return of irregular immigrants in national legislation

6.4.1 Spain

The Returns Directive is implemented in Spain by the Immigration Act 2/2009 and by the Royal Decree 162/2014. The Royal Decree provides for a maximum detention period of 60 days¹⁰⁶². It is worth noting that the detention period has increased in Spain after the implementation of the EU Directive. In any event, as regards family life related provisions the following comments should be made. To start with, initially the second paragraph of Article 7 (3) of the Royal Decree provided that efforts should be made for families to be detained together being provided, as far as possible, separate accommodation which would guarantee adequate privacy. Similarly, Article 16 (2) (k) provided that detainees shall have the right to have their minor children with them provided that there are units that guarantee family unity and privacy. It becomes evident that the provisions merely provided for a possibility for families to be detained together and not an obligation and therefore they did not implement effectively Article 17 of the Directive which constitutes a ‘shall’ provision. For this reason, the Supreme Court in its judgment of 19 February 2015¹⁰⁶³ annulled the words ‘as far as possible’ from Article 7 (3), as well as the conditionality of Article 16 (2) (k) finding them incompatible with the Returns Directive. This being said, Spain is now obliged to detain families separately. As to the rest of the family related provisions contained in the Royal Decree, they mostly concern issues of communication with family members¹⁰⁶⁴, as well as family visits¹⁰⁶⁵.

6.4.2 Greece

The ‘Returns Directive’ has been implemented in the Greek legal system by the Law 3907/2011. The legislation incorporates the provisions of the Directive which relate to the immigrant’s family life in an effective manner. Therefore, the Greek implementing legislation provides that the public authorities shall take due account of the best interests of the child and family life when they implement the provisions of the law¹⁰⁶⁶ and that they should extend the period for voluntary departure taking into account the length of the stay, the existence of

¹⁰⁶² Article 21 (2) of the Royal Decree 162/2014

¹⁰⁶³ Judgment of the Supreme Court of 10 February 2015

¹⁰⁶⁴ Articles 16 (1) and 16 (m) of the Royal Decree 162/2014

¹⁰⁶⁵ Articles 9 (k) and 42 of the Royal Decree 162/2014

¹⁰⁶⁶ Article 20 of the Law 3907/2011

children attending school and the existence of other family and social links¹⁰⁶⁷. Furthermore, the said legislation contains the Directive provisions regarding return of unaccompanied minors¹⁰⁶⁸, as well as those regarding the conditions under which families may be detained¹⁰⁶⁹.

Interestingly, Law 3907/2011 contains a separate provision regarding return of EU citizens, their family members, as well as family members of Greek nationals. In particular, Article 40 provides that the provisions of the law are applicable to EU citizens without prejudice to the fact that Articles 22 to 24 of Decree 106/2007 may contain more favourable provisions.

It should be emphasised that in every return of a third-country national, Greek authorities should respect the Article 8 ECHR rights of the persons concerned in line with the case law of the Strasbourg Court which was analysed in the relevant Chapter of this study. Nevertheless, Law 3907/2011 contains a provision¹⁰⁷⁰ which explicitly prohibits return of third-country nationals who have certain family relations in Greece without the need of the application of any proportionality test as the one proposed by the ECtHR in Article 8 cases. These are the minor child of parents who reside regularly in Greece and the parent who has the custody of a Greek minor or a support obligation which s/he fulfils¹⁰⁷¹. The prohibition of return includes pregnant women during the pregnancy period and for the first six months after the child’s birth.

6.4.3 Germany

The rules regarding the return of irregularly staying third-country nationals in Germany are set out in Articles 57-62a¹⁰⁷² of the Residence Act. At the outset, the German law provides for a voluntary period of departure which may vary from seven to thirty days¹⁰⁷³ whereas the maximum period of detention provided for is that of six months with the possibility of an up to twelve months extension only in cases the foreigner hinders his/her deportation¹⁰⁷⁴. It should be mentioned that pursuant to the Commission’s report on EU Return Policy, Germany is one of the EU Member States which did not alter the maximum length of detention after the

¹⁰⁶⁷ Article 22 (2) of the Law 3907/2011

¹⁰⁶⁸ Article 25 of the Law 3907/2011

¹⁰⁶⁹ Articles 31 and 32 of the Law 3907/2011

¹⁰⁷⁰ Article 41 (1) of the Law 3907/2011

¹⁰⁷¹ The return of the parent of a Greek national is not prohibited if s/he is a threat to public policy, national security or public health pursuant to Article 41 (2) of the Law 3907/2011.

¹⁰⁷² Chapter 5, Part 2 of the Residence Act

¹⁰⁷³ Article 59 (1) of the Residence Act

¹⁰⁷⁴ Article 62 (4) of the Residence Act

transposition of the Returns Directive as the 18-month time limit was provided for by national law already before¹⁰⁷⁵. It should be reminded that the 18-month period equates to the maximum period permitted under the Returns Directive.

As regards return of families or foreigners who have family ties in Germany a distinction between two cases deems necessary. The first case concerns third-country national whose expulsion is permitted under national and international law and they are therefore awaiting deportation alone or together with the rest of their family member. The second case concerns immigrants who due to the strong family ties they have in Germany they cannot be expelled and therefore their deportation is suspended.

As regards the first of the two above mentioned cases, it should be noted that the German legislation provides that minors and families with minors may only be detained in exceptional cases and only for as long as it is taken into consideration the well-being of the child¹⁰⁷⁶. Even in that case, according to Article 62a (1) of the Residence Act, families should be detained together and separately from the rest of the detainees awaiting deportation, being granted appropriate privacy. Not least, Article 62a (2) of the Residence Act provides that detainees shall be allowed to establish contact with their family members who are not awaiting deportation themselves. It is interesting to note that Article 62a (3) of the Residence Act directly refers to Article 17 of the Returns Directive as regards the needs of minor detained children.

As regards the second case, Articles 60a (1) and (2) of the Residence Act, which deal with the suspension of the deportation of a third-country national read as follows:

‘For reasons of international law or on humanitarian grounds or to safeguard the political interests of the Federal Republic of Germany, the supreme Land authority may order the deportation of foreigners from specific states or of categories of foreigners defined by any other means to be suspended in general or with regard to deportation to specific states for a maximum of six months. Section 23 (1) shall apply to a period in excess of six months’.

‘The deportation of a foreigner shall be suspended for as long as deportation is impossible in fact or in law and no residence permit is granted. The deportation of a foreigner shall also be suspended if the public prosecutor’s office or the criminal court considers his or her temporary presence in the federal territory to be appropriate in connection with criminal proceedings relating to a criminal offence, because it would be more difficult to investigate the facts of the case without his or her information. A foreigner may be granted a

¹⁰⁷⁵ COM(2014) 199 final, at part IV

¹⁰⁷⁶ Article 62 (1) of the Residence Act

temporary suspension of deportation if his or her continued presence in the federal territory is necessary on urgent humanitarian or personal grounds or due to substantial public interests’.

The term ‘international law’ inevitably refers to the ECHR and the protection of ‘family’ and ‘private life’ under Article 8. This being said, deportations of foreign nationals who have family or social ties in Germany shall be suspended in case they are likely to violate Article 8 of the ECHR. Not least, Article 60a (2b) of the Residence Act deals with a particular situation which seems to be attached with special attention. The said provision provides that the deportation of the parents or of one parent who possesses the sole right of custody over a minor child who holds a residence permit shall be suspended for as long as the minor holds the residence permit. The same applies to the deportation of other minor children who live as a family unity with that parent.

PART IV: CONCLUSIONS

Conclusion No. 1: What is new for ‘family life’ after Lisbon?

In the introduction of the this study, we posed the question whether the adoption of the Lisbon Treaty is likely to bring any changes to the field of the aliens’ right to family life. As it has been mentioned throughout the dissertation, the majority of the Directives that have been examined were adopted in the early 2000s. It has also been remarked that the Lisbon Treaty was adopted in 2009 bringing the significant changes to the field of fundamental rights that have been discussed in the relevant section of the present thesis. That being said, the question that needs to be answered is whether the Directives can remain unchanged following the fact that the ECFR gained the same legal status as the Treaties and whether the enhancement of fundamental rights protection in the EU calls for a different approach towards family life in the EU.

We are of the opinion that the adoption of the Lisbon Treaty directly affects the right to family life and that there is an imperative need for a recast of the Directives, especially the one concerning family reunification of third-country nationals, and for a judicial interpretation of the latter based on Article 7 of the ECFR, which would not necessarily be linked to Article 8 of the ECHR. It is noted that the EU legislature has not yet taken satisfactory steps in order to clarify that the Directives are mere instruments which should be read in light of the ECFR. It should also be underlined that the CJEU does not refer to Article 7 of the ECFR when it deals with a family life related case but rather interprets the provision of the Directive that is subject to the preliminary ruling question, basing its argumentation on the scope of the Directive or on its previous case law on same or similar issues. The above mentioned finding applies both to family reunification cases of third-country nationals and of EU citizens. As regards the latter, the CJEU has in some cases been willing to ‘look’ outside the provisions of the Directive but has referred to Article 21 or 45 of the TFEU rather than to the ECFR.

We believe that the fact that the EU does not take the necessary steps in that direction is related to the current political situation in Europe and the fact that recently several Member States have started to adopt a more ‘domestic’ view on the issue of migration and asylum. In that respect, it is worth mentioning that there are several EU Member States that have toughened their legislation even in the years following the adoption of the Lisbon Treaty. This has been the case in two of the three Member States that are examined in this study, namely

Greece and Germany, as analysed in Conclusion No. 6. The above mentioned situation in combination with the fact that the right to family life is not a constitutionally protected right in all EU Member States, as well as the fact that several Constitutional Courts have questioned the competence of the CJEU to interpret fundamental rights, are in all probability the reasons that make the EU legislature and the CJEU reluctant to adopt a different approach towards the issue. We believe that, regardless of the variety of challenges that the EU and its Member States currently face, the EU legislature should take a cautious step forward and re-consider at least the Family Reunification Directive, whereas the CJEU should start resolving the family life related cases through an interpretation of Article 7 of the ECFR, which should guarantee a more extended protection than Article 8 of the ECHR.

Our view finds its legal base on Article 52 (3) of the ECFR. As mentioned above, this provision provides that in so far as the ECFR contains rights which correspond to the rights contained in the ECHR, the meaning and scope of these rights shall be the same as those laid down by the latter. It should also be reminded that pursuant to the same provision of the ECFR, the above mentioned principle does not prevent EU law from providing more extensive protection even if the right at stake corresponds to an ECHR right. The right to family life is often used as the best example of a right which is contained in an equivalent way to both fundamental rights instruments. At this point we consider it essential to examine all possible scenarios that may derive from this provision.

Let us first examine the first scenario according to which the interpretation of Article 7 of the ECFR should be the same as the one given by the Strasbourg Court in Article 8 cases. The adoption of this view would result in rather low standards of protection at EU level especially if we accept the distinction made by the Strasbourg Court between family reunification and expulsion cases. It has been shown that in reunification cases, the balancing test between the individual’s interests and the state’s interests is made at the stage of determining whether there has been an interference with the right to respect for family life. In this framework, the states can invoke different interests, even if they those are not included in Article 8 (2) and a case normally succeeds if reunification cannot take place in the country of origin. Therefore, according to the first scenario, Article 7 of the ECFR would offer protection mostly in refugees or asylum seekers cases where normally serious reasons impede reunification in the country of origin or in cases where standards of human rights protection in the immigrant’s country of origin are particularly low.

However, we have already expressed the view that the distinction between positive and negative obligations under Article 8 of the ECHR is arbitrary and should not be followed. The Strasbourg Court itself has repeatedly stated, even though only at a theoretical level, that drawing a distinction between negative and positive obligations deriving from Article 8 is particularly difficult and that the applicable principles should be the same. Following this reasoning, Article 8 ECHR and the corresponding Article 7 of the ECFR would allow for a wider protection in family reunification cases that would be based both on a ‘connections test’ and on an ‘elsewhere test’, as we propose in the relevant Chapter of this dissertation. The interests of the state that would justify an interference with the right to family life would also be limited to those included in Article 8 (2) of the ECHR.

Despite all the above, from our point of view the second scenario according to which the EU may provide more extensive protection, even if the right at stake is comparable to an ECHR right, is the most appropriate in the case of the right to family life. The Strasbourg Court seems to have ‘reached its limits’ with regards to family reunification cases applying an ‘elsewhere approach’ which has been repeatedly criticised in this study for not being an adequate one, whereas even in case the ECtHR adopts the same approach with regards to expulsion and reunification cases, the quite often contradictory judgments do not guarantee for a minimum protection of adequate standards. This being said, a new approach more focused on the protection that the family life ‘deserves’ at EU level is, in our view, necessary. The case law of the Strasbourg Court may appear useful especially due to the long tradition that this court has in the field of human rights. Nevertheless, we suggest that the EU should guarantee higher standards of protection than the applicable ones under Article 8 and should not follow the Strasbourg case law in an unquestionable way. We lay down the reasons in the following Conclusions.

Conclusion No. 2: The compatibility of the Directives with Article 8 of the ECHR

We consider it necessary to reflect on the compatibility of the legal instruments that have been examined in this dissertation with Article 8 of the ECHR. This is important as, regardless of a possible broader interpretation of fundamental rights that may derive from Article 7 of the ECFR as proposed in Conclusion No. 1, the legal instruments shall already at the present stage at least comply with Article 8 of the ECHR. In that respect, we speak about

an obligation rather than a possibility that derives from the relevant provision of the ECFR. Among all legal instruments, the Family Reunification Directive is the one which raises concerns with regards to this issue. In that respect, it should be noticed that although the CJEU in *Parliament v. Council* (cited above) found that the Family Reunification Directive is compatible with Article 8 ECHR, we consider that there are certain provisions that appear to pass below even the threshold of protection of this provision. We should keep in mind that the above mentioned judgment was adopted before Lisbon and back then the legal status and effect of the ECFR were unclear and by no means could be considered primary law.

The first critique is primarily focused on the definition of family adopted by the Family Reunification Directive. The first problem concerns the provisions that allow Member States to refuse reunification with the 12 and 15 years old minor children. Although these provisions cannot be invoked any longer by the Member States, we believe that they infringe the standards of protection provided for by Article 8 ECHR. Indeed, it is the Strasbourg Court’s common practice to unconditionally include the relationship between parents and minor children in the notion of family.

In particular, as far as Article 4 (6) of the Family Reunification Directive is concerned, we consider the infringement to be direct. Member States are let free to treat 15 years old children as not qualifying as minor children for the purposes of reunification. The argument that the provision falls within the margin of appreciation left by the Strasbourg Court to Contracting States is not convincing. In that respect, it should be noted that although this margin of appreciation does exist in Article 8 cases, it comes into play at the determination of whether the case deserves ‘respect’ from the immigration authorities and whether the interference has been justified and not at the decision on whether the relationship constitutes family life. The Strasbourg Court has always recognised that the relationship between parents and minor children constitutes ‘family life’ without recognising any margin of appreciation to states in that respect.

The same considerations apply with regards to the derogation set out in the Family Reunification Directive concerning children who are older than 12 and arrive independently from their parents. This provision also narrows the concept of family as Member States will be able to treat minor children, who will not be able to pass a language test, as not qualifying as family members for the purpose of family reunion. We agree with the Parliament’s

argument in *Parliament v. Council* (cited above) that integration does not appear as one of the justification grounds of Article 8 (2) and although it is taken into consideration by the ECtHR, this happens mostly in expulsion and not in reunification cases, where certain amount of time has been spent in the country and integration efforts and social ties have been developed. Therefore, by imposing a clear condition for integration at the 12 years old minor child prior to his/her entry, the Directive contravenes both Article 8 (1) and Article 8 (2) of the ECHR.

Not least, the concept of family provided for by the Family Reunification Directive appears to be narrower than the one of the ECHR in two other issues. First, as explained in the relevant section of this study, the Strasbourg Court in many, albeit not all, of the cases considers as ‘family life’ the relationship between parents and their young adult unmarried children. However, this issue is left to the discretion of Member States under the Family Reunification Directive. Second, the case law on Article 8 treats unmarried stable relationships, including those between same-sex partners, as equivalent to marriages. The Strasbourg Court has recently reaffirmed this finding even in a family reunification context. Nevertheless, these issues are also left to the discretion of Member States under the Family Reunification Directive. As a result, there would be certain cases of adult children or non-marital homosexual or heterosexual relationships that would gain protection under Article 8 of the ECHR, whereas there would be no provision under domestic law that would allow reunification. Lastly, we believe that the Family Reunification Directive lacks a more ‘*de facto* oriented’ approach as regards the concept of family in order to comply with Article 8 of the ECHR. We make a suggestion on this matter later on under Conclusion No. 4.

Second, as regards the rest of the provisions of the Family Reunification Directive, we consider it necessary to make a distinction between the actual approach adopted by the Strasbourg Court on family reunification cases and the approach that we consider should be adopted pursuant to all that we discussed in Part II of the present study. In particular, following the ‘elsewhere approach’ adopted in practice by the ECtHR, in conjunction with the fact that the ‘balancing test’ is carried out in the framework of the examination whether there is an obligation for public authorities to ‘respect’ the applicants’ family life, we would reach the conclusion that the rest of the provisions of the Family Reunification Directive do not raise issues of compatibility with the ECHR. This is so as under Article 8 (1), the states enjoy a wider margin of appreciation and may restrict the right to family life of the person concerned for a wide variety of reasons including control of immigration and integration.

On the contrary, if family reunification cases are to be discussed under Article 8 (2) as we propose, then certain conditions set out in the Directive related to integration of family members are to be found incompatible with the ECHR, as integration does not appear to be among the justification grounds of Article 8 (2). The most relevant conditions set out in the Directive are, in addition to the integration conditions referred to in the last subparagraph of Article 4 (1) which were discussed right above, the requirement for a two-year lawful residence of Article 8, the integration measures of Article 7 (2) and the minimum age requirement for spouses of Article 4 (5). It should be stressed that Article 17 of the Family Reunification Directive that calls for an individual assessment is a particularly positive provision which is in line with a ‘connections approach’ which is the one we suggest that should be followed by the Strasbourg Court in reunification cases.

As mentioned above, several of the issues raised in this conclusion have been discussed by the Luxembourg Court in *Parliament v. Council* (cited above). We consider the position adopted by the CJEU in this case particularly problematic and quite restrictive. In principle, the Luxembourg Court found that the derogations fall within the margin of appreciation given in immigration cases to the Member States and that Member States which decide to invoke these derogations should implement them respecting fundamental rights and having due account of the best interest of the children and the nature and solidity of the family relationships. However, this is a rather simplistic approach. It seems difficult to think of a situation in which the refusal to admit a 12 years minor just because s/he would fail an integration test would take due account of the best interest of the child. It is indisputable that in the majority of the cases the best interest of the child implies regular and stable contact with both parents and therefore the argument of the CJEU in that respect appears problematic.

Conclusion No. 3: The problematic issues detected in the reunification systems

Independently of the issue of compatibility of the Directives with Article 8 of the ECHR and before proceeding to propose a new approach to family reunification, we consider it necessary to highlight the most remarkable problematic issues that have been detected in the reunification systems which were examined in Part III of the dissertation. Our research has demonstrated that the most problematic matters concern the concept of family and the requirements for family reunion. Subsequently, we express our view with respect to the different family reunification systems.

A) Concept of family

The first of the issues regarding the concept of family concerns, on one side, whether it reflects the diversity of family models that is nowadays encountered in European societies and, on the other side, whether it takes into account the concept of family as perceived in the countries of origin. To begin with, this study has demonstrated that the concept of ‘family’ is in general terms focused on the ‘core family’ model. The ECHR and the ICCPR are probably the legal documents that appear more flexible regarding the definition of ‘family’ adopting an approach that is more based on *de facto* family relationships. Nevertheless, even these international human rights conventions are still ‘nuclear family’ oriented and leave little space for protection outside this concept. The legal definition of family is even more traditional under the Family Reunification Directive and the domestic immigration legislations that have been examined throughout this dissertation.

