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DIRECTIVE ON FAMILY REUNIFICATION: COUNCIL DIRECTIVE 2003/86/EC of 22 September 2003 on the right to family reunification¹

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¹ Krieken, P. 2004. The Consolidated Asylum and Migration Acquis. TMC Asser Press: The Hague.

1. INTRODUCTION

Legal Instruments

1.1 International Legal Instruments

- Convention of the Rights of the Child (CRC):
 - Art 10(1): *In accordance with the obligations of States Parties under article 9, par applications by a child or his or her parents to leave or enter a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner (ibid)...*
 - Art 9(1): *a child shall not be separated from h/her parent against her will*
 - Art 18(1): *[B]oth parents have common responsibilities for the upbringing and developments of the child...*
 - Art 16
 - Art 3
- The Universal Declaration of Human Rights (UNDHR) :
 - Art 12,
 - Art 16(1)
 - Art 16(3)
- International Covenant on Civil and Political Rights (ICCPR):
 - Art 17
 - Art 23(1)
 - Art 23 (2)
- International Covenant on Economic, Social and Cultural Rights (ICESCR):
 - Art 10(1): *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 case and education of dependent children...*
- 1990 International Convention on the Protection of the Rights of All Migrant Workers and their families (Migrant Workers Convention): Art 14,
 - Art 44(1): *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.'*
- 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):
 - Art 16(1): State Parties **shall**...ensure...(d) The same rights and responsibilities as parents irrespective of their marital status, in matters relating to children ...
 - Art 5(b): *States and Parties shall take all appropriate measures ...to ensure...the recognition of common responsibility of men and women in the upbringing and development of their children...*

1.2 Regional Legal Instruments

- **European Social Charter of 1966