As described in Part I of this dissertation, there has been a notable evolution in the family models in the recent years. Family is no longer perceived merely as the relationship between children and parents and/or the relationship between spouses. Starting up with the spousal relationships it is not under dispute that every time more couples decide to conclude a registered partnership instead of a marriage, or they choose to merely cohabite without registering their partnership. Not least, there are partners or spouses who decide to live in separate homes even though they lead a genuine family life together. Same-sex relationships constitute a reality that deserves special attention as well. The evolution is also remarkable as regards the relationship between parents and children. First, nowadays more children are born outside marriage. Second, it appears that young adults maintain stronger family ties with their parents than they did in the past in terms of economic and emotional dependency. Lastly, it should not be disregarded that there are several persons who consider as direct family, family members from the extended family (such as a grandmother, a sister or an uncle, often as the only alive family member) or even one or more of their friends.

It is worth highlighting that the above mentioned family models are merely some of the ‘diverse family models’ and that there exist a lot more circumstances under which people may develop family life. In any event, this study reveals that the legislature in international, EU and national level disregards the pluralism in family models or considers it in a marginal way. At EU level, this is more evident with regard to family reunification for third-country

nationals than it is for EU citizens and refugees, even though the latter are also likely to face problems in that respect. Indeed, reunification with persons who are not spouses or minor children is according to the Family Reunification Directive entirely left to the discretion of the Member States. The same approach has been adopted by the legislatures of the Member States that have been included in the study, with Spain being notably more inclusive with regard to some of the above mentioned family models and Greece being totally exclusive providing family reunion merely with the spouse and the minor child.

Next, we have noticed that the definition of family does not only disregard family models that fall outside the ‘nuclear family’ as seen right above, but is also exclusively based on the European perception of what constitutes ‘family’, without taking into account what amounts to family in the countries of origin of the foreigner. In that respect, it should be noted that the research made in Part I of the thesis has revealed that there are different perceptions towards family worldwide. In brief, in several countries family relationships in the horizontal line are considered as relations equivalent or even more important than the ones between parents and children. Other examples concern the so-called ‘arranged marriages’ or the fact that in several countries of origin there is a strong moral or possibly even a legal duty for the child to take care of the sick or old parents. Not least, the age of marriages may vary among different countries of origin and is likely to be lower than the applicable one in the European continent. All the above family situations are either excluded from the definition of family or they are likely to be regarded as ‘suspicious’ by public authorities for being marriages of convenience.

From all the above it becomes apparent that the concept of family lacks both an approach that would depart from the strict notion of ‘core family’ but also an approach that would take into account at least to a certain extent elements inherent in the concept of family in the countries of origin. We believe that the right to family life would be far better served if the legislatures leave space for more flexibility in that respect.

A second problematic issue that concerns the concept of family is the high amount of definitions of ‘family members’ that have been detected along this study. As it has been demonstrated, the definition of family differs both at international, EU and national level but also depending on the status or nationality of the foreigner. In short, there is a different definition of ‘family members’ in case the sponsor is an EU citizen, a third-country national and a national of one EU Member State, with the former enjoying a right to reunify with a larger number of family members. The applicable definition of family also varies among

third-country nationals depending on the status of the sponsor. This being said, EU Blue Card holders, and now researchers, are treated in a privileged way by the EU legislature and the national legislatures of the three Member States included in the study in comparison to other third-country nationals. Lastly, different definitions apply depending on whether the third-country national is a migrant, a refugee or an asylum seeker.

It becomes evident that the EU and national legislatures do not adopt a single definition of ‘family’ which would be applicable to all cases but appears at times more flexible and at others more restrictive taking into account different factors. The first factor is the nationality of the sponsor who wishes to reunify with his/her family members. This factor may be explained as an effort to grant a more privileged status to persons who have tighter links with the country where reunification takes place. Political commitment between states like the integration in the EU is also relevant in that respect. In all three Member States, for example, nationals enjoy a right to reunify with a more extended number of family members and in less stringent conditions as compared to third-country nationals. Nevertheless, in the majority of the cases the nationality does not imply better integration or stronger links to the host country. Indeed, an EU citizen who has just arrived in Germany and wishes to reunify with his/her family members is far better off than a third-country national who resides in Germany already for several years. Therefore, nationals of some states in principle enjoy a more favourable right to family reunification, as well as a more extended definition of family solely because they happen to be nationals of those states.

The second factor is apparently related to the economic interests of the EU, as well as of each of the Member States. There are certain categories of third-country nationals who due to the status they acquire are treated in a more favourable way by the legislature in comparison with the rest of the third-country nationals. Principally, these are the Blue Card holders and the researchers. In this case, the EU, as well as the host Member States, offer enhanced reunification rights with the purpose of attracting innovation and highly-skilled workers to their territories. Relevant to this observation is the fact that the EU has recently amended the Researchers Directive, conferring enhanced reunification rights to researchers, precisely with the aim of becoming more attractive for qualified third-country researchers. The enhanced rights include a broader definition of family, as well as certain restrictions which are otherwise applicable to the concept of family of a third-country national not being applied to their case.

The third factor is related to the immigration status of the sponsor. As it has been shown in the relevant section of the present study, refugees and in some Member States seekers or other beneficiaries of international protection enjoy a more favourable right to reunification with their family members. In this case, favourable treatment is based on humanitarian considerations. These people enjoy a broader concept of family and are also normally exempted from several of the requirements for family reunification, which are applicable to third-country nationals of other statuses.

We consider the number of different definitions encountered especially at EU and national level excessive. We believe that there should be a single definition of family independently of whether we speak, for instance, about Blue Card holders, refugees or ‘regular’ migrants. The concept of family shall also not depend on the nationality of the sponsor, nor shall it be ‘used’ by the states in order to attract the type of migration that is more ‘desirable’ to them. We believe that the connection of the right to family reunification to Article 7 of the ECHR will leave more space for what we consider as a fairer approach in the respect, given that in this way the right to family reunification will be tightly linked to a fundamental right. We consider a fairer definition of family could be put forward as discussed in Conclusion No. 4.

B) Conditions for family reunion

As far as the requirements for family reunification are concerned, in addition to the criticism that has been made in Part III of this study regarding some of them being particularly restrictive, we have detected another issue which primarily concerns the fact that in several cases the requirements have little to do with family life *per se* and are imposed for migration control purposes. The most striking example is the requirements that are imposed in order for better integration to be achieved in the host Member State, namely the integration measures and conditions and the requirement for a prior lawful residence. We believe that these requirements introduce an element of integration in the family reunification procedure which is not relevant with the notion of family life.

We have drawn similar conclusions with regards to the criteria that the Strasbourg Court applies to expulsion cases. In the relevant section of the thesis, we made the observation that several of them aim at assessing the level of integration that the foreign enjoys in the host Member State and not the importance of his/her family life which is the actual protected right. This approach results in a degradation of the importance and the strength of family life, which

does not need to be reinforced with elements that fall entirely outside its scope. The same approach will be adopted below with regards to the possibility of imposing pre-entry training to family members. Our proposal regarding the conditions for family reunion is made in Conclusion No. 4.

C) Family reunification systems

We consider that the discussion regarding the problematic issues in reunification systems should involve an analysis of the different models that may apply to family reunification. First, reunification models may be divided into ‘formal’ and ‘material’. This distinction concerns the criteria that a legislature applies in order to define the persons that shall qualify as family members for the purposes of family reunification. In that respect, ‘formal’ reunification model is the one that lists the exact family relationships that are required in order for reunification to take place. A legislation which is based on this kind of reunification model may provide, for instance, that the sponsor may reunify with the spouse and the minor children or adopt a more expanded definition of family. On the contrary, the ‘material’ reunification systems do not set out a list of formal relationships but adopt a more *de facto* family approach, leaving space for varying relationships to fit in the persons that may be admitted for family reasons.

Second, as regards the applicable for the entrance conditions, there are jurisdictions that apply a ‘quota’ system whereas others that adopt a so-called ‘free choice’ system. The ‘quota’ system is based on a maximum number of residence permits that may be issued every year, with the residence permits that exceed this number being shortlisted for the following year. On the contrary, a ‘free choice’ system does not set a limit in the residence permits but the entrance is authorised only in case the sponsor meets the requirements that are laid down by law.

As it has been clearly shown in this research study, the EU and the majority of the EU Member States have adopted a strictly ‘formal’ model as regards the family members that are authorised entry and residence for family reasons. We find this approach problematic as it will often result in foreigners not being able to reunify with persons that they have close emotional ties just because they do not fit in the definition of family that has been adopted. Not least, some others will force themselves to comply with certain family models, even though they do not so desire, in order to achieve family reunification. As regards the distinction between ‘quota’ and ‘free choice’ systems, it should be noted that the Directives,

as well as the domestic legislation of the vast majority of the Member States, adopt a ‘free choice’ system. We consider that in principle the adoption of this system is the correct approach. Nevertheless, it should not escape out attention that Directive allows for several requirements which may make family reunification particularly difficult to exercise. It should also be emphasised that Member States may make use of the requirements for family reunification in order to control migration flows.

Conclusion No. 4: A new proposal for family reunification

In the present section, we express our view on how family reunification would better function and propose several changes in the current reunification regimes that we believe are likely to make the entire family reunification system fairer and more efficient. Our proposal is based on the more fundament-rights oriented approach that have been suggested in Conclusion No. 1, on the issues of compatibility with the ECHR that have been discussed in Conclusion No. 2 and on the problematic issues detected in the current reunification systems that have been analysed in Conclusion No. 3. In short, we consider that the current system of family reunification should be based more on an individual assessment of each application both as regards the concept of family and the conditions for family reunion (section A). Subsequently, under section B we make a suggestion regarding procedural aspects of family reunification. It should be noted that all that is being discussed under section A should, in our view, become applicable to all sponsors of whatever status or nationality, whereas the procedural issues that are being discussed under section B merely concern the family reunification regime of third-country nationals.

A) Application of an individual assessment to the definition of family and to the conditions for family reunion

Concept of family

The model adopted with regards to the persons who qualify as family members has been criticised above for being strictly ‘formal’, traditional and rather ‘European’. We believe that the achievement of fairer reunifications will be better served by a more individually based assessment of what constitutes family. It should be mentioned that the proposed model for the determination of the persons who shall be accepted for family reunification constitutes a mix of ‘formal’ and ‘material’ system.

To begin with, we believe that ideally the persons who are to be accepted as ‘family members’ of each foreigner should be assessed on a totally individual basis. Nevertheless, given that the implementation of this approach is expected to encounter several practical problems and, even if implemented correctly, is likely to slow down the process, we consider that the best solution is a middle ground one. In particular, the EU legislature should consider, in addition to the already established provisions, adding a new ‘shall’ provision to the different Directives that deal with family members or family reunification, that would pave the way for reunification with persons that do not fall within the notion of ‘core family’ but with whom the foreigner has strong and real emotional ties. In that way, the ‘core family’ relationships that are more likely to fall under the legal notion of family, will be still treated under the current provisions of the Directives and the domestic legislations in a fast and effective way but foreigners whose real emotional ties fall outside the scope of these provisions will be able to claim and achieve reunification on the basis of this new provision.

The research that we have conducted regarding the German immigration legislation has revealed that Article 36 of the Residence Act takes that path. However, this provision is mostly concerned with dependants of the sponsor whereas the one proposed in this section would cover *de facto* family relations that do not fall within the notion of ‘core family’. We believe that the adoption of such provision is likely to solve various problems that have been detected with regards to the concept of family in the course of our research. It should be clarified that such provision is likely to work only in case its wording facilitates reunification. Our research has revealed that expressions such as ‘in exceptional circumstances’, ‘when appropriate’ or in ‘particular situations’ often leave excessive discretion to public authorities and result in extremely few cases coming with a successful result. This is the case, for instance, with Article 36 of the Residence Act which provides that reunification may take place ‘if necessary in order to avoid particular hardship’ but also with the Spanish legislation that provides that the minimum resources for family reunification may be inferior ‘in exceptional circumstances’.

We are of the opinion that the proposed reunification model is likely to give solution to the problems that a strictly ‘formal system’ entails and is definitely more compatible with Article 8 of the ECHR and the rather *de facto* approach adopted by the Strasbourg Court. We cannot disregard the fact that the application of the proposed system could in practice present certain problems of legal uncertainty and equal treatment similar to the ones discussed below in the

framework of the application of the individual assessment system to the conditions for family reunion. In that respect, we adopt the same argumentation that will be expressed below adding that a possible incorrect implementation of the law by the public administration should not constitute an obstacle for the legislature to adopt laws that wave inequalities.

Conditions for family reunification

As already mentioned above, the application of the individual assessment is based on the principle that the conditions for family reunion should not constitute a threshold under which all applications should be rejected but Member States should take into account other factors before deciding on the outcome of each application. As already noticed in part III of the thesis, this already constitutes an obligation for Member States pursuant to Article 17 of the Family Reunification Directive. We consider this approach the most appropriate and we believe that Member States that have not transposed the said provision should do so, whereas Member States that have transposed the above mentioned provision of the Family Reunification Directive but do not implement it in practice should change their administrative practices in order for the conditions for family reunion to be examined not in an impersonal way but taking into consideration other crucial factors.

We are of the opinion that the individual assessment should be applied in the following way. To begin with, the factors that Member States should take into account are primarily those referred to in Article 17 of the Family Reunification Directive, namely ‘the nature and solidity of the person’s family relationships’, ‘the duration of his residence in the Member State’ and ‘the existence of family, cultural and social ties with his/her country of origin’. Nevertheless, we believe that Member States should take into account other important factors, even if they are not mentioned in Article 17. An example of these factors may be found in the Commission’s guidance for the application of the Family Reunification Directive that has been discussed in Part III. As mentioned above, these factors are ‘(...) the living conditions in the country of origin, the age of the children concerned, the fact that a family member has been born and/or raised in the MS, economic, cultural and social ties in the MS, the dependency of family members, the protection of marriages and/or family relations’. Therefore, public authorities should first and foremost consider making exemptions in case one or more requirements for family reunification are not met, taking into account the above mentioned factors.

Not least, conducting the individual assessment, Member States shall consider what the exact purpose of each requirement is and decide to make an exemption in case the justification ground of the requirement is not relevant in the application under examination. In particular, when the Family Reunification Directive makes clear that a certain requirement is set for the purpose, for instance, of the prevention of forced marriages, national authorities shall consider not applying the relevant requirement in case it is clear that the application does not involve a forced marriage. It should be mentioned that this obligation does not derive directly from Article 17 of the Family Reunification Directive but rather from a literal interpretation of the provisions that contain a justification ground for a particular requirement. It should also be noted that the most relevant requirements for the application of this kind of individual assessment are the minimum age requirement for spouses which has the aim of prevention of forced marriages and the better integration, the integration measures for family members that apparently have the aim of better integration and the application of a prior lawful residence which also has the aim of better integration for the families in the host countries.

Next, carrying out the individual assessment, public authorities shall respect the following three principles. First, we consider that the principles established in *Chakroun* (cited above) should respectively become applicable to the individual assessment process. In particular, public authorities should conduct the individual assessment in light of the objective of the Directive which is to promote family reunification and they should not put obstacles that would make reunification impossible. As we have seen in *Dogan* case (cited above), for instance, requiring an illiterate person to comply with integration measures would amount to a denial of family reunification which undermines the objective of the Directive. The same is true as far as family members with disabilities or with particularly low educational level. Second, public authorities should take due account of the best interest of the child when examining an application for family reunification. This obligation derives directly from Article 5 (5) of the Family Reunification Directive but also by international human rights law and more importantly by the CRC. This being said, public authorities shall consider thoroughly what the best interest of the child is when the case they deal with concerns minor children. In that respect, it suffices to mention that in the majority of the cases the best interest of the minor child is to be able to maintain a regular and close contact with both of his/her parents. Third, all decisions shall be justified and proportional.

It should be stressed that throughout the entire application of the individual assessment, Member States enjoy wide discretion and they are limited merely by the standards of protection offered by the ECHR, the ECFR and the CRC. It becomes evident that we face once more the same problematic which concerns the standard of protection of Article 8 ECHR in reunification cases and the possibilities of a more extended protection based on the ECFR. In that respect, we adopt the same view as under Conclusion No. 1.

Generally speaking, the individual assessment is based on the reasonable assumption that every application for family reunification has a different background and cannot therefore be dealt with by public authorities in an identical way. We believe that the adoption of this approach will result in more human rights oriented decisions on family reunification and is capable of guaranteeing that the ‘free choice’ system is not ‘misused’ by host states in order to control migration flows. Not least, the application of this system offers a flexibility which is necessary in uncertain economic situations such as the present ones, especially as regards the ‘sufficient resources’ that are being required before reunification may take place. It should be noted that the importance of the application of the individual assessment has been underlined by the CJEU as well. In particular, in *Chakroun* (cited above) the CJEU indicated that Member States cannot set a minimum required income which would apply in all cases of family reunification but must conduct an individual examination before each application is refused. The same approach has been adopted by the CJEU in joined cases *O. and S.* (cited above).

Regardless of all the above, it cannot be overlooked that the application of the individual assessment system may raise concerns of equality and legal uncertainty as there is the fear that similar situations may be treated differently and that third-country nationals may feel uncertain about the exact conditions of the law and the way that they can exercise their right to family reunification. It may also entail extra work, bureaucracy and probably longer waiting periods. Nevertheless, it should be noted that as long as the individual assessment is applied for an exception in favour of the third-country national to be made, these concerns should have a limited impact on the application of the above described system. In any event it is a challenge for Member States to make efficient, coherent, justified and fair decisions when dealing with the applications for family reunion.

B) Procedural proposals

In-country applications for family reunion

We consider as one of the weakest points of the Directive the fact that it solely deals with family reunification in the ‘traditional sense’ of the term, which implies that the family member is in the country of origin and applies for a visa to eventually reunify with the sponsor. Indeed, the Family Reunification Directive seems to overlook the existing reality that the family members are often already present in the territory of a Member State, leaving the issue of the in-country applications ‘open’ and to the discretion of the Member States. This has had as a result that the legislations of the EU Member States differ notably in that respect. Indeed, in Spain in-country applications are only accepted for the regular migrant’s child, whether born in Spain or not, in Greece this is merely possible in case family members reside regularly, whereas in Germany family members are allowed to apply for family reunification in the German territory only in case it is unreasonable to require them to return to the country of origin to follow the regular procedure.

As far as the issue of in-country application for family reunification is concerned, we consider it necessary to make a distinction between family members who reside regularly in the host Member State and those who reside irregularly. In case family members reside regularly in a Member State, the situation does not appear to be particularly problematic given that already in several Member States there is a possibility for the family member to change residence permit and be covered by that of the sponsor if s/he so desires. The same is true as regards the children who are born in the Member States who are normally covered by the sponsor’s residence permit. These findings have been confirmed to a certain degree by the present study but also by the Commission’s implementation report on the Family Reunification Directive. We suggest that states that do provide the possibility of in-country applications for family members who already reside regularly in their territories should consider modifying their legislation, as it appears irrational to require a regular immigrant to return to the country of origin in order to follow the regular reunification procedure.

On the contrary, in case the family members are irregularly present in the territory of the host Member State the situation is more complex. These family members have normally entered the host country irregularly or entered regularly with a tourist visa and stayed irregularly after the visa’s expiry. In any event, it is common knowledge that they are not willing to return to

the country of origin in order to follow the reunification procedure which is proposed by the Family Reunification Directive and they are not likely to do so for several reasons. Most importantly, for fear of not being readmitted once they leave the territory of the host country. Indeed, family members would not separate from their families and risk being involved in a timely and costly procedure with uncertain results. They would rather decide to stay in an irregular situation in the host Member State hoping to benefit from a regularisation programme in case the host country offers such possibility. The situation becomes even more complex, if we consider that often these family members cannot be expelled for human rights reasons pursuant to what has been discussed in Part II regarding expulsion cases under Article 8 of the ECHR.

A regularisation programme, which would take into account the immigrant’s family ties in the host country, could give a solution to this bizarre situation. Indeed, the ‘arraigo social’ in Spain, for instance, has offered to a certain degree the possibility for what is called *de facto* family reunification. Nevertheless, to what extent a regularisation programme would succeed in giving a solution to the above described problem would depend on the rest of the requirements which will be imposed on the family members that will wish to regularise their stay. The ‘arraigo social’ can be criticised for being attached to a work contract which will often be difficult for family members to achieve especially in countries with high unemployment rate. Similarly, the Greek regularisation programmes can be criticised for requiring a particularly long period of stay in the Greek territory before regularisation.

A solution to this problem could be achieved by a modification of the Family Reunification Directive that would encourage Member States to accept applications when the family members are already present in the territory of the Member State. As mentioned in the relevant section of this study, the second subparagraph of Article 5 (3) of the Family Reunification Directive provides that by way of derogation a Member State may in appropriate circumstances accept application when the family member is present in its territory. The provision is in the right direction, although its wording appears rather vague, as it does not specify what those ‘appropriate circumstances’ may be. Indeed, there is a wide margin of appreciation left to Member States firstly, to apply or not the derogation and secondly, to the way they would actually apply it. The Family Reunification Directive needs to be more precise in that respect adopting a ‘shall’ provision and specifying as to the exact conditions under which an in-country application may be submitted. Family members who

cannot reasonably be expected to return to the country of origin should be given the possibility to lodge the application in the host country, especially in cases that their deportation cannot be implemented for human rights reasons. We consider this to be a realistic approach which is expected to give solution to an undesirable, both for the immigrants and for the states, situation.

Who is to be competent for the examination of the applications?

The second suggestion that we believe is likely to be beneficial for the family reunification procedure concerns the competent authorities for the examination of the applications in case the family member resides in the country of origin. The comparative study of the three Member States has revealed two different approaches as to how the procedure is initiated. On one side, in Germany the entire procedure is initiated by the family member who applies for reunification to the relevant consular authority in the country of origin submitting all necessary documents. On the other side, in Spain and Greece, the procedure is initiated by the sponsor who is required to apply to the competent authority in the host country providing all evidence that s/he fulfils the requirements, whereas the consular authorities in the country of origin are expecting the positive answer of this authority and primarily deal with issues that concern the entrance of the family member to the host country.

The second of the two detected approaches appears more correct from a legal point of view, as legal systems normally recognise family reunification as the sponsor’s right and therefore it should be him/her the one to initiate the procedure which will make possible the exercise of this right. Nevertheless, the ‘German model’ is more efficient and, most importantly, less time consuming. We are of the opinion that the competence for family reunification should become an exclusive competence of the consular authorities, which should deal with the entire procedure from the beginning until the issue of the visa. Depending on the requirements imposed in each country, the consular authorities may merely communicate with the relevant public authorities in the country of destination of the family members in order to be informed for issues concerning the validity and the nature of the residence permit of the sponsor.

This approach is expected to shorten the period of the procedure for up to a couple of months as the final outcome of the application will be dependent upon one decision, which will be that of the consular authority in the country of origin. We consider this solution to be the appropriate one for the acceleration of family reunification procedure and we believe that its

application will help in the solution of a problematic issue in reunification procedures which is the extensive period that they often last. In that respect, it is recalled that the Family Reunification Directive does not particularly call for a fast process as it imposes a nine-month period which may be extended even further. The study of the domestic legislation of the Member States has also revealed that, even though the nine-month period is normally respected, family reunifications procedures may be lengthy.

Conclusion No. 5: Margin of appreciation in the field of family life

In the introduction of the thesis we clarified that we would approach the right to family life as a right that is broader than mere reunification of third-country nationals. Therefore, we examined issues related to family members of EU citizens, third-country nationals who are highly qualified workers or researchers, seekers and beneficiaries of international protection but also expulsion and regularisation cases of persons of foreign origins who have family ties in the host country. The fact that the existence of family plays a role in these cases is not under dispute. Nonetheless, there are two questions that have been raised throughout the research that are worth being answered. The first one concerns the importance of the foreigner’s family in each of the above mentioned cases and, more precisely, how important the existence of family ties is for reunification, regularisation and expulsion. The second question concerns the ‘familiar’ in immigration law issues of the margin of appreciation and principle of subsidiary and the role they play in cases that relate to family life.

As regards the first question, we consider it necessary to distinguish between reunification, on one hand, and regularisation and expulsion, on the other hand. This is so as in the case of reunification, family ties constitute an element without which the exercise of the right is impossible. On the contrary, in expulsions or regularisation cases, family ties play a secondary role in the entire procedure and are considered, if so, together with other elements or in case other requirements are also fulfilled. In particular, in expulsion cases family ties may prevent the realisation of the expulsion but the mere fact that the migrant has family ties in the host country is not sufficient for the suspension of the deportation. The ties should be of certain intensity and nature in order to eventually play a crucial role in the procedure, whereas other factors are taken into account. Family ties become even less significant in the regularisation procedures. As seen in the countries included in the present study, family ties may help a migrant to regularise his/her stay but the outcome of an application for

regularisation will in most of the cases depend on a combination of factors, with the existence of family members often playing only a marginal role.

As far as the margin of appreciation and its applicability to the field of family life is concerned, the following comments should be made. As a starting point it should be noted that, as seen above, Article 8 of the ECHR constitutes a ‘qualified’ and not an ‘absolute’ right and that the Strasbourg Court has repeatedly mentioned that the Contracting States enjoy a margin of appreciation in Article 8 cases. In EU law, where the competence in immigration and refugee issues is shared between the EU and the Member States, we have also detected the same issue, although in this case we would rather speak about the principle of subsidiarity. Having said that, the question that needs to be answered is how wide this margin of appreciation left to the states is in each of the issues examined in the present dissertation and what is the reason why in some cases the margin of appreciation left to states is wider than in others.

Starting up with Article 8 of the ECHR, it should be noted that the Strasbourg Court leaves a margin of appreciation to the states both in reunification and in expulsion cases. As mentioned in Part II of this thesis, the ECtHR in principle adopts the view that this margin of appreciation is the same both as regards positive and negative obligations deriving from Article 8. Nonetheless, this view remains theory as in practice the ECtHR recognises that the margin of appreciation is wider in admission than in expulsion cases. This is so as in admission cases the margin of appreciation comes into play already at the stage of determining whether there is an obligation for a state to ‘respect’ family life, whereas in deportation cases the margin of appreciation is taken into account when determining whether the interference has been justified or not. Not least, in admission cases Contracting States may invoke any interest for restricting the right to family life, whereas in deportation cases they may restrict the same right provided that they pursue one of the legitimate aims of Article 8 (2).

Having said that, the conclusion that we may draw is that, in case of European Conventional law, the margin of appreciation is not related to the importance that family ties have in the immigration procedure but rather on whether this immigration procedure implies an admission of an immigrant or not. Therefore, the margin of appreciation is a lot wider in family reunification cases, which involve an admission of a migrant than in expulsion cases. The fact that first admission is conceived as a ‘delicate’ issue is further confirmed by the fact

that in expulsion cases the deportation often follows serious breaches of law, even criminal ones, whereas in admission cases the immigrant is not involved in criminality but merely wishes to enter the host state in order to reunify with his/her family there. Regardless of this notable difference between the two types of cases, the margin of appreciation left to states is a lot wider in reunification than in expulsion cases.

As regards the principle of subsidiarity which is a rather similar concept of EU law that aims at determining the level of intervention of EU law when the competence is shared between the Union and its Member States, the following observations should be made. To start with, it is true that as mentioned by the CJEU in *Parliament v. Council* (cited above), EU law obliges Member States to admit certain family members without leaving them any margin of appreciation. This applies with regards to the ‘core’ provisions of all Directives that confer family reunification rights. Nevertheless, the ‘intervention’ of EU law appears to be of higher level as far as the admission of family members of EU citizens is concerned. The EU legislature and the CJEU have established a reunification system that leaves Member States limited margin to decide on which family members may be admitted to their territories, as well as on the conditions of admission. The same consideration applies in, general terms, to the case of EU Blue Card holders, refugees and, now, to researchers.

On the contrary, EU law does not intervene in the same way in relation to admission of family members of third-country nationals. The examination of the Family Reunification Directive, as well as the domestic legislations, has demonstrated that Member States are left a considerably wider margin to decide whether they would admit family members, other than the spouse and the minor children, and under what conditions. As far as family members of nationals, these are left to the absolute discretion of domestic legislatures, although as we have seen in this study, the EU legislature has indirectly intervened provoking issues of ‘reverse discrimination’. Lastly, the present study has made evident that the intervention of EU law with regards to expulsions is a lot lower, whereas regularisation constitutes an area that the EU has not legislated at all. Therefore, we can conclude that at EU level the margin of appreciation left to Member States depends on the nationality and the status of the sponsor, as well as on certain economic interests.

Conclusion No. 6: The future of family reunification

A) Pre-entry training?

Approximately one-third (Annex I, Table 1) of the new residence permits issued in 2014 at EU level concerned residence permits for family reunification. This is a consequence of the financial crisis, which resulted in significantly less permits issued for employment purposes especially in the Member States which have been most affected by the financial crisis (Annex II, Table 3). Therefore, the percentage of residence permits issued for family members has soared. The residence permits for family reunion has also increased in absolute numbers (Annex II, Table 2) precisely due to the fact that the entrance for employment purposes has toughened and therefore the immigrants’ interest to enter Europe as family members has grown, given that in some cases this might be the only option for regular migration.

European States are therefore faced with a rather new phenomenon. They admit a great number of new migrants without being able to choose their actual profile. Indeed, family members are chosen by the regular migrant who already resides in one country and are granted the right on the basis of the family relationship they have with the sponsor and not on their education, qualification or labour market needs of the country at the certain time. This situation is likely to trigger a discussion regarding the possibility of imposing or offering some training courses to family members before entering the EU. Indeed, one may think that since the family members become the new workers in the EU and given that as mentioned above the states are not able to control the exact profile that they have, a pre-entry training would help in the competitiveness and labour integration in the host countries.

Nonetheless, from a human rights perspective, this approach is particularly problematic. Indeed, the Family Reunification Directive has already been criticised for leaving Member States the possibility to impose pre-entry integration measures which may in some cases make family reunification particularly difficult to exercise. The same criticism has been made with respect to other requirements for family reunification. This being said, imposing an additional requirement for the admission of the family members is expected to toughen even further the exercise of the right and leave more discretion to Member States to control migration flows through the requirements for family reunification. Not least, labour integration is a criterion which has nothing to do with family life and therefore the critique expressed above in relation

to the application of integration measures applies accordingly to the possibility of imposing pre-entry training conditions.

Regardless of the above analysed concern, it should definitely be underlined that Article 14 of the Family Reunification Directive, which provides that Member States shall give the right to employment to the family members, is one of the most positive provisions of the entire Directive. The observations made above should by no means encourage the EU legislature to amend this provision. Indeed, the said provision and its subsequent implementation in the EU Member States have helped in the avoidance of several problems that family migration policies have caused in other parts of the world, where family members are deprived the right to work being forced to stay at home in some cases for several years. Such family migration policies often influence psychologically the family member and provoke inequalities between the partners or spouses. It should be emphasised that the issue at hand has a gender perspective as well, as the spouses who enter as family members are in the majority of the cases women.

B) Family life and harmonisation of the legislations in the EU

After having examined the domestic legislation in three EU Member States and briefly looked into the legislation in the rest of the Member States we are able to reach some conclusions regarding the harmonisation in the domestic legislation of the EU Member States as regards family life. The issue of harmonisation raises three main questions. Have the Directives manage to harmonise the legislation for family reunification in the EU Member States? Is harmonisation in this field possible, and in case of a positive answer, is it desirable? Furthermore, are we heading towards more or less harmonisation in the field of family reunification?

The answer to the first question is rather negative, at least as regards family reunification for third-country nationals. Taking as an example the definition of family that has been adopted in the three Member States of the present study, one may easily understand that the legislations differ considerably. In Spain, the concept of family is rather broad and includes adult dependent children, as well as the dependent parents of the sponsor. In Greece, the concept of family merely contains the spouse and the minor children. In Germany, on one side, minor children as old as 16 years need to pass integration conditions in order to qualify as family members whereas, on the other side, Article 36 of the Residence Act allows reunification with

family members who are not part of the ‘core family’ whatsoever. The low level of harmonisation has also been detected in other issues that have been examined in the comparative study of the present dissertation, such as the requirements for family reunification, the family members’ rights and the access to an independent residence.

The situation is different with regards to family members of EU citizens. Although the nature of the Citizenship Directive is the same as the one applicable to third-country nationals, the fact that it sets quite high minimum standards of protection has definitely resulted in a higher level of harmonisation among Member States. This is evident in the three Member States of the study. All three Member States dispose of a very similar, at least as regards its crucial issues, system regarding family members of EU citizens in their territory. The concept of family, the requirements for family reunification, as well as procedural issues display high similarities in the corresponding legislations. This finding is confirmed if we take a look at the EU free movement regimes in other EU Member States.

Therefore, the low level of harmonisation that the Family Reunification Directive has brought to the legislations of the EU Member States is not related to the fact that the Directive is a minimum harmonisation one. We believe that letting Member States free to provide for more extensive protection in case they so desire is the correct approach for migration related issues. Directives with full harmonisation purposes would prevent Member States from providing more favourable regimes as regards family migration. The reason why the Family Reunification Directive did not succeed in harmonising the legislations in the EU at least to a certain level derives from the content of the Directive and, in particular, the low standards of protection that it calls for. Indeed, as regards some of the issues the standard of protection is so low that the majority of the Member States provide for a more extensive protection creating, in all probability, 28 different regimes for family reunification in the EU. The harmonisation would have been far better achieved by a Directive which would have set considerably higher standards of protection for the migrant who wishes to exercise the right to reunification. The example of the Citizenship Directive used above confirms this finding.

The above made observation answers to a large extent to the second question which has been introduced in this paragraph, that is to say that full harmonisation is neither possible nor necessarily desirable as the EU law stands rights now. On the contrary, a satisfactory level of harmonisation which would guarantee that migrants in all Member States enjoy a right to

family reunification which is effective and in line with the human rights involved is both desirable and possible through a Family Reunification Directive of minimum harmonisation of higher standards than the one applicable right now.

As regards the future of harmonisation in the legislations of the EU Member States, we believe that the above suggested approach is not likely to be adopted by the EU in the near future. The fact that, as will be analysed right below, several Member States have recently toughened their legislation on family migration raises concerns that in a possible future recast of the Directive, Member States will push for lower standards instead of higher ones, situation which may result in even less harmonisation in the field of family migration. This being said, it is likely that in the following years Member States are allowed to impose more pre-entry requirements which will cause even greater differences among the legislations of the Member States. On one side, some Member States will keep the existing standards for family reunification whereas, on the other side, Member States that will decide to adopt restrictive migration policies will rely on the new requirements set out in the Directive in order to toughen their legislation of family migration and further control immigration flows.

C) Restrictive turn in the family migration policies and case law?

In order to be able to ascertain whether the legislation, as well as the case law at EU and national level are likely to make a restrictive turn in the future, we should first take a look at the reforms in the family migration laws that have occurred in the last years and connect these findings to the current political and economic situation in Europe. The most significant reforms in the three Member States that have been included in this dissertation, as well as at EU level may be summarised in the following way.

In Germany, the family reunification procedure becomes more restrictive in 2007. A minimum age requirement and integration measures for spouses are introduced that year and the income requirement is extended to German nationals who wish to reunify with their family members. Furthermore, in 2011 the requirement for two years of residence in order for the family member to accede to an autonomous right is extended to three years.

In Greece, in 2005 the legislature transposes the Family Reunification Directive for the first time. The legislation toughens notably in comparison to Law 2910/2001 which was until then in force. A minimum age of 18 years was introduced for the spouse who sought entrance. The

requirement for sufficient resources was toughened up whereas the access to employment was restricted for the first 12 months of residence in the Greek territory in line with the derogation offered by the Family Reunification Directive. Furthermore, in 2014 the legislature introduced further requirements such as that the sponsor should hold a residence permit of two-year validity, whereas the same residence permit was required to give access to a permanent residence permit. Not least, the same year the Greek legislature introduces integration conditions for family members who were found to be in an irregular situation in Greece before the submission of the application for family reunification.

In Spain, the legislation on family reunification for third-country nationals has not been recently further toughened. The most significant changes that have taken place in the Spanish Immigration Law concern EU citizens who reside in Spain and the immigrants’ access to healthcare coverage. In particular, as it has been noted above, Spain and Estonia were the only EU Member States which did not require EU citizens to comply with the requirements referred to in Article 7 of the Citizenship Directive and the right of residence for more than three months was given merely on the basis of the EU citizenship. This situation has recently changed in Spain and EU citizens are now required to prove that they have sufficient resources and sickness insurance for themselves and their family members in order to enjoy the right of residence of more than three months in Spain. As regards the right to health care, the law has been recently modified and undocumented or unemployed immigrants do no longer have access to free medical treatment.

At EU level the Family Reunification Directive has not been reformed since it was first adopted in 2003. Nonetheless, in 2011 the European Commission launched a public consultation on family reunification in order to decide on possible actions regarding the Directive. The consultation was a result of the Commission’s concerns that the Directive set particularly low standards and a new proposal might be needed. Nevertheless, the Commission instead of initiating the procedure for a new Directive on family reunification, it decided to adopt some guidance on the application of the existing Family Reunification Directive. As mentioned in the relevant Chapter, the guidance interpret the Directive in a rather favourable towards the third-country national way. This being said, the legislation at EU level does not, at first sight, seem to follow the restrictive turn encountered in the national legislations. Nonetheless, we believe that the Commission decided to publish the guidance instead of making a new proposal for the Directive for fear that the Council would push for

even lower standards than the ones offered by the current Family Reunification Directive. In this sense, we believe that the issue of family migration remains a very controversial one at EU law level.

Next, given that the judgments adopted by CJEU on the Family Reunification Directive vary considerably, we are not at the moment in a position to reach a safe conclusion in relation to whether there is a real restrictive turn in the case law. Indeed, the rather controversial judgment in *Parliament v. Council* (cited above), followed a particularly favourable towards the immigrant judgment in *Chakroun* (cited above), the reluctant judgments in *Noorzia* and *Dogan* (both cited above) and, recently, the rather favourable, albeit moderate, judgment in *K. and A.* (cited above). The same is true with respect to the CJEU’s judgments on free movement of EU citizens and their family members, with the protection of the social security systems of the host Member State being converted to a priority for the Luxembourg Court, as it was recently made clear in *Dano* (cited above).

Taking all the above into consideration, we believe that in all probability several Member States will continue to adopt more restrictive family migration rules either by introducing pre-entry requirements that are already permitted under the current Directive or by forcing even more restrictive policies at EU level. Their decisions are influenced by the financial crisis and the high rates of unemployment, as well as the rise of the far right parties in Europe. More restrictive policies are expected to be enforced in the field of refugee law following the huge humanitarian crisis in Syria and the fact that the debate is soon expected to shift from issues of distribution and reception to issues of family reunification given that once installed, several of the refugees will apply for family reunification. As regards the CJEU, we believe that while in the near future it will try to avoid unnecessary tensions and confrontation with the Member States on family migration issues, it will inevitably at some point have to take a stand on whether it will approach the issue from a fundamental rights perspective or will bring to a halt the significant changes that the Lisbon Treaty brought to the field of fundamental rights.

PART V: VERSIÓN EN CASTELLANO

INTRODUCCIÓN

Esta tesis trata sobre el derecho a la vida familiar de los inmigrantes, solicitantes de asilo y refugiados. El derecho a la vida familiar es, por diversas razones, un derecho particularmente importante en el ámbito del derecho de la inmigración, asilo y derecho de refugiados. Por un lado, dentro del Convenio Europeo de Derechos Humanos (en adelante, "el CEDH") constituye el derecho que atrae el mayor número de casos de inmigración. Asimismo, en muchos países europeos, los permisos de residencia por motivos familiares han ganado recientemente importancia debido principalmente a la disminución de la emisión de permisos por razones de empleo. Por otro lado, el derecho a la vida familiar es particularmente importante para los extranjeros. De hecho, no es objeto de controversia que la familia es importante para la integración de los inmigrantes y refugiados en el Estado de acogida y tiene implicaciones más amplias que afectan sobre todo la forma en que el extranjero se comporta en el país de acogida. Los inmigrantes y los refugiados a menudo se sienten solos y desamparados sin sus familias en el país de acogida, mientras que los solicitantes de asilo y refugiados en particular, pueden, además, sentirse preocupados por la integridad física de los miembros de la familia que han dejado atrás en situaciones difíciles.

A pesar de que consideramos el derecho a la vida familiar importante en cualquier caso para el extranjero, la necesidad de un nuevo estudio en este campo se deriva de varias circunstancias que han cambiado recientemente, tanto a nivel internacional como a nivel nacional. Algunas de ellas provocaron nuestra investigación, mientras que otras surgieron en el transcurso de la misma. En primer lugar, la adopción del Tratado de Lisboa en 2009 y los cambios que trajo al área de los derechos fundamentales crea las circunstancias para una futura investigación en el campo del derecho a la vida familiar. Como el derecho a la vida familiar constituye un derecho fundamental, la necesidad de investigar sobre los posibles impactos de la adopción del Tratado de Lisboa en esta área se convirtió en imperativa. En segundo lugar, la crisis económica a la que se enfrenta Europa en combinación con el aumento de la xenofobia y los partidos "anti-migrantes" en la Unión Europea (en adelante, "la UE") suponen presión para que la UE y los parlamentos nacionales adopten legislaciones más restrictivas en el ámbito de la migración por causas familiares. En resumen, el derecho a la vida familiar intenta encontrar un equilibrio entre la protección de los derechos humanos y la

preocupación de los países de acogida por controlar cada vez más la inmigración. A todo lo anterior hay que añadir que Europa se enfrenta actualmente a un reto importante debido a la enorme crisis humanitaria en Siria que ha obligado a miles de personas a buscar asilo, entre otros lugares, en Europa.

En este entorno ambiguo, estamos convencidos de que es necesaria una investigación sobre el derecho a la vida familiar de los inmigrantes y refugiados con el fin de averiguar en qué medida las directivas y legislaciones nacionales sobre la migración familiar pueden permanecer sin cambios después de la adopción del Tratado de Lisboa y cuál debería ser la "respuesta" más adecuada a nivel nacional e internacional a los desafíos y evolución antes mencionadas. ¿Es el enfoque actual sobre la migración relacionada con el derecho a la vida familiar compatible con los derechos fundamentales "post-Lisboa"? En caso de una respuesta negativa, ¿qué tipo de cambios debe implicar un enfoque diferente? Esta tesis doctoral tiene también como objetivo examinar el efecto y la eficacia de estas directivas a nivel nacional, aproximadamente 10 años después de la fecha límite para su transposición y formular sugerencias para su mejora. La perspectiva comparativa que se deriva del examen de la legislación de los tres países de la UE estudiados, España, Grecia y Alemania, pondrá de relieve las deficiencias y los puntos fuertes tanto de las legislaciones nacionales, como de la legislación comunitaria. Por último, esta tesis estudiará las numerosas sentencias del Tribunal Europeo de Derechos Humanos (en adelante, "el TEDH" o "el Tribunal de Estrasburgo"), del Tribunal de Justicia de la Unión Europea (en adelante, "el TJEU" o "el Tribunal de Luxemburgo") y de los tribunales nacionales que han interpretado diversos conceptos relacionados con la migración familiar.

En este estudio, el concepto de derecho a la vida familiar no se limita, ni se considera idéntico, al derecho a reagrupación familiar. Por el contrario, se argumenta que el derecho a la vida familiar es en principio un concepto más amplio que el derecho a la reagrupación familiar. La tesis seguirá tres líneas principales de investigación que constituyen tres aspectos diferentes del mismo derecho a la vida familiar. En primer lugar, estudiaremos casos de entrada de familiares que se realiza con el procedimiento de reagrupación familiar. En segundo lugar, consideraremos las posibilidades que los inmigrantes tienen para regularizar su estancia dependiendo de sus relaciones familiares. En tercer lugar, examinaremos los casos de expulsión de inmigrantes que tienen vínculos familiares en el país de acogida. En cuanto al primero de los tres puntos, la investigación se centrará en la legislación internacional,

comunitaria y nacional. El segundo punto constituye competencia exclusiva de los Estados miembros y, por tanto, la investigación se centrará en la legislación nacional de los tres Estados miembros de la UE incluidos en este estudio. Por último, por lo que se refiere al tercer punto, la investigación se centrará en particular en el derecho internacional de los derechos humanos, pero también en la legislación comunitaria y nacional.

Las cuestiones relativas a la inmigración, asilo y refugiados constituyen una competencia compartida entre la UE y sus Estados miembros, y en todas ellas el papel de los derechos humanos es de especial importancia. Estas dos características han propiciado un estudio de múltiples niveles que se iniciará con el análisis del derecho a la vida familiar como un derecho humano y fundamental protegido a nivel internacional y comunitario y continuará con el examen de los instrumentos reales que dan efecto a este derecho. Estos instrumentos son las directivas de la UE y las legislaciones nacionales de España, Grecia y Alemania. Especialmente por lo que se refiere al derecho de los nacionales de terceros países a la reagrupación familiar, debido a la complejidad y la pluralidad detectadas al analizar las legislaciones nacionales, se ha considerado beneficioso enriquecer el estudio con información sobre la legislación de los demás Estados miembros de la UE.

En cuanto a la estructura de la tesis, esta se dividirá en tres partes principales que contienen varios capítulos. La primera parte examina brevemente las definiciones de los conceptos jurídicos y sociológicos más importantes en el ámbito de la vida familiar. La segunda parte se centra en el derecho a la vida familiar en el derecho internacional de derechos humanos. El primer capítulo de la segunda parte trata sobre el derecho a la vida familiar en las convenciones internacionales de derechos humanos, mientras que el segundo capítulo se centra en el artículo 8 del CEDH y la jurisprudencia correspondiente del TEDH. En la tercera y más extensa parte de la tesis se analiza el derecho a la vida familiar dentro del ámbito del derecho comunitario y la legislación nacional de los tres Estados miembros. En esta parte se examinan las directivas pertinentes de la UE en el ámbito de la migración y, en particular las relativas al derecho a la vida familiar. Esta parte también analiza tanto la transposición de estas directivas en la legislación doméstica, así como las partes de la legislación nacional que constituyen competencia exclusiva de los Estados miembros.

En cuanto a la metodología, el principal método de recogida de materiales ha sido la investigación basada en fuentes documentales de archivo así como datos electrónicos y

revistas científicas consultadas online. Al principio, centré la investigación por ordenamientos jurídicos y una vez concluida esta fase, organicé la información temáticamente con el fin de facilitar la perspectiva comparativa adoptada en este estudio. Además, durante todo el período de investigación, he participado en los dos módulos jurídicos del Máster en Migraciones Contemporáneas (Universidad Autónoma de Barcelona y Universidad de Barcelona) y en la escuela de verano sobre migración organizada por el Migration Policy Center (Instituto Universitario Europeo de Florencia). La investigación de la legislación nacional de Grecia se ha beneficiado de una visita de estudio a Grecia (Universidad Aristotélica de Tesalónica). A lo largo de todo el período de investigación, he trabajado en estrecha colaboración con el Instituto de Derecho Público (IDP) de la Universidad de Barcelona. Quisiera expresar mi sincero agradecimiento a los profesores e investigadores de las instituciones anteriormente mencionadas por su asesoramiento y por su ayuda.

CONCLUSIONES

Conclusión No. 1: ¿Qué novedades aporta la adopción del Tratado de Lisboa al derecho a la vida familiar?

En la introducción de la presente tesis, nos hemos preguntado si la adopción del Tratado de Lisboa puede implicar algún cambio en el campo del derecho a la vida familiar de los extranjeros. Como se ha mencionado a lo largo de la tesis, la mayoría de las directivas que han sido examinadas fueron adoptadas a principios de la década de 2000. Asimismo, que el Tratado de Lisboa se adoptó en 2009, introduciendo los cambios significativos en el ámbito de los derechos fundamentales que se han comentado en el capítulo correspondiente de la presente tesis. Dicho esto, la pregunta que debe responderse es si las directivas pueden permanecer sin cambios tras el hecho de que la Carta de los Derechos Fundamentales de la Unión Europea (en adelante, "la Carta") ganara el mismo valor jurídico que los Tratados y si la mejora de la protección de los derechos fundamentales en la UE requiere un enfoque diferente en el ámbito del derecho a la vida familiar.

Somos de la opinión de que la adopción del Tratado de Lisboa afecta directamente el derecho a la vida familiar y que existe una necesidad imperativa de refundición de las directivas, en especial la relativa a la reagrupación familiar de los nacionales de terceros países, y de una interpretación judicial de las mismas basada en el artículo 7 de la Carta, que no tiene por qué estar vinculada con el artículo 8 del CEDH. Se hace notar que el legislador comunitario aún no ha tomado medidas satisfactorias con el fin de aclarar que las directivas son meros instrumentos que deben leerse a la luz de la Carta. También hay que destacar que el TJEU no se refiere al artículo 7 de la Carta cuando se trata de un caso relacionado con la vida familiar, sino que interpreta la disposición de la directiva que está sujeto a la cuestión prejudicial, basando su argumentación en el objetivo de la directiva o en su jurisprudencia anterior sobre cuestiones iguales o similares. Esta conclusión se aplica tanto a los casos de reagrupación familiar de los nacionales de terceros países, como de los ciudadanos de la UE. En cuanto a este último, el TJEU en algunos casos se ha referido a los artículos 21 o 45 del Tratado de Funcionamiento de la Unión Europea pero no a la Carta.

En nuestra opinión, el hecho de que la UE no haya tomado hasta el momento los pasos necesarios en esa dirección está relacionado con la situación política actual en Europa y con el

hecho de que recientemente varios Estados miembros han comenzado a adoptar una visión más nacional en el tema de la migración y asilo. A este respecto, cabe mencionar que existen varios Estados miembros de la UE que han endurecido su legislación incluso en los años siguientes a la adopción del Tratado de Lisboa. Este ha sido el caso de dos de los tres Estados miembros que se examinan en esta tesis, Grecia y Alemania, tal como se analiza en la conclusión No. 6. Esta situación en combinación con el hecho de que el derecho a la vida familiar no es un derecho constitucionalmente protegido en todos los Estados miembros de la UE, así como el hecho de que varios tribunales constitucionales hayan cuestionado la competencia del TJUE de interpretar los derechos fundamentales, son con toda probabilidad, las razones por las cuales el legislador comunitario y el TJUE no adopten un enfoque diferente hacia el tema. Creemos que, independientemente de la variedad de retos a los que la UE y sus Estados miembros se enfrentan actualmente, el legislador comunitario debe dar un paso cauteloso hacia adelante y volver a considerar, como mínimo la directiva sobre reagrupación familiar, mientras que el TJUE debe empezar a resolver los casos relacionados con la vida familiar a través de una interpretación del artículo 7 de la Carta, que debería garantizar una protección más amplia que el artículo 8 del CEDH.

Nuestro punto de vista encuentra su base jurídica en el artículo 52 (3) de la Carta. Como se ha mencionado anteriormente, esta disposición establece que, en la medida en que la Carta contenga derechos que correspondan a los derechos contenidos en el CEDH, el significado y el alcance de estos derechos deberán ser los mismos que los establecidos por este último. También hay que recordar que, de conformidad con la misma disposición de la Carta, el principio antes mencionado no impide que la legislación de la UE pueda proporcionar una protección más amplia, incluso si el derecho en cuestión corresponde a un derecho protegido por el CEDH. El derecho a la vida familiar se utiliza a menudo como el mejor ejemplo de un derecho que está contenido en una forma equivalente a los dos instrumentos de derechos fundamentales. En este punto consideramos que es esencial examinar todos los escenarios posibles que pueden derivarse de esta disposición.

Examinemos primero el primer escenario, según el cual la interpretación del artículo 7 de la Carta debe ser la misma que la dada por el Tribunal de Estrasburgo en casos del artículo 8. En este caso, el nivel de protección en la UE del derecho a la vida familiar sería bajo, especialmente si aceptamos la distinción hecha por el Tribunal de Estrasburgo entre casos de reagrupación familiar y casos de expulsión. Se ha demostrado que en los casos de

reagrupación, la "prueba de equilibrio" entre los intereses del individuo y los intereses del Estado se realiza en la etapa en la que se determina si se ha producido una "interferencia" con el derecho al respeto de la vida familiar. En este marco, los Estados pueden invocar diferentes intereses, aunque estos no estén incluidos en el artículo 8 (2), y un caso normalmente tiene éxito si la reagrupación no puede tener lugar en el país de origen. Por tanto, de acuerdo con el primer escenario, el artículo 7 de la Carta ofrecería protección en su mayoría en casos de refugiados o solicitantes de asilo en los que razones graves impiden la reagrupación en el país de origen, o en casos en que la protección de los derechos humanos en el país de origen del inmigrante es particularmente baja.

Sin embargo, ya hemos expresado la opinión de que la distinción entre las "obligaciones positivas" y "negativas" en virtud del artículo 8 del CEDH es arbitraria y no debería seguirse. El Tribunal de Estrasburgo ha declarado en repetidas ocasiones, aunque sólo a nivel teórico, que establecer una distinción entre las "obligaciones positivas" y "negativas" derivadas del artículo 8 es particularmente difícil y que los principios aplicables deben ser los mismos. Siguiendo este razonamiento, el artículo 8 del CEDH y el correspondiente artículo 7 de la Carta permitirían una mayor protección en casos de reagrupación familiar que se basaría tanto en un enfoque que examina los vínculos del país de origen y de acogida ('connections approach'), así como si la reagrupación es posible en otro país ('elsewhere approach'), tal como se ha propuesto en el correspondiente capítulo de esta tesis. Los intereses de Estado que justifiquen una interferencia con el derecho a la vida familiar también estarían limitados a los que están incluidos en el artículo 8 (2) del CEDH.

A pesar de todo lo anterior, desde nuestro punto de vista, la segunda hipótesis según la cual la UE puede proporcionar una protección más amplia, incluso si el derecho en juego es comparable a un derecho del CEDH, es la más apropiada en el caso del derecho a la vida familiar. El Tribunal de Estrasburgo parece "haber llegado a sus límites" con respecto a los casos de reagrupación familiar aplicando un enfoque que ha sido criticado en varias ocasiones en este estudio por no ser el adecuado. Incluso en el caso de que el TEDH adopte el mismo enfoque en lo que respecta a casos de expulsión y reagrupación, las sentencias muy a menudo contradictorias no garantizan una protección mínima de estándares adecuados. Por ello, en nuestra opinión, un nuevo enfoque más centrado en la protección que la vida familiar "merece" a nivel de la UE es necesario. La jurisprudencia del Tribunal de Estrasburgo puede ser útil sobre todo debido a la larga tradición de este tribunal en el campo de los derechos

humanos. Sin embargo, en esta tesis se sugiere que la UE garantice unos estándares de protección más elevados que los aplicables en virtud del artículo 8 y que no siga la jurisprudencia del Tribunal de Estrasburgo de manera incuestionable. Detallamos las razones de esta recomendación en las siguientes conclusiones.

Conclusión No. 2: La compatibilidad de las directivas con el artículo 8 del CEDH

Consideramos necesario reflexionar sobre la compatibilidad de los instrumentos jurídicos que han sido examinados en esta tesis con el artículo 8 del CEDH. Esto es importante ya que, independientemente de una posible interpretación más amplia de los derechos fundamentales que pueden derivar del artículo 7 de la Carta, como se propone en la conclusión No. 1, los instrumentos jurídicos deben ya en la etapa actual, ser al menos compatibles con el artículo 8 del CEDH. A este respecto, es una obligación más que una posibilidad que se deriva de la disposición pertinente de la Carta. Entre todos los instrumentos jurídicos, la directiva sobre reagrupación familiar es la que plantea preocupaciones con respecto a esta cuestión. A este respecto, cabe hacer notar que aunque el TJUE en el caso *Parlamento c. Consejo* (citado anteriormente) encontró que la directiva sobre reagrupación familiar es compatible con el artículo 8 del CEDH, consideramos que hay ciertas disposiciones de la directiva cuyos niveles de protección parecen ser incluso más bajos que los del artículo 8. Debemos tener en cuenta que la sentencia antes mencionada se adoptó antes del Tratado de Lisboa y en un momento en el que la situación jurídica y el efecto de la Carta no estaban nada claros y la última no se podía considerar de ninguna manera como derecho originario.

A este respecto, la primera crítica se centra principalmente en la definición de familia aprobada por la directiva sobre reagrupación familiar. El primer problema se refiere a las disposiciones que permiten a los Estados miembros rechazar la reagrupación familiar con los hijos de 12 y 15 años de edad. Aunque estas disposiciones ya no pueden ser invocadas por los Estados miembros, creemos que infringen los estándares de protección previstos en el artículo 8 del CEDH. De hecho, debe mencionarse que constituye práctica común del Tribunal de Estrasburgo incluir incondicionalmente la relación entre padres e hijos menores de edad en el concepto de familia.

En particular, por lo que se refiere al artículo 4 (6) de la directiva sobre reagrupación familiar, consideramos que la infracción es directa. Los Estados miembros son libres de decidir que los niños de 15 años de edad no califican como hijos menores de edad a efectos de la reagrupación. El argumento de que la disposición se refiere al margen de apreciación dado por el Tribunal de Estrasburgo a los Estados contratantes no es convincente. A este respecto, cabe señalar que, aunque el margen de apreciación existe en cuanto a los casos del artículo 8, este entra en juego en la determinación de si el caso merece "respeto" de las autoridades de inmigración y si la "interferencia" está justificada, y no en la decisión sobre si la relación constituye "familia" o no. El Tribunal de Estrasburgo ha reconocido siempre que la relación entre padres e hijos menores de edad constituye "vida familiar" sin reconocer ningún margen de apreciación a los Estados a este respecto.

Las mismas consideraciones se aplican con respecto a la excepción prevista en la directiva sobre reagrupación familiar sobre los niños que son mayores de 12 y llegan al país de acogida de forma independiente de sus padres. Esta disposición también restringe el concepto de familia ya que los Estados miembros pueden considerar que los niños menores de edad, que no serán capaces de pasar una prueba de idioma, no califican como miembros de la familia para la reagrupación familiar. Estamos de acuerdo con el argumento del Parlamento en el caso *Parlamento c. Consejo* (citado anteriormente) que la integración no aparece como uno de los motivos de justificación del artículo 8 (2) y, aunque se toma en consideración por el TEDH, esto sucede principalmente en casos de expulsión y no en casos de reagrupación, cuando el extranjero ha pasado cierto tiempo en el país de acogida y se han desarrollado ciertos esfuerzos de integración y enlaces sociales. Por tanto, mediante la imposición de una condición clara para la integración de un menor de 12 años de edad antes de su entrada, la directiva infringe tanto el artículo 8 (1), como también el artículo 8 (2) del CEDH.

No menos importante, el concepto de familia previsto en la directiva sobre reagrupación familiar parece ser más restrictivo que la del CEDH en otros dos aspectos. En primer lugar, como se explica en la sección correspondiente de este estudio, el Tribunal de Estrasburgo en muchos casos, aunque no todos, considera como "vida familiar" la relación entre los padres y sus hijos adultos siempre que sean solteros y jóvenes. Sin embargo, esta cuestión se deja a discreción de los Estados miembros en virtud de la directiva sobre reagrupación familiar. En segundo lugar, la jurisprudencia sobre el artículo 8 trata las relaciones estables no matrimoniales, incluyendo las que existen entre parejas del mismo sexo, como equivalentes a

las matrimoniales. El Tribunal de Estrasburgo ha reafirmado recientemente lo anteriormente mencionado incluso en un contexto de reagrupación familiar. Sin embargo, estas cuestiones también se dejan a discreción de los Estados miembros en virtud de la directiva sobre reagrupación familiar. Como resultado, habría ciertos casos de hijos adultos o de relaciones heterosexuales u homosexuales no matrimoniales que ganarían la protección del artículo 8 del CEDH, mientras que no habría ninguna disposición en virtud de la legislación nacional que permitiría la reagrupación. Por último, creemos que la directiva sobre reagrupación familiar carece de un enfoque orientado al concepto de familia *de facto* con el fin de cumplir con el artículo 8 del CEDH. Hacemos una sugerencia sobre esta materia en la conclusión No. 4.

En segundo lugar, en lo que respecta al resto de las disposiciones de la directiva sobre reagrupación familiar, consideramos que es necesario hacer una distinción entre el enfoque adoptado por el Tribunal de Estrasburgo sobre los casos de reagrupación familiar y el enfoque que nosotros consideramos que debe ser adoptado por el mismo tribunal de conformidad con todo lo que hemos comentado en la Parte II de la presente tesis. En particular, tras el enfoque adoptado en la práctica por el TEDH según el cual se examina si la reagrupación es posible en otro país, en conjunción con el hecho de que la "prueba de equilibrio" se lleva a cabo en el marco de la verificación de si existe una obligación por parte de las autoridades públicas a "respetar" la "vida familiar" del solicitante, llegaríamos a la conclusión de que el resto de las disposiciones de la directiva sobre reagrupación familiar no plantean problemas de compatibilidad con el CEDH. Esto es así ya que en virtud del artículo 8 (1), los Estados gozan de un margen amplio de apreciación y pueden restringir el derecho a la vida familiar de la persona en cuestión por una amplia variedad de razones, incluyendo el control de la inmigración y la integración.

Por el contrario, si los casos de reagrupación familiar se discuten en virtud del artículo 8 (2), como proponemos, entonces ciertas condiciones establecidas en la directiva relativas a la integración de los miembros de la familia han de ser consideradas incompatibles con el CEDH, ya que la integración no aparece entre los motivos de justificación del artículo 8 (2). Los requisitos establecidos en la directiva más relevantes son, además de las condiciones de integración del último párrafo del artículo 4 (1), el requisito de una residencia regular de dos años del artículo 8, las medidas de integración del artículo 7 (2) y la edad mínima para los cónyuges del artículo 4 (5). Cabe destacar que el artículo 17 de la directiva sobre reagrupación familiar que requiere de una evaluación individual es una disposición

especialmente positiva que está en línea con el enfoque que examina los vínculos del país de origen y de acogida, que es el que nosotros sugerimos debería ser seguido por el Tribunal de Estrasburgo en casos de reagrupación.

Como se ha mencionado anteriormente, varias de las cuestiones planteadas en esta conclusión han sido consideradas por el Tribunal de Luxemburgo en el caso *Parlamento c. Consejo* (citado anteriormente). Consideramos que la posición adoptada por el TJUE en este caso es particularmente problemática y bastante restrictiva. En principio, el Tribunal de Luxemburgo encontró que las excepciones se encuentran dentro del margen de apreciación dado en casos de inmigración a los Estados miembros y que los Estados miembros que decidan acogerse a estas excepciones deben ponerlas en práctica respetando los derechos fundamentales y teniendo debidamente en cuenta el interés superior de los niños y la naturaleza y la solidez de los vínculos familiares. Sin embargo, este es un enfoque bastante simplista. Parece difícil pensar en una situación en la que la negativa a admitir a un menor de 12 años, sólo porque él o ella fallaría una prueba de integración, podría tener debidamente en cuenta el interés superior del niño. Es indiscutible que en la mayoría de los casos, el interés superior del niño implica un contacto regular y estable con ambos padres y por lo tanto el argumento del TJUE en ese sentido parece problemático.

Conclusión No. 3: Las cuestiones problemáticas detectadas en los sistemas de reagrupación

Independientemente de la cuestión de la compatibilidad de las directivas con el artículo 8 del CEDH y antes de proceder a proponer un nuevo planteamiento a la reagrupación familiar, consideramos que es necesario resaltar cuáles son las principales cuestiones problemáticas detectadas en los sistemas de reagrupación que se han examinado en la parte III de la tesis. Nuestra investigación ha demostrado que las cuestiones más problemáticas se refieren al concepto de familia y los requisitos para la reagrupación familiar. Con posterioridad, expresamos nuestro punto de vista con respecto a los diferentes sistemas de reagrupación familiar.

A) Concepto de familia

La primera de las cuestiones relacionadas con la definición de familia se refiere, por un lado, a si esta refleja la diversidad de modelos familiares que se encuentran hoy en día en las

sociedades europeas y, por otro lado, a si se tiene en cuenta el concepto de familia como se percibe en los países de origen. Para empezar, esta tesis ha demostrado que el concepto de "familia" está en términos generales centrado en el modelo del "núcleo familiar". El CEDH y el Pacto Internacional de Derechos Civiles y Políticos son probablemente los documentos jurídicos que son más flexibles en cuanto a la definición de la "familia", adoptando un enfoque que se basa más en relaciones familiares *de facto*. Sin embargo, incluso estos convenios internacionales de derechos humanos siguen estando orientados a "familias nucleares" y dejan poco espacio para la protección fuera de este concepto. La definición jurídica de la familia es aún más tradicional en el marco de la directiva sobre reagrupación familiar y las legislaciones nacionales de inmigración que han sido examinadas a lo largo de esta tesis.

Como se describe en la Parte I de esta tesis, en los últimos años se ha producido una evolución notable en los modelos familiares. La familia ya no se percibe simplemente como la relación entre los hijos menores de edad y sus padres y/o la relación entre los cónyuges. Comenzando con las relaciones de pareja, no hay duda de que cada vez más parejas deciden registrar su pareja en lugar de concluir un matrimonio, o bien optan por simple convivencia no registrada. No menos importante, hay parejas o cónyuges que constituyen una familia pero deciden vivir en casas separadas. Asimismo, las relaciones homosexuales constituyen una realidad que merece especial atención. La evolución también es notable en cuanto a la relación entre padres e hijos. En primer lugar, hoy en día más niños nacen fuera del matrimonio. En segundo lugar, los jóvenes adultos mantienen enlaces familiares más fuertes con sus padres en comparación con el pasado en términos de dependencia económica y emocional. Por último, debe tenerse en cuenta que hay varias personas que consideran familia directa a, miembros de la familia lejana (como una abuela, una hermana o un tío, a menudo el único miembro de la familia viva) o incluso uno o más de sus amigos.

Cabe destacar que los modelos familiares antes mencionados no son más que algunos de los diversos modelos de familia y que existen muchas más circunstancias bajo las cuales las personas pueden desarrollar su vida familiar. En cualquier caso, este estudio demuestra que el legislador en el ámbito internacional, comunitario y nacional no tiene en cuenta la pluralidad de modelos familiares o los considera de una manera marginal. A nivel comunitario, esto es más evidente en lo que respecta a la reagrupación familiar de los nacionales de terceros países que para los ciudadanos de la UE y para los refugiados, a pesar de que estos últimos también

pueden afrontar problemas en ese sentido. De hecho, la reagrupación familiar con personas que no sean cónyuges o hijos menores de edad bajo la directiva sobre reagrupación familiar se deja del todo a discreción de los Estados miembros. El mismo enfoque ha sido adoptado por los legisladores de los Estados miembros que se han incluido en este estudio, con España siendo notablemente más inclusiva en relación con algunos de los modelos familiares antes mencionados y Grecia siendo totalmente exclusiva proporcionando reagrupación familiar solamente con el cónyuge y el hijo menor de edad.

A continuación, hemos observado que la definición de familia no sólo desconoce los modelos de familia que están fuera del "núcleo familiar" como acabamos de comentar, sino que también se basa exclusivamente en una percepción eurocéntrica del concepto de "familia", sin tener en cuenta lo que constituye familia en los países de origen del extranjero. A este respecto, hay que observar que la investigación realizada en la primera parte de la tesis ha puesto de manifiesto que existen diferentes percepciones hacia lo es familia en el mundo. De manera resumida, en varios países las relaciones familiares en la línea horizontal se consideran equivalentes o incluso más importantes que las relaciones entre padres e hijos. Otros ejemplos se refieren a los llamados "matrimonios concertados" o al hecho de que en varios países de origen existe una fuerte obligación moral o incluso legal para el hijo de cuidar de los padres enfermos o mayores. No menos importante, la edad en la que se celebran los matrimonios puede variar entre los diferentes países de origen y es probable que sea menor que la aplicable en el continente europeo. Todas estas situaciones familiares están excluidas de la definición de la familia o corren el riesgo de ser consideradas como "sospechosas" por las autoridades públicas por ser matrimonios de conveniencia.

De todo lo anterior se hace evidente que el concepto de familia carece tanto de un enfoque que se apartaría de la noción estricta de la "familia nuclear", como también de un enfoque que tendría en cuenta, al menos en cierta medida, elementos inherentes al concepto de familia en los países de origen. Creemos que el derecho a la vida familiar estaría mejor garantizado si los legisladores dejaran espacio para una flexibilidad a este respecto.

Una segunda cuestión problemática que se refiere al concepto de familia es la gran cantidad de definiciones de "miembros de la familia" que se han detectado a lo largo de este estudio. Como se ha demostrado, la definición de familia se diferencia tanto a nivel internacional, comunitario y nacional, así como en función del estatus o nacionalidad del extranjero. En

resumen, existe una definición diferente de "miembros de la familia" según el extranjero sea ciudadano de la UE, nacional de un tercer país o nacional de un Estado miembro de la UE, con el primero gozando de un derecho a reagrupación con un mayor número de familiares. La definición aplicable de la familia también varía entre los nacionales de terceros países en función del estado del extranjero. Dicho esto, los titulares de la tarjeta azul de la UE, y ahora los investigadores, son tratados de manera privilegiada por el legislador comunitario y los legisladores nacionales de los tres Estados miembros incluidos en el estudio en comparación con otros nacionales de terceros países. Por último, se aplican distintas definiciones dependiendo de si el nacional de un tercer país es un inmigrante, refugiado o solicitante de asilo.

Se hace evidente que la UE y los legisladores nacionales no adoptan una única definición de "familia" que sería aplicable a todos los casos, sino que son más flexibles o más restrictivos tomando en cuenta diferentes factores. El primer factor es la nacionalidad del extranjero que desea reagrupar a los miembros de su familia. Este factor puede ser explicado como un esfuerzo para otorgar un estatus más privilegiado a las personas que tienen vínculos más fuertes con el país en el que tiene lugar la reagrupación. Compromisos políticos entre Estados como la integración en la UE también pueden ser relevantes a este respecto. En los tres Estados miembros estudiados, por ejemplo, los nacionales disfrutaban de un derecho de reagrupación con un número de miembros de la familia más amplio y en condiciones menos estrictas en comparación con los nacionales de terceros países. Sin embargo, en la mayoría de los casos, la nacionalidad no implica mejor integración o vínculos más fuertes con el país de acogida. De hecho, un ciudadano comunitario que acaba de llegar a Alemania está en condiciones más favorables en cuanto a su derecho a reagrupación familiar que un nacional de un tercer país que reside en Alemania ya desde hace varios años. Por lo tanto, los nacionales de algunos Estados, en principio, disfrutaban de un derecho más favorable a la reagrupación familiar, así como una definición más extendida de la "familia" por el mero hecho de ser nacionales de esos Estados.

El segundo factor está aparentemente relacionado con los intereses económicos de la UE, así como de cada uno de los Estados miembros. Hay ciertas categorías de nacionales de terceros países que, debido al estatus que adquieren, son tratados de manera más favorable por el legislador en comparación con el resto de los nacionales de terceros países. Principalmente, estos son los titulares de la tarjeta azul y los investigadores. En este caso, la UE, así como el

Estado miembro de acogida, ofrecen derechos de reagrupación familiar más amplios con el fin de atraer la innovación y trabajadores altamente cualificados a sus territorios. Relevante para esta observación es el hecho de que la UE ha modificado recientemente la directiva de investigadores, confiriendo un derecho de reunificación más favorable para los investigadores, precisamente con el objetivo de ser más atractiva para los investigadores cualificados de terceros países. Estas condiciones más favorables incluyen una definición más amplia de la "familia", así como que ciertas restricciones, que son por lo demás aplicables al concepto de "familia" de un tercer país, no se aplican a su caso.

El tercer factor está relacionado con el estatus migratorio del extranjero. Como se ha demostrado en esta tesis, los refugiados y en algunos Estados miembros, los solicitantes de asilo u otros beneficiarios de protección internacional, gozan de un derecho más favorable en cuanto a la reagrupación familiar. En este caso, el tratamiento favorable se basa en consideraciones humanitarias. Estas personas disfrutan de un concepto más amplio de familia y también están normalmente exentas de varios de los requisitos para la reagrupación familiar, que son aplicables a los nacionales de terceros países de otro estatus migratorio.

Consideramos que el número de definiciones de "familia" detectadas especialmente a nivel europeo y nacional es excesivo. Creemos que debe existir una definición de la "familia" independientemente de si hablamos, por ejemplo, sobre titulares de la tarjeta azul, refugiados o migrantes. Asimismo, el concepto de familia no debería depender de la nacionalidad del extranjero, ni ser "utilizado" por los Estados con el fin de atraer el tipo de migración que resulta más deseable. Creemos que la conexión del derecho a la reagrupación familiar con el artículo 7 de la Carta dejará más espacio para lo que consideramos como un enfoque más justo en este respeto, ya que de esta manera el derecho a la reagrupación familiar estará estrechamente vinculado a un derecho fundamental. Consideramos que una definición más justa de la familia pudiera ser planteada como se discute en la conclusión No. 4.

B) Condiciones para la reagrupación familiar

Por lo que se refiere a los requisitos para la reagrupación familiar, además de la crítica efectuada en la Parte III de esta tesis con respecto a que algunos de ellos son particularmente restrictivos, hemos detectado otro problema que afecta principalmente al hecho de que en varios casos los requisitos tienen poco que ver con la vida familiar per se y se imponen para el control de la migración. Los ejemplos más notables son los requisitos que se imponen con el

fin de conseguir una mejor integración en el Estado miembro de acogida, a saber, las medidas y las condiciones de integración y el requisito de una residencia regular previa de cierta duración. Creemos que estos requisitos introducen un elemento de integración en el procedimiento de reagrupación familiar que no es relevante con la noción de la "vida familiar".

Hemos llegado a conclusiones similares con respecto a los criterios que el Tribunal de Estrasburgo aplica a los casos de expulsión. En la sección correspondiente de la tesis, hemos indicado que varios de ellos tienen como objetivo evaluar el nivel de integración que el extranjero goza en el Estado miembro de acogida y no la importancia de su vida familiar, que es el derecho objeto de protección. Este enfoque da lugar a una degradación de la importancia y la fuerza de la vida familiar, que no necesita ser reforzada con elementos que se encuentran completamente fuera de su alcance. El mismo enfoque se adoptará más adelante con respecto a la posibilidad de imponer a los miembros de la familia cursos de formación previos a la entrada. Nuestra propuesta en cuanto a las condiciones para la reagrupación familiar se presenta en la conclusión No. 4.

C) Los sistemas de reagrupación familiar

Consideramos que el debate con respecto a las cuestiones problemáticas en sistemas de reagrupación debería implicar un análisis de los diferentes modelos que pueden aplicarse a la reagrupación familiar. En primer lugar, los modelos de reagrupación se pueden dividir en "formales" y "materiales". Esta distinción se refiere a los criterios que aplica un legislador con el fin de determinar qué personas cumplen las condiciones requeridas para ser consideradas como miembros de la familia a los efectos de reagrupación familiar. A este respecto, el modelo de reagrupación "formal" es el que enumera las relaciones familiares exactas que se requieren con el fin de que tenga lugar la reunificación. Una legislación que se basa en este tipo de modelo de reagrupación puede hacer posible, por ejemplo, que el reagrupante reagrupe al cónyuge y los hijos menores de edad o adoptar una definición de familia más amplia. Por el contrario, los sistemas de reagrupación "materiales" no establecen una lista de relaciones formales, sino que adoptan un enfoque más *de facto*, dejando espacio para que las personas que pueden ser admitidas por razones familiares formen parte de varios modelos de relaciones.

En segundo lugar, en cuanto a las condiciones aplicables para la entrada, algunas jurisdicciones aplican un sistema de "cuota", mientras que otras adoptan un sistema de

"elección libre". El sistema de "cuota" se basa en un número máximo de permisos de residencia que pueden ser emitidos cada año. Los permisos de residencia que superan este número pasan a la lista de espera para el año siguiente. Por el contrario, un sistema de "elección libre" no establece un límite en los permisos de residencia, pero la entrada está autorizada sólo en caso de que el reagrupante cumpla con los requisitos que se establecen en la ley.

Como se ha mostrado claramente en esta tesis, la UE y la mayoría de los Estados miembros de la UE han adoptado un modelo estrictamente "formal" en lo que respecta a los miembros de la familia que tienen la entrada y residencia autorizadas por razones familiares. Consideramos que este enfoque es problemático, ya que a menudo dará lugar a que los extranjeros no puedan reagrupar a las personas con las que tienen vínculos emocionales estrechos simplemente porque no encajan en la definición de familia que ha sido adoptada. No menos importante, otros se verán obligados a encajar con ciertos modelos de familia, a pesar de que no lo desean, con el fin de lograr la reunificación familiar. En cuanto a la distinción entre los sistemas de "elección libre" y "cuota", cabe señalar que las directivas, así como la legislación nacional de la gran mayoría de los Estados miembros, adoptan un sistema de "elección libre". Consideramos que, en principio, la adopción de este sistema es la opción correcta. Sin embargo, no debe pasarse por alto que la directiva permite una serie de requisitos que pueden hacer que la reagrupación familiar sea particularmente difícil de ejercer. También hay que destacar que los Estados miembros pueden utilizar los requisitos para la reagrupación familiar con el fin de controlar los flujos migratorios.

Conclusión No. 4: Una nueva propuesta para la reunificación familiar

En la presente sección, presentamos una opción de mejora del funcionamiento de la reagrupación familiar y proponemos varios cambios en los regímenes actuales de reagrupación que creemos pueden convertir el sistema de reagrupación familiar en más justo y eficiente. Nuestra propuesta se basa en el enfoque más orientado a los derechos fundamentales que se han sugerido en la conclusión No. 1, en las cuestiones de compatibilidad con el CEDH que se han presentado en la conclusión No. 2 y en las cuestiones problemáticas detectadas en los sistemas actuales de reagrupación que se han analizado en la conclusión No. 3. En resumen, consideramos que el sistema actual de reagrupación familiar debe basarse más en una evaluación individual de cada solicitud, respecto tanto al concepto de

familia así como a las condiciones para la reagrupación familiar (Sección A). En consecuencia, en la Sección B presentamos una sugerencia respecto a aspectos procedimentales de reagrupación familiar. Debe tenerse en cuenta que todo lo que se comenta en la Sección A debería, en nuestra opinión, aplicarse a todos los extranjeros de cualquier estatus migratorio o nacionalidad, mientras que las cuestiones procedimentales que se discuten en la Sección B solamente se refieren al régimen de reagrupación familiar de los nacionales de terceros países.

A) Aplicación de una evaluación individual a la definición de la familia y a las condiciones para la reagrupación familiar

Concepto de familia

El modelo adoptado respecto a las personas que califican como miembros de la familia ha sido criticado anteriormente por ser estrictamente "formal", tradicional y más bien eurocéntrico. Creemos que para lograr reagrupaciones más justas es necesaria la aplicación de una evaluación más individual de lo que constituye familia en cada caso. El modelo que proponemos para la determinación de las personas que han de ser aceptadas por reagrupación familiar constituye una combinación de un sistema "formal" y un sistema "material".

Para empezar, creemos que, idealmente, la evaluación de las personas que deben ser aceptadas como miembros de la familia de un extranjero debe hacerse sobre una base totalmente individual. Sin embargo, dado que es probable que la aplicación de esta aproximación pueda encontrarse con varios problemas prácticos e incluso si se aplica correctamente es probable que retrase el procedimiento, consideramos una solución intermedia como que la mejor opción. En particular, el legislador comunitario debe considerar, además de las disposiciones ya establecidas, añadir una nueva disposición obligatoria a las diferentes directivas que tratan sobre los miembros de la familia o la reagrupación familiar, que allanaría el camino para la reagrupación con personas que no entran dentro del concepto del "núcleo familiar", pero con las que el extranjero tiene lazos emocionales fuertes y reales. De esa manera, las relaciones del "núcleo familiar" que son más propensas a caer bajo el concepto jurídico de la familia seguirán siendo tratadas según las actuales disposiciones de las directivas y las legislaciones domésticas de una manera rápida y eficaz, pero los extranjeros cuyos verdaderos lazos emocionales quedan fuera del ámbito de aplicación de estas

disposiciones podrán reclamar y lograr la reagrupación sobre la base de esta nueva disposición.

La investigación que hemos llevado a cabo en relación con la legislación alemana de inmigración ha puesto de manifiesto que el artículo 36 de la Ley de Inmigración toma ese camino. Sin embargo, esta disposición se refiere sobre todo a personas que están a cargo del reagrupante mientras que la propuesta que hacemos en esta conclusión cubriría *de facto* relaciones familiares que no entran dentro del concepto de la "familia nuclear". Creemos que la adopción de dicha disposición puede resolver varios problemas que han sido detectados en relación con el concepto de familia en el transcurso de nuestra investigación. Cabe aclarar que dicha disposición podría funcionar sólo en caso de que su redacción facilitara la reagrupación. Nuestra investigación ha demostrado que expresiones como "en circunstancias excepcionales", "cuando sea apropiado" o en "situaciones particulares" a menudo dejan una discrecionalidad excesiva a las autoridades públicas y el resultado es que muy pocos casos son exitosos. Este es el caso, por ejemplo, con el artículo 36 de la Ley de Inmigración alemana que establece que la reagrupación puede efectuarse "si es necesario con el fin de evitar dificultades especiales", y también con la legislación española que establece que los recursos suficientes para la reagrupación familiar pueden ser inferiores en "circunstancias excepcionales".

Somos de la opinión de que el modelo de reagrupación que proponemos puede dar solución a los problemas que un sistema estrictamente "formal" conlleva y es definitivamente más compatible con el artículo 8 del CEDH y el enfoque más *de facto* adoptado por el Tribunal de Estrasburgo. No podemos pasar por alto el hecho de que la aplicación del sistema propuesto podría en la práctica presentar ciertos problemas de inseguridad jurídica e igualdad de trato similares a los que se mencionan a continuación en el marco de la aplicación del sistema de evaluación individual a las condiciones para la reagrupación familiar. A este respecto, adoptamos la misma argumentación que se expresa a continuación añadiendo que una posible implementación incorrecta de la ley por la administración pública no debe constituir un obstáculo para la adopción de legislación que evite desigualdades.

Las condiciones para la reagrupación familiar

Como ya se ha mencionado anteriormente, la aplicación de la evaluación individual se basa en el principio de que las condiciones para la reagrupación familiar no deben constituir un umbral por debajo del cual se rechacen todas las solicitudes, sino que los Estados miembros

deben tener en cuenta otros factores antes de decidir el resultado de cada solicitud. Como ya se ha anotado en la parte III de la tesis, esto ya constituye una obligación para los Estados miembros de conformidad con el artículo 17 de la directiva sobre reagrupación familiar. Consideramos que esta aproximación es la más adecuada y creemos que los Estados miembros que no han transpuesto dicha disposición deberían hacerlo, mientras que los Estados miembros que han transpuesto la disposición antes mencionada pero no la implementan en la práctica, deben cambiar sus prácticas administrativas a fin de que las condiciones para la reagrupación familiar no se examinen de una manera impersonal, sino teniendo en cuenta otros factores cruciales.

Consideramos que la evaluación individual se debe aplicar de la manera descrita a continuación. Para empezar, los factores que los Estados miembros deben tener en cuenta son principalmente los contenidos en el artículo 17 de la directiva sobre reagrupación familiar, a saber, "la naturaleza y la solidez de los vínculos familiares de la persona", "la duración de su residencia en el Estado miembro" y "la existencia de lazos familiares, culturales o sociales con su país de origen". Sin embargo, creemos que los Estados miembros deben tener en cuenta otros factores importantes, aunque estos no se mencionen en el artículo 17. Un ejemplo de estos factores se puede encontrar en la guía de la Comisión para la aplicación de la directiva sobre reagrupación familiar que ha sido analizada en la Parte III. Como se ha mencionado, estos factores son "(...) las condiciones de vida en el país de origen; la edad de los menores afectados; el hecho de que algún miembro de la familia haya nacido o crecido en el Estado miembro; los lazos económicos, culturales y sociales en el Estado miembro; la dependencia de los miembros de la familia; la protección de los matrimonios y de los vínculos familiares". Por tanto, las autoridades públicas deben, ante todo, considerar la posibilidad de excepciones en caso de que uno o más requisitos para la reagrupación familiar no se cumplan, teniendo en cuenta los factores anteriormente mencionados.

No menos importante, al realizar la evaluación individual, los Estados miembros deben considerar cuál es el objetivo exacto de cada requisito y decidir hacer una excepción en el caso de que la justificación del requisito no sea relevante en la solicitud que es objeto de evaluación. En particular, cuando la directiva sobre reagrupación familiar deja claro que un cierto requisito se establece con el fin, por ejemplo, de la prevención de los matrimonios forzados, las autoridades nacionales deben considerar no aplicar el requisito pertinente en el caso de que esté claro que la solicitud no implica un matrimonio forzado. Cabe mencionar que

esta obligación no se deriva directamente del artículo 17 de la directiva sobre reagrupación familiar, sino más bien de una interpretación literal de cada una de las disposiciones que contienen un objetivo del requisito. También hay que señalar que los requisitos más relevantes para la aplicación de este tipo de evaluación individual son el requisito de la edad mínima para los cónyuges que tiene el objetivo de la prevención de los matrimonios forzados y la mejor integración, las medidas de integración para los miembros de la familia que aparentemente tienen el objetivo de la mejor integración y la aplicación de una residencia regular previa que también tiene el objetivo de la mejor integración de las familias en los países de acogida.

A continuación, al llevar a cabo la evaluación individual, las autoridades públicas deben respetar los tres principios siguientes. En primer lugar, consideramos que los principios establecidos en el caso *Chakroun* (citado anteriormente) deberían ser, respectivamente, aplicables al proceso de evaluación individual. En particular, las autoridades públicas deben llevar a cabo la evaluación individual a la luz del objetivo de la directiva, que es promover la reagrupación familiar, y no deben poner obstáculos que imposibilitarían la reagrupación. Como hemos visto en el caso *Dogan* (citado anteriormente), por ejemplo, requerir a una persona analfabeta a cumplir con medidas de integración equivaldría a una denegación de la reagrupación familiar, que socava el objetivo de la directiva. Lo mismo es cierto en cuanto a familiares con discapacidades o con un nivel educativo particularmente bajo. En segundo lugar, las autoridades públicas deben tener debidamente en cuenta el interés superior del niño al examinar una solicitud de reagrupación familiar. Esta obligación se deriva directamente del artículo 5 (5) de la directiva sobre reagrupación familiar y también del derecho internacional de derechos humanos y, más importante, de la Convención sobre los Derechos del Niño. Dicho esto, las autoridades públicas deberían considerar a fondo cuál es el mejor interés del niño cuando el caso que tratan implica hijos menores de edad. A este respecto, basta con mencionar que en la mayoría de los casos el mejor interés del menor es ser capaz de mantener un contacto regular y estrecho con ambos padres. En tercer lugar, todas las decisiones deberán ser justificadas y proporcionales.

Cabe destacar que a lo largo de toda la aplicación de la evaluación individual, los Estados miembros disponen de un amplio margen de apreciación y están limitados únicamente por las normas de protección que ofrece el CEDH, la Carta y la Convención sobre los Derechos del Niño. Se hace evidente que nos enfrentamos una vez más a la misma problemática que se

refiere al nivel de protección del artículo 8 del CEDH en casos de reagrupación y a las posibilidades de una protección más amplia sobre la base de la Carta. A este respecto, adoptamos la misma opinión que en virtud de la conclusión No. 1.

En términos generales, la evaluación individual se basa en la suposición razonable de que cada solicitud de reagrupación familiar tiene un contexto diferente y, por tanto, no puede ser tratada por las autoridades públicas de una manera idéntica. Creemos que la adopción de esta aproximación dará lugar a decisiones sobre reagrupación familiar más orientadas a derechos humanos y será capaz de garantizar que los Estados de acogida no hagan un mal uso del sistema de "elección libre" con el fin de controlar los flujos migratorios. No menos importante, la aplicación de este sistema ofrece una flexibilidad que es necesaria en situaciones de incertidumbre económica como las actuales, especialmente en lo que se refiere a los "recursos suficientes" que se requieren antes de que la reagrupación pueda realizarse. Cabe señalar que la importancia de la aplicación de la evaluación individual ha sido subrayada por el TJUE también. En particular, en el caso *Chakroun* (citado anteriormente) el TJUE indicó que los Estados miembros no pueden establecer un ingreso mínimo requerido que se aplicaría en todos los casos de reagrupación familiar, sino que deben llevar a cabo una evaluación individual antes de denegar una solicitud de reagrupación familiar. Este mismo enfoque ha sido adoptado por el TJUE en los casos *O.* y *S.* (citados anteriormente).

Independientemente de todo lo anterior, no puede pasarse por alto que la aplicación del sistema de evaluación individual puede plantear preocupaciones de igualdad e inseguridad jurídica en cuanto existe el temor de que situaciones similares pueden ser tratadas de manera diferente y que los nacionales de terceros países pueden sentirse inseguros en cuanto a las condiciones exactas de la ley y la forma en la que puedan ejercer su derecho a la reagrupación familiar. También puede implicar trabajo adicional, burocracia, y probablemente, períodos de espera más largos. No obstante, debe tenerse en cuenta que mientras la evaluación individual se aplica para que se haga una excepción en favor del nacional del tercer país, estas preocupaciones deben tener un impacto limitado en la aplicación del sistema descrito anteriormente. En cualquier caso, la toma de decisiones eficientes, coherentes, justificadas y razonables constituye un reto para los Estados miembros cuando tratan con solicitudes de reagrupación familiar.

B) Las propuestas procedimentales

Solicitudes de reagrupación familiar cuando la familia ya está en el país de acogida

Consideramos como uno de los puntos más débiles de la directiva sobre reagrupación familiar el hecho de que se ocupa únicamente de la reagrupación en el "sentido tradicional" del término, lo que implica que el miembro de la familia está en el país de origen y solicita un visado para reagruparse con el extranjero. En efecto, la directiva sobre reagrupación familiar parece pasar por alto la realidad existente en la que los miembros de la familia a menudo ya están presentes en el territorio de un Estado miembro, dejando la posibilidad de solicitar reagrupación en el territorio del país de acogida "abierto" y a discreción de los Estados miembros. Como resultado, las legislaciones de los Estados miembros de la UE difieren notablemente en ese sentido. En España las solicitudes para reagrupación familiar en el territorio español se aceptan solo para el hijo del inmigrante regular, ya sea nacido en España o no; en Grecia esto es posible en caso de que los miembros de la familia ya sean residentes regulares en Grecia, mientras que en Alemania a los miembros de la familia se les permite solicitar la reagrupación familiar en el territorio alemán sólo en caso de que no sea razonable exigir al familiar que regrese al país de origen para seguir el procedimiento ordinario.

Por lo que se refiere a la cuestión de la admisión de la solicitud para la reunificación familiar cuando la familia ya está en el territorio del país de acogida consideramos que es necesario hacer una distinción entre los miembros de la familia que residen regularmente en el Estado miembro de acogida y los que residen de manera irregular. En el caso de que los miembros de la familia residan regularmente en un Estado miembro, la situación no parece particularmente problemática ya que en varios Estados miembros existe la posibilidad de que el miembro de la familia cambie su permiso de residencia y esté cubierto por el del reagrupante si así lo desea. Lo mismo es cierto en lo que respecta a los niños que nacen en los Estados miembros que normalmente están cubiertos por el permiso de residencia del reagrupante. Estos resultados se han confirmado en cierta medida por el presente estudio, así como por el informe de la Comisión Europea sobre la transposición de la directiva sobre reagrupación familiar. Sugerimos que los Estados que no ofrecen la posibilidad de solicitudes en su territorio para los familiares que ya residen en él regularmente deban considerar la modificación de su legislación, ya que parece irracional exigir a un inmigrante regular regresar al país de origen con el fin de seguir el procedimiento regular de reagrupación.

Por el contrario, la situación es más compleja en el caso de que los miembros de la familia estén presentes de forma irregular en el territorio del Estado miembro de acogida. Estos miembros de la familia han entrado en el país de acogida de forma irregular o bien de forma regular con un visado de turista y se han quedado irregularmente al expirar el visado. En cualquier caso, es de conocimiento común que estos familiares no están dispuestos a regresar al país de origen con el fin de seguir el procedimiento de reagrupación propuesto por la directiva sobre reagrupación familiar y, de hecho, no es probable que lo hagan por varias razones. La más importante, por temor a no ser readmitidos una vez que abandonen el territorio del país de acogida. De hecho, los miembros de la familia no se separarían de sus familias y correrían el riesgo de estar involucrados en un procedimiento largo y costoso cuyos resultados no son seguros. Preferirán permanecer en situación irregular en el Estado miembro de acogida con la esperanza de beneficiarse de un programa de regularización en caso de que el país de acogida ofrezca tal posibilidad. La situación se complica aún más, si consideramos que a menudo estos miembros de la familia no pueden ser expulsados por razones de derechos humanos de conformidad con lo que se ha analizado en la segunda parte de la tesis con respecto a los casos de expulsión en virtud del artículo 8 del CEDH.

Un programa de regularización que tenga en cuenta los lazos familiares de los inmigrantes en el país de acogida podría dar una solución a esta extraña situación. De hecho, el "arraigo social" en España, por ejemplo, ha ofrecido en un cierto grado la posibilidad de lo que se llama reagrupación familiar *de facto*. Sin embargo, la medida en la que un programa de regularización podría dar solución al problema descrito anteriormente dependerá del resto de los requisitos que se imponen a los miembros de la familia que deseen regularizar su estancia. El "arraigo social" puede ser criticado por estar vinculado a un contrato de trabajo, que a menudo será difícil de obtener para los miembros de la familia, especialmente en países con una alta tasa de desempleo. Del mismo modo, los programas de regularización en Grecia pueden ser criticados por requerir un período particularmente largo de estancia en el territorio griego antes de la regularización.

Una solución a este problema podría lograrse mediante una modificación de la directiva sobre reagrupación familiar en la que se aliente a los Estados miembros a aceptar solicitudes cuando los miembros de la familia ya están presentes en el territorio del Estado miembro. Como se ha mencionado en el capítulo correspondiente de esta tesis, el párrafo segundo del artículo 5 (3) de la directiva sobre reagrupación familiar establece que a modo de excepción, el Estado

miembro puede, en determinados casos aceptar la solicitud cuando el miembro de la familia se encuentra en su territorio. La disposición está en la dirección correcta, aunque su formulación parece bastante imprecisa, ya que no especifica cuáles pueden ser esos "casos determinados". De hecho, se reconoce un amplio margen de apreciación a los Estados miembros en primer lugar, a transponer o no la excepción y, en segundo lugar, a la forma en que realmente la implementarían. La directiva sobre reagrupación familiar debe ser más precisa a este respecto adoptando una disposición obligatoria y especificando las condiciones exactas bajo las cuales dicha solicitud se puede presentar. Los miembros de familia para los cuales no sería razonable volver al país de origen deben tener la posibilidad de presentar la solicitud en el país de acogida, especialmente en los casos en que su expulsión no se puede ejecutar por motivos de derechos humanos. Consideramos que esta aproximación es realista y puede dar solución a la actual situación indeseable, tanto para los inmigrantes como para los Estados.

¿Qué autoridad ha de ser competente para el examen de las solicitudes de reagrupación familiar?

La segunda propuesta que creemos que sería beneficiosa para el procedimiento de reagrupación familiar se refiere a las autoridades competentes para la evaluación de la solicitud en caso de que el miembro de la familia resida en el país de origen. El estudio comparativo de los tres Estados miembros ha puesto de manifiesto dos enfoques diferentes en cuanto a cómo se inicia el procedimiento. Por un lado, en Alemania el procedimiento es iniciado por el miembro de la familia que solicita la reagrupación en el consulado correspondiente en el país de origen presentando todos los documentos necesarios. Por otro lado, en España y Grecia, el procedimiento se inicia por el reagrupante que solicita la reagrupación a la autoridad competente del país de acogida proporcionando todas las pruebas de que él o ella cumple con los requisitos, mientras que los consulados en el país de origen, una vez recibida la respuesta positiva de esta autoridad, se encargan principalmente de los temas relativos a la entrada del reagrupado en el país de acogida.

El segundo enfoque parece más correcto desde un punto de vista jurídico, ya que los sistemas jurídicos normalmente reconocen la reagrupación familiar como el derecho del reagrupante y por tanto debe ser él o ella quien inicie el procedimiento que hará posible el ejercicio de este derecho. Sin embargo, el "modelo alemán" es más eficiente y, lo más importante, más rápido.

Somos de la opinión de que la competencia para la reagrupación familiar debe ser exclusiva de las autoridades consulares, que deben ocuparse de todo el procedimiento desde el principio hasta la emisión del visado. Dependiendo de los requisitos impuestos en cada país, las autoridades consulares podrán limitarse a comunicar con las autoridades públicas del país de acogida con el fin de informarse sobre cuestiones relativas a la validez y la naturaleza del permiso de residencia del reagrupante.

Consideramos que de esta manera la duración del procedimiento se reduciría un par de meses ya que el resultado final de la solicitud dependerá de una decisión que será la de la autoridad consular en el país de origen. Creemos que esta propuesta es la adecuada para la aceleración del procedimiento de reagrupación familiar y que su implementación ayudará a solucionar un asunto problemático en los procedimientos de las reagrupaciones que es el extenso período que suelen durar. A este respecto, se recuerda que la directiva sobre reagrupación familiar no facilita particularmente un procedimiento rápido, ya que impone un período de nueve meses que puede, además, ampliarse. El estudio de la legislación nacional de los Estados miembros también ha puesto de manifiesto que, a pesar de que el período de nueve meses normalmente se respeta, los procedimientos de reunificación de la familia son bastante largos.

Conclusión No. 5: Margen de apreciación en el ámbito de la vida familiar

En la introducción de la tesis hemos aclarado que el derecho a la vida familiar se consideraría como un derecho más amplio que la mera reagrupación familiar de los nacionales de terceros países. Por tanto, se han examinado cuestiones relacionadas con los familiares de ciudadanos comunitarios, los nacionales de terceros países que son trabajadores altamente cualificados o investigadores, los solicitantes y beneficiarios de protección internacional, así como casos de expulsión y vías de regularización de los extranjeros que tienen vínculos familiares en el país de acogida. El hecho de que la existencia de la familia tiene un papel importante en estos casos no es objeto de controversia. Sin embargo, hay dos cuestiones que se han planteado a lo largo de la investigación que merecen ser consideradas. La primera de ellas se refiere a la importancia que tiene la familia del extranjero en cada uno de los casos anteriormente mencionados y, más precisamente, a la importancia de la existencia de los lazos familiares en casos de reagrupación, regularización y expulsión. La segunda cuestión se refiere a un tema "familiar" en el ámbito del derecho de la inmigración que es el margen de apreciación y el

principio de subsidiariedad y el papel que tienen en los casos que se relacionan con la vida familiar.

En cuanto a la primera pregunta, consideramos que es necesario distinguir entre casos de reagrupación, por un lado, y casos de regularización y expulsión, por otro lado. Esto es así ya que en el caso de la reagrupación familiar, los lazos familiares constituyen un elemento sin el cual el ejercicio del derecho es imposible. Por el contrario, en los casos de regularización o expulsiones, los lazos familiares juegan un papel secundario en todo el procedimiento y si se consideran, de ser así, es junto a otros elementos o si además se cumplen otros requisitos. En particular, en los casos de expulsión, los lazos familiares pueden impedir la expulsión, pero el mero hecho de que el migrante tenga lazos familiares en el país de acogida no es suficiente para la suspensión de la expulsión. Estos lazos deben ser de cierta intensidad y naturaleza con el fin de jugar un papel crucial en el procedimiento, y además otros factores son tomados en cuenta. Los lazos familiares se vuelven aún menos significativos en los procedimientos de regularización. Como se observa en los países incluidos en el presente estudio, los lazos familiares pueden ayudar a un extranjero a regularizar su estancia, pero el resultado de una solicitud de regularización, en la mayoría de los casos, dependerá de una combinación de factores, con la existencia de los vínculos familiares a menudo limitados a un papel marginal.

Por lo que se refiere al margen de apreciación y su aplicabilidad en el campo de la vida familiar, deben tenerse en cuenta las siguientes consideraciones. Como punto de partida cabe señalar que, como se ha visto anteriormente, el artículo 8 del CEDH, constituye un derecho "cualificado" y no un derecho "absoluto" y que el Tribunal de Estrasburgo ha mencionado en varias ocasiones que los Estados contratantes gozan de un margen de apreciación en casos del artículo 8. En el derecho comunitario, donde la competencia en asuntos de inmigración y asilo es compartida entre la UE y los Estados miembros, también hemos detectado la misma situación, aunque en este caso hablaríamos más bien del principio de subsidiariedad. Dicho esto, la pregunta que debe responderse es cuán amplio es este margen de apreciación del que disponen los Estados en cada uno de los temas examinados en la presente tesis y cuál es la razón por la cual en algunos casos el margen de apreciación de los Estados es más amplio que en otros.

Empezando con el artículo 8 del CEDH, cabe señalar que el Tribunal de Estrasburgo deja un cierto margen de apreciación a los Estados tanto en casos de reagrupación como también en

casos de expulsión. Como se ha mencionado en la segunda parte de esta tesis, el TEDH en principio toma la posición de que este margen de apreciación es el mismo tanto en lo que respecta a las obligaciones positivas como a las obligaciones negativas derivadas del artículo 8. No obstante, este punto de vista sigue quedando a nivel teórico ya que en la práctica, el TEDH reconoce que el margen de apreciación es más amplio en casos de admisión que en casos de expulsión. Esto es así ya que en los casos de admisión el margen de apreciación entra en juego ya en la etapa de determinar si existe una obligación para un Estado de "respetar" la vida familiar, mientras que en los casos de deportación el margen de apreciación se tiene en cuenta para determinar si la "interferencia" se puede justificar o no. No menos importante, en los casos de admisión, los Estados contratantes pueden invocar a cualquier interés para limitar el derecho a la vida familiar, mientras que en los casos de expulsión pueden limitar el mismo derecho, siempre que persigan alguno de los objetivos legítimos del artículo 8 (2).

Una vez dicho esto, la conclusión a la que podemos llegar es que, en el caso del CEDH, el margen de apreciación no está relacionado con la importancia que los lazos familiares tienen en el procedimiento migratorio, sino más bien con si este procedimiento implica la admisión de un inmigrante o no. Por tanto, el margen de apreciación es mucho más amplio en los casos de reagrupación familiar, que implican la admisión de un inmigrante que en los casos de expulsión. Se confirma que la admisión se concibe como una cuestión "delicada" por el hecho de que en casos de expulsión, esta es en muchas ocasiones una consecuencia de violaciones graves de la ley cometidas por el extranjero, incluso delitos criminales mientras que en los casos de admisión el inmigrante no está involucrado en la criminalidad, pero desea meramente entrar en el Estado de acogida con el fin de reagruparse con su familia allí. A pesar de esta notable diferencia entre los dos tipos de casos, el margen de apreciación de los Estados es mucho más amplio en los casos de reagrupación que en los casos de expulsión.

En cuanto al principio de subsidiariedad, que es un concepto bastante similar en el marco de la legislación comunitaria que tiene como objetivo determinar el nivel de intervención de la legislación comunitaria cuando la competencia es compartida entre la UE y sus Estados miembros, se deben hacer las siguientes observaciones. Para empezar, es cierto que, como se ha destacado por el TJUE en el caso *Parlamento c. Consejo* (citado anteriormente), la legislación comunitaria obliga a los Estados miembros a admitir a ciertos miembros de la familia sin dejarles ningún margen de apreciación. Esto se aplica en lo que respecta a las disposiciones "centrales" de todas las directivas que confieren derechos de reagrupación

familiar. Sin embargo, la intervención de la legislación comunitaria parece ser de nivel superior en cuanto a la admisión de los miembros de la familia de ciudadanos comunitarios. El legislador comunitario y el TJUE han establecido un sistema de reagrupación que deja un margen limitado a los Estados miembros para decidir qué miembros de la familia pueden ser admitidos en sus territorios, así como sobre las condiciones de admisión. La misma consideración se aplica, en términos generales, para el caso de los titulares de la tarjeta azul de la UE, los refugiados y, ahora, para los investigadores.

Por el contrario, la legislación de la UE no interviene de la misma forma en relación con la admisión de los miembros de familia de los nacionales de terceros países. El examen de la directiva sobre reagrupación familiar, así como de las legislaciones nacionales, ha demostrado que los Estados miembros gozan de un margen considerablemente más amplio para decidir si van a admitir miembros de la familia, que no sean el cónyuge y los hijos menores de edad, y en qué condiciones. En cuanto a la admisión de los familiares de los nacionales de los Estados miembros, ésta se deja a discreción absoluta de los legisladores nacionales, aunque, como hemos visto en este estudio, el legislador comunitario ha intervenido indirectamente provocando problemas de "discriminación inversa". Por último, el presente estudio ha puesto de manifiesto que la intervención de la legislación de la UE con respecto a las expulsiones es mucho menor, mientras que la regularización constituye un área que la UE no ha legislado en absoluto. Por lo tanto, podemos concluir que en la UE el margen de apreciación que se deja a los Estados miembros depende de la nacionalidad y el estatus migratorio del reagrupante, así como de ciertos intereses económicos.

Conclusión No. 6: El futuro de la reagrupación familiar

A) ¿Formación previa a la entrada?

Aproximadamente un tercio (Anexo I, Tabla 1) de los nuevos permisos de residencia emitidos en el año 2014 a nivel de la UE son permisos de residencia por reagrupación familiar. Esto es una consecuencia de la crisis económica, que resultó en un número significativamente menor de permisos emitidos por fines de empleo, especialmente en los Estados miembros que se han visto más afectados por la crisis económica (Anexo II, Tabla 3). Por tanto, el porcentaje de permisos de residencia emitidos por reagrupación familiar se ha disparado. Los permisos de residencia para reagrupación familiar también han aumentado en números absolutos (Anexo II, Tabla 2), debido precisamente al hecho de que el acceso, con fines de empleo se ha

endurecido y, por tanto, el interés de los inmigrantes para entrar en Europa como miembros de la familia ha crecido, ya que en algunos casos puede ser la única opción para la migración regular.

Por ello, los Estados europeos se enfrentan a un fenómeno relativamente nuevo, ya que admiten un gran número de nuevos inmigrantes sin ser capaces de elegir su perfil. De hecho, los reagrupados son elegidos por el extranjero que ya reside en un país y se les concede el derecho sobre la base de la relación que tienen con el reagrupante y no sobre la base de su educación, cualificación o las necesidades del mercado de trabajo de un país. Esta situación es probable que desencadene una discusión con respecto a la posibilidad de imponer u ofrecer algunos cursos de formación a los miembros de la familia antes de la entrada en la UE. De hecho, uno puede pensar que, dado que los miembros de la familia se convierten en los nuevos trabajadores de la UE y teniendo en cuenta que, como se mencionó anteriormente, los Estados no son capaces de controlar el perfil exacto que tienen, una formación previa a la entrada ayudaría a la integración laboral y competitividad en los países de acogida.

Sin embargo, desde una perspectiva de derechos humanos, este enfoque es particularmente problemático. En efecto, la directiva sobre reagrupación familiar ya ha sido criticada por dejar a los Estados miembros la posibilidad de imponer medidas de integración previas a la entrada que en algunos casos hacen que la reagrupación familiar sea particularmente difícil de ejercer. La misma crítica se ha hecho con respecto a los demás requisitos para la reagrupación familiar. Dicho esto, la imposición de un requisito adicional para la admisión de los familiares endurecerá aún más el ejercicio del derecho y dejará más libertad a los Estados miembros para controlar los flujos migratorios a través de los requisitos para la reagrupación familiar. Asimismo, la integración laboral es un criterio que no tiene nada que ver con la vida familiar y, por tanto, la crítica expresada anteriormente en relación con la aplicación de medidas de integración se aplica de acuerdo a la posibilidad de imponer condiciones de formación previas a la entrada.

Independientemente de la preocupación anteriormente analizada, hay que destacar que el artículo 14 de la directiva sobre reagrupación familiar, que establece que los Estados miembros tienen que conceder el derecho al empleo a los reagrupados, es una de las disposiciones más positivas de toda la directiva. Las observaciones hechas anteriormente no deben de ninguna manera, animar al legislador comunitario a modificar dicha disposición. En

efecto, esta disposición y su posterior transposición en los Estados miembros de la UE ha ayudado a evitar varios problemas que las políticas migratorias han causado en otras partes del mundo, donde los reagrupados no tienen derecho a trabajar y se ven obligados a permanecer en casa en algunos casos por varios años. Tales políticas migratorias a menudo influyen psicológicamente en el miembro de la familia y provocan desigualdades entre las parejas o cónyuges. Este tema en cuestión tiene una perspectiva de género, ya que los cónyuges que entran como familiares son en la mayoría de los casos mujeres.

B) La vida familiar y la armonización de las legislaciones en la UE

Después de haber examinado la legislación nacional en tres Estados miembros de la UE y brevemente en el resto de los Estados miembros podemos llegar a algunas conclusiones con respecto a la armonización de la legislación nacional de los Estados miembros de la UE por lo que concierne a la vida familiar. El tema de la armonización plantea tres cuestiones principales. ¿Han logrado las directivas armonizar la legislación relativa a la reagrupación familiar en los Estados miembros de la UE? ¿Es la armonización en este campo posible, y en caso de una respuesta afirmativa, ¿es deseable? Por otra parte, ¿nos dirigimos hacia una mayor o menor armonización en el ámbito de la reagrupación familiar?

La respuesta a la primera pregunta es más bien negativa, al menos en lo que respecta a la reagrupación familiar de los nacionales de terceros países. Tomando como ejemplo la definición de familia que se ha adoptado en los tres Estados miembros del presente estudio, se puede entender fácilmente que las legislaciones difieren considerablemente. En España, el concepto de familia es bastante amplio e incluye hijos adultos que están a cargo del solicitante, así como los padres del reagrupante. En Grecia, el concepto de familia incluye sólo al cónyuge y a los hijos menores de edad. En Alemania, por un lado, los niños menores de 16 años tienen que cumplir las condiciones de integración con el fin de calificar como miembros de la familia mientras que, por otro lado, el artículo 36 de la Ley de Inmigración permite la reagrupación con miembros de la familia que no forman parte del "núcleo familiar" en absoluto. El bajo nivel de armonización se ha detectado también en otras cuestiones que han sido examinadas en el estudio comparativo de la presente tesis, tales como los requisitos para la reagrupación familiar, los derechos de los miembros de la familia y el acceso a una residencia independiente.

La situación es diferente en lo que respecta a los familiares de ciudadanos comunitarios. Aunque la naturaleza de la directiva 38/2004 es la misma que la aplicable a los nacionales de terceros países, el hecho de que imponga bastante altos mínimos estándares de protección ha dado lugar a un mayor nivel de armonización entre los Estados miembros. Esto es evidente en los tres Estados miembros del estudio. Los tres Estados miembros disponen de un sistema muy similar, al menos en lo que respecta a sus asuntos cruciales, en relación con los familiares de ciudadanos comunitarios en sus territorios. El concepto de familia, los requisitos para la reagrupación familiar, así como cuestiones de procedimiento presentan muchas similitudes en las legislaciones correspondientes. Esto se confirma en los regímenes de libre circulación de la UE en otros Estados miembros de la UE.

Por tanto, el bajo nivel de armonización entre las legislaciones de los Estados miembros de la UE que ha supuesto la directiva sobre reagrupación familiar no está relacionado con el hecho de que la directiva sea una directiva de armonización mínima. Creemos que permitir que los Estados miembros tengan la posibilidad de proporcionar una protección más amplia en caso de que así lo deseen es el enfoque correcto en cuestiones relacionadas con la inmigración. Directivas con fines de armonización completa impedirían a los Estados miembros establecer regímenes más favorables en cuanto a la migración familiar. La razón por la que la directiva sobre reagrupación familiar no consiguió armonizar las legislaciones en la UE, al menos a un cierto nivel, se deriva del contenido de la directiva y, en particular, de los bajos niveles de protección que requiere. En efecto, en algunos temas el nivel de protección es tan bajo que la mayoría de los Estados miembros prevén una protección más amplia creando, con toda probabilidad, 28 regímenes diferentes para la reagrupación familiar en la UE. Se habría alcanzado una mejor armonización mediante una directiva que hubiera establecido estándares considerablemente más altos de protección para el extranjero que desea ejercer el derecho de reagrupación, como confirma el ejemplo de la directiva 38/2004 utilizado anteriormente.

La observación anterior responde en gran parte a la segunda cuestión que se ha introducido en esta conclusión, es decir que la plena armonización no es posible ni necesariamente deseable tal como la legislación comunitaria está actualmente. Por el contrario, un nivel satisfactorio de armonización que garantice que los extranjeros gocen en todos los Estados miembros de un derecho a la reagrupación familiar, que sea efectivo y de acuerdo con los derechos humanos implicados, es tan deseable como posible a través de una directiva de armonización mínima de estándares más altos que la aplicable en este momento.

En cuanto al futuro de la armonización de las legislaciones de los Estados miembros de la UE, creemos que no es probable que la aproximación sugerida anteriormente sea adoptada por la UE en un futuro próximo. El hecho de que, como se analizará a continuación, varios Estados miembros han endurecido recientemente su legislación en materia de migración familiar hace temer que en una posible refundición futura de la directiva, los Estados miembros demanden unos niveles de protección más bajos en lugar de más altos, situación que puede resultar en una armonización aún menor en el ámbito de la migración familiar. Dicho esto, es probable que en los próximos años los Estados miembros puedan imponer más requisitos previos a la entrada que causarán aún más diferencias entre las legislaciones de los Estados miembros. Por un lado, algunos Estados miembros mantendrán las normas existentes para la reagrupación familiar, mientras que, por otro lado, los Estados miembros que decidan adoptar políticas migratorias restrictivas se basarán en los nuevos requisitos establecidos en la directiva con el fin de endurecer su legislación de migración familiar y controlar los flujos migratorios.

C) ¿Giro restrictivo en las políticas relacionadas con la migración familiar y en la jurisprudencia?

Con el fin de poder determinar si la legislación, así como la jurisprudencia, a nivel comunitario y nacional son propensos a hacer un giro restrictivo en el futuro, primero debemos examinar las reformas en las legislaciones relacionadas con la migración familiar que se han producido en los últimos años y establecer una conexión con la situación política y económica actual en Europa. Las reformas más significativas en los tres Estados miembros que se han incluido en esta tesis, así como a nivel comunitario, pueden resumirse de la siguiente manera.

En Alemania, la reagrupación familiar se vuelve más restrictiva en 2007. En ese año, se introducen un requisito de edad mínima y medidas de integración para los cónyuges y el requisito de recursos suficientes se extiende a los nacionales alemanes que desean reagrupar a sus familiares. Por otra parte, en 2011 el requisito de dos años de residencia para que el reagrupado pueda acceder a un derecho autónomo se amplía a tres años.

En Grecia, en 2005 el legislador transpone la directiva sobre reagrupación familiar por primera vez. La legislación se endurece notablemente en comparación con la Ley 2910/2001, que fue hasta entonces vigente. Una edad mínima de 18 años se introduce para el cónyuge que

solicita entrada. La exigencia de recursos suficientes se endureció mientras que el acceso al empleo se restringió durante los primeros 12 meses de residencia en el territorio griego en línea con la excepción que ofrece la directiva sobre reagrupación familiar. Por otra parte, en 2014 el legislador introdujo nuevos requisitos tales como que el reagrupante debe tener un permiso de residencia de validez de dos años, mientras que este mismo permiso de residencia tiene que dar acceso a un permiso de residencia permanente. No menos importante, el mismo año, el legislador griego introdujo condiciones de integración para los familiares que fueron hallados en situación irregular en Grecia antes de la presentación de la solicitud de reagrupación familiar.

En España, la legislación relativa a la reagrupación familiar de los nacionales de terceros países no se ha endurecido recientemente. Los cambios más significativos que se han producido en la ley de inmigración española se refieren a los ciudadanos comunitarios que residen en España y al acceso de los extranjeros a la asistencia sanitaria. En particular, como se ha señalado anteriormente, España y Estonia eran los únicos Estados miembros de la UE que no requerían a los ciudadanos comunitarios cumplir con los requisitos mencionados en el artículo 7 de la directiva 38/2004 y el derecho de residencia por más de tres meses fue otorgado simplemente sobre la base de la ciudadanía comunitaria. Esta situación ha cambiado recientemente en España y los ciudadanos de la UE están ahora obligados a acreditar que disponen de recursos suficientes y de un seguro médico para ellos y sus familiares con el fin de disfrutar del derecho de residencia de más de tres meses en España. En cuanto al derecho a asistencia sanitaria, la ley ha sido recientemente modificada e inmigrantes irregulares o en paro ya no tienen acceso a tratamiento médico gratuito.

A nivel comunitario la directiva sobre reagrupación familiar no ha sido reformada desde que fue adoptada por primera vez en 2003. No obstante, en 2011, la Comisión Europea puso en marcha una consulta pública sobre la reunificación familiar con el fin de decidir sobre posibles acciones en relación con la directiva. La consulta fue resultado de las preocupaciones de la Comisión respecto al hecho que la directiva introducía estándares particularmente bajos y se podría necesitar una nueva propuesta. No obstante, en lugar de iniciar el procedimiento para una nueva directiva sobre la reagrupación familiar, la Comisión decidió adoptar algunas guías sobre la aplicación de la directiva sobre reagrupación familiar existente. Como se mencionó en el capítulo correspondiente, las guías interpretan la directiva en una manera favorable para el nacional de un tercer país. Dicho esto, la legislación a nivel comunitario no

parece seguir, a primera vista, el giro restrictivo encontrado en las legislaciones nacionales. No obstante, creemos que la Comisión decidió publicar las guías en vez de hacer una nueva propuesta de directiva por temor a que el Consejo impulsara estándares aún más bajos que los ofrecidos por la directiva actual sobre reagrupación familiar. En este sentido, creemos que la cuestión de la migración familiar sigue siendo muy controvertida a nivel de la legislación comunitaria.

Teniendo en cuenta que las sentencias adoptadas por el TJUE sobre la directiva sobre reagrupación familiar varían considerablemente, no estamos por el momento en condiciones de concluir si existe o no un giro restrictivo real en la jurisprudencia. De hecho, la controvertida sentencia en *Parlamento c. Consejo* (citado anteriormente) fue seguida de una sentencia particularmente favorable hacia el inmigrante en *Chakroun* (citado anteriormente), las sentencias reacias en *Noorzia* y *Dogan* (ambos citadas anteriormente) y, recientemente, la más favorable, aunque moderada, sentencia en *K. y A.* (citada anteriormente). Lo mismo es cierto con respecto a las sentencias del TJUE sobre la libre circulación de los ciudadanos de la UE y sus familiares, con la protección de los sistemas de seguridad social del Estado miembro de acogida convertidos en una prioridad para el Tribunal de Luxemburgo, como recientemente se puso de manifiesto en *Dano* (citado anteriormente).

Tomando en cuenta todo lo anterior, creemos que con toda probabilidad, varios Estados miembros continuarán adoptando reglas de migración familiar más restrictivas, ya sea mediante la introducción de requisitos previos a la entrada que ya están permitidos por la directiva actual o forzando políticas aún más restrictivas a nivel de la UE. Sus decisiones están influenciadas por la crisis económica y las altas tasas de desempleo, así como por el aumento de los partidos de extrema derecha en Europa. Además, es probable que las políticas más restrictivas sean aplicadas en el campo de derecho de los refugiados a raíz de la enorme crisis humanitaria en Siria y el hecho de que el centro del debate pronto pasará de los problemas de distribución y recepción a las cuestiones de reunificación familiar, dado que una vez instalados, varios de los refugiados solicitarán la reagrupación familiar. En cuanto al TJUE, creemos que mientras que en un futuro próximo tratará de evitar tensiones innecesarias y la confrontación con los Estados miembros en materia de migración familiar, es inevitable que en algún momento tenga que tomar una posición sobre si abordará el tema desde una perspectiva de derechos fundamentales o por el contrario pondrá en un segundo plano los importantes cambios que el Tratado de Lisboa trajo a la esfera de los derechos fundamentales.

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Συμβούλιο της Επικρατείας 1679/2001- Judgment of the Supreme Administrative Court 1679/2001

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Συμβούλιο της Επικρατείας 3045/2002 - Judgment of the Supreme Administrative Court 3045/2002

Συμβούλιο της Επικρατείας 1906/2003- Judgment of the Supreme Administrative Court 1906/2003

Συμβούλιο της Επικρατείας 22/2009- Judgment of the Supreme Administrative Court 22/2009

Συμβούλιο της Επικρατείας 460/2013- Judgment of the Supreme Administrative Court 460/2013

Τριμελές Διοικητικό Πρωτοδικείο Αθηνών 9471/2006- Judgment of the Three-Member Regional Administrative Court of Athens 9471/2006

Τριμελές Διοικητικό Πρωτοδικείο Αθηνών 6318/2007- Judgment of the Three-Member Regional Administrative Court of Athens 6318/2007

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GERMAN COURTS

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Bundesverfassungsgericht Urteil vom 3. April 1990- Judgment of the Federal Constitutional Court of 3 April 1990

Bundesverfassungsgericht Urteil vom 17. Juli 2002- Judgment of the Federal Constitutional Court of 17 July 2002

Bundesverfassungsgericht Urteil vom 11. November 2004- Judgment of the Federal Constitutional Court of 11 November 2004

Bundesverfassungsgericht Urteil vom 25. März 2011- Judgment of the Federal Constitutional Court of 25 March 2011

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Bundesverwaltungsgericht Urteil vom 30. März 2010- Judgment of the Federal Administrative Court of 30 March 2010

Oberverwaltungsgericht Berlin-Brandenburg Urteil vom 28. April 2009- Judgment of the Higher Administrative Court of Berlin-Brandenburg of 28 April 2009

LIST OF LEGISLATION (in original language):

INTERNATIONAL HUMAN RIGHTS CONVENTIONS

African Charter on Human and Peoples’ Rights

American Convention on Human Rights

Convention on the Rights of the Child

European Convention on Human Rights

European Social Charter

Geneva Convention

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Universal Declaration of Human Rights

EU LEGAL INSTRUMENTS

Lisbon Treaty: Treaty on the European Union, Treaty on the functioning of the European Union

European Charter on Fundamental Rights

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Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Decision No. 1/80 of the Association Council of 19 September 1980 on the development of the association

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

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Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service

Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research

Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification published on 8 October 2008, COM(2008) 610 final

Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States published on 10 December 2008, COM(2008) 840 final

Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02

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

Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment

Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States published on 2 July 2009, COM(2009) 313 final

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Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection

Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC) published on 15 November 2011, COM(2011) 735 final

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union

Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service published on 28 September 2011, COM(2011) 587 final

Report from the Commission to the Council and the European Parliament on the application of Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research published on 22 December 2011, COM(2011) 901 final

Opinion 2/13 of the Court of Justice of the EU of 18 December 2014

Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights published on 10 June 2013, 47+1(2013) 008 rev2

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection

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Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Free movement of EU citizens and their families: Five actions to make a difference published on 25 November 2013, COM(2013) 837 final

Communication from the Commission to the Council and the European Parliament on EU Return Policy published on 28 March 2014, COM(2014) 199 final

Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification published on 3 April 2014, COM(2014) 210 final

Commission Staff Working Document Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens published on 26 September 2014, SWD(2014) 284 final

Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment published on 22 May 2014, COM(2014) 287 final

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State published on 26 June 2014, COM (2014) 382 final

Communication from the Commission to the European Parliament and the Council. Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the

context of EU law on free movement of EU citizens published on 26 September 2014, COM(2014) 604 final

Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary published on 9 September 2015, COM(2015) 451 final

SPANISH LEGISLATION

Constitución Española

Código Civil Español

Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social

Ley Orgánica 8/2000, de 22 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social

Ley Orgánica 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros

Ley Orgánica 14/2003, de 20 de noviembre, de Reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social

Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social

Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura

Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo

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Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social

Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria

Real Decreto 1161/2009, de 10 de julio, por el que se modifica el Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo

Ley Orgánica 10/2011, de 27 de julio, de modificación de los artículos 31 bis y 59 bis de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social

Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009

Real Decreto 1710/2011, de 18 de noviembre, por el que se modifica el Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo

Ley 2/2012, de 29 de junio, de Presupuestos Generales del Estado para el año 2012

Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones

Ley 17/2012, de 27 de diciembre, de Presupuestos Generales del Estado para el año 2013

Real Decreto 1192/2012, de 3 de agosto, por el que se regula la condición de asegurado y de beneficiario a efectos de la asistencia sanitaria en España, con cargo a fondos públicos, a través del Sistema Nacional de Salud

Ley Orgánica 4/2013, de 28 de junio, de reforma del Consejo General del Poder Judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial

Ley 22/2013, de 23 de diciembre, de Presupuestos Generales del Estado para el año 2014

Real Decreto 844/2013, de 31 de octubre, por el que se modifica el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, aprobado por el Real Decreto 557/2011, de 20 de abril

Real Decreto 162/2014, de 14 de marzo, por el que se aprueba el reglamento de funcionamiento y régimen interior de los centros de internamiento de extranjeros

Real Decreto 987/2015, de 30 de octubre, por el que se modifica el Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo

Instrucción DGI/SGRJ/10/2008, sobre autorizaciones de residencia temporal por circunstancias excepcionales cuando se trate de hijos de padre o madre que hubieran sido originariamente españoles.

Instrucción DGI/SGRJ/03/2010, sobre aplicación de la sentencia del Tribunal Supremo, de 1 de junio de 2010, relativa a la anulación de varios apartados del Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el acuerdo sobre el Espacio Económico Europeo

Instrucción DGI/SGRJ/03/2011, sobre la aplicación del Reglamento de la LO 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, en materia de informe de arraigo

Instrucción DGI/SGRJ/04/2011, sobre aplicación del Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, en materia de acreditación de la disposición de vivienda adecuada en procedimientos sobre residencia por reagrupación familiar

Real Decreto 162/2014, de 14 de marzo, por el que se aprueba el reglamento de funcionamiento y régimen interior de los centros de internamiento de extranjeros

GREEK LEGISLATION

Σύνταγμα της Ελλάδας

ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ ΥΠ’ ΑΡΙΘΜ. 131/2006 Εναρμόνιση της ελληνικής νομοθεσίας με την Οδηγία 2003/86/ΕΚ σχετικά με το δικαίωμα οικογενειακής επανένωσης (ΦΕΚ Α’ 143/13.7.2006)

ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ ΥΠ’ ΑΡΙΘ. 106/2007 Ελεύθερη κυκλοφορία και διαμονή στην ελληνική επικράτεια των πολιτών της Ευρωπαϊκής Ένωσης και των μελών των οικογενειών τους (ΦΕΚ Α’ 135/21.6.2007)

ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ 220/2007 Προσαρμογή της Ελληνικής Νομοθεσίας προς τις διατάξεις της Οδηγίας 2003/9/ΕΚ του Συμβουλίου της 27ης Ιανουαρίου 2003, σχετικά με τις ελάχιστες απαιτήσεις για την υποδοχή των αιτούντων άσυλο στα κράτη μέλη (ΦΕΚ Α’ 251/13.11.07)

ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ ΥΠ’ ΑΡΙΘΜ. 167/2008 Συμπλήρωση π.δ. 131/2006 Εναρμόνιση της ελληνικής νομοθεσίας με την Οδηγία 2003/86/ΕΚ του Συμβουλίου, σχετικά με το δικαίωμα οικογενειακής επανένωσης (ΦΕΚ Α’ 223/4.11.2008)

ΝΟΜΟΣ ΥΠ’ ΑΡΙΘ. 3719/2008 Μεταρρυθμίσεις για την οικογένεια, το παιδί, την κοινωνία και άλλες διατάξεις (ΦΕΚ Α’ 241/26.11.2008)

ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ ΥΠ’ ΑΡΙΘΜ. 114/2010 Καθιέρωση ενιαίας διαδικασίας αναγνώρισης σε αλλοδαπούς και ανιθαγενείς του καθεστώτος του πρόσφυγα ή δικαιούχου επικουρικής προστασίας σε συμμόρφωση προς την Οδηγία 2005/85/ΕΚ του Συμβουλίου «σχετικά με τις ελάχιστες προδιαγραφές για τις διαδικασίες με τις οποίες τα κράτη μέλη χορηγούν και ανακαλούν το καθεστώς του πρόσφυγα» (ΦΕΚ Α’ 195/22.11.2010)

ΝΟΜΟΣ ΥΠ’ ΑΡΙΘ. 3838/2010 Σύγχρονες διατάξεις για την Ελληνική Ιθαγένεια και την πολιτική συμμετοχή ομογενών και νομίμως διαμενόντων μεταναστών και άλλες ρυθμίσεις (ΦΕΚ Α’ 49/24.03.2010)

ΝΟΜΟΣ ΥΠ’ ΑΡΙΘ. 3907/2011 Ίδρυση Υπηρεσίας Ασύλου και Υπηρεσίας Πρώτης Υποδοχής, προσαρμογή της ελληνικής νομοθεσίας προς τις διατάξεις της Οδηγίας

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2008/115/EK «σχετικά με τους κοινούς κανόνες και διαδικασίες στα κράτη-μέλη για την επιστροφή των παρανόμως διαμενόντων υπηκόων τρίτων χωρών» και λοιπές διατάξεις (ΦΕΚ Α’ 7/26.01.2011)

ΝΟΜΟΣ ΥΠ’ ΑΡΙΘ. 4071/2012 Ρυθμίσεις για την τοπική ανάπτυξη, την αυτοδιοίκηση και την αποκεντρωμένη διοίκηση Ενσωμάτωση Οδηγίας 2009/50/EK

ΠΡΟΕΔΡΙΚΟ ΔΙΑΤΑΓΜΑ ΥΠ’ ΑΡΙΘΜ. 141/2013 Προσαρμογή της ελληνικής νομοθεσίας προς τις διατάξεις της Οδηγίας 2011/95/ΕΕ του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 13ης Δεκεμβρίου 2011 (L 337) σχετικά με τις απαιτήσεις για την αναγνώριση και το καθεστώς των αλλοδαπών ή των ανιθαγενών ως δικαιούχων διεθνούς προστασίας, για ένα ενιαίο καθεστώς για τους πρόσφυγες ή για τα άτομα που δικαιούνται επικουρική προστασία και για το περιεχόμενο της παρεχόμενης προστασίας (ΦΕΚ Α’ 226/21.10.2013)

ΝΟΜΟΣ ΥΠ’ ΑΡΙΘ. 4251/2014 Κώδικας Μετανάστευσης και Κοινωνικής Ένταξης και λοιπές διατάξεις (ΦΕΚ Α’ 80/01.04.2014)

ΝΟΜΟΣ ΥΠ’ ΑΡΙΘ. 4332/2015 Τροποποίηση διατάξεων Κώδικα Ελληνικής Ιθαγένειας

ΝΟΜΟΣ ΥΠ’ ΑΡΙΘ. 4356/2015 Σύμφωνο συμβίωσης, άσκηση δικαιωμάτων, ποινικές και άλλες διατάξεις

Κοινή Υπουργική Απόφαση 23443/2011 Καθορισμός του τύπου άδειας διαμονής που χορηγείται σε υπηκόους τρίτων χωρών, συντρόφους πολίτη της Ε. Ε. ή Έλληνα, με τον οποίο διατηρούν σταθερή σχέση προσηκόντως αποδεδειγμένη (ΦΕΚ Β’ 2225/4.10.2011)

Υπουργική Απόφαση 58211/2014 Ορισμός των κριτηρίων ένταξης που απαιτούνται κατά την εξέταση των αιτημάτων οικογενειακής επανένωσης (ΦΕΚ Β’ 3119/20.11.2014)

Εγκύκλιος Υπουργείου Εσωτερικών 4174/2008 σχετικά με την εφαρμογή των διατάξεων του ΠΔ 106/2007

Οδηγίες Υπουργείου Εσωτερικών 41301/2014 για την εφαρμογή των διατάξεων του ν. 4251/2014

GERMAN LEGISLATION

Grundgesetz, GG

Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz, Residence Act)

Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Freizügigkeitsgesetz/EU, FreizügG/EU)

Staatsangehörigkeitsgesetz, StAG

Gesetz zur Neuregelung des Asylverfahrens (Asylverfahrensgesetz, AsylVfG)

Asylbewerberleistungsgesetz, AsylbLG

Gesetz über die Eingetragene Lebenspartnerschaft (LPartG)

Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz

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ANNEX I

	Total	Family		Education		Employment		Other	
	#	#	(%)	#	(%)	#	(%)	#	(%)
EU-28⁸	2 305 758	680 025	29.5	476 817	20.7	572 414	24.8	576 502	25.0
Belgium	43 823	23 114	52.7	6 286	14.3	4 768	10.9	9 655	22.0
Bulgaria	8 795	2 591	29.5	911	10.4	304	3.5	4 989	56.7
Czech Republic	35 458	10 687	30.1	6 030	17.0	11 083	31.3	7 658	21.6
Denmark	35 886	10 339	28.8	8 101	22.6	10 954	30.5	6 492	18.1
Germany	237 627	91 661	38.6	49 406	20.8	29 275	12.3	67 285	28.3
Estonia	3 222	1 263	39.2	777	24.1	882	27.4	300	9.3
Ireland	36 728	2 526	6.9	23 730	64.6	5 139	14.0	5 333	14.5
Greece	22 451	12 647	56.3	835	3.7	2 190	9.8	6 779	30.2
Spain	188 573	100 841	53.5	29 438	15.6	42 379	22.5	15 915	8.4
France	218 267	92 093	42.2	65 403	30.0	19 118	8.8	41 653	19.1
Croatia	3 334	1 928	57.8	418	12.5	609	18.3	379	11.4
Italy	204 335	99 051	48.5	24 373	11.9	53 327	26.1	27 584	13.5
Cyprus	13 841	2 111	15.3	1 444	10.4	7 989	57.7	2 297	16.6
Latvia	9 857	4 903	49.7	1 050	10.7	971	9.9	2 933	29.8
Lithuania	7 252	1 473	20.3	666	9.2	4 800	66.2	313	4.3
Luxembourg	4 289	2 470	57.6	456	10.6	965	22.5	398	9.3
Hungary	21 188	6 736	31.8	5 168	24.4	3 733	17.6	5 551	26.2
Malta	9 895	2 077	21.0	2 924	29.6	2 044	20.7	2 850	28.8
Netherlands	69 569	22 115	31.8	12 746	18.3	11 780	16.9	22 928	33.0
Austria	23 186	13 394	57.8	6 350	27.4	3 442	14.8	:	:
Poland	355 418	1 188	0.3	29 825	8.4	206 176	58.0	118 229	33.3
Portugal	29 764	13 846	46.5	3 407	11.4	6 409	21.5	6 102	20.5
Romania	10 294	3 331	32.4	3 535	34.3	1 803	17.5	1 625	15.8
Slovenia	9 891	5 099	51.6	500	5.1	4 183	42.3	109	1.1
Slovakia	5 510	1 735	31.5	1 082	19.6	1 741	31.6	952	17.3
Finland	21 552	8 043	37.3	5 528	25.6	4 786	22.2	3 195	14.8
Sweden	107 947	46 262	42.9	9 194	8.5	14 857	13.8	37 634	34.9
United Kingdom	567 806	96 501	17.0	177 234	31.2	116 707	20.6	177 364	31.2
Iceland	:	:	:	:	:	:	:	:	:
Liechtenstein	709	488	68.8	35	4.9	101	14.2	85	12.0
Norway	25 902	9 093	35.1	4 192	16.2	7 830	30.2	4 787	18.5
Switzerland	43 252	18 526	42.8	8 767	20.3	12 776	29.5	3 183	7.4

: not available

Table 1: Total number of first residence permits issued in the EU, EEA and Switzerland by reason, in 2014 (source <http://ec.europa.eu/eurostat>)

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ANNEX II

geo	time	2008	2009	2010	2011	2012	2013	2014
EU (28 countries)		4.208.149	4.810.247	5.733.979	5.708.397	6.460.944	7.112.380	6.845.306

Table 2: All valid permits by reason on 31 December of each year (family reasons) (source <http://ec.europa.eu/eurostat>)

geo	time	2008	2009	2010	2011	2012	2013	2014
EU (28 countries)		3,160,465	3,621,053	3,043,055	3,347,973	3,649,431	3,117,044	2,917,378

Table 3: All valid permits by reason on 31 December of each year (remunerated activities reasons) (source <http://ec.europa.eu/eurostat>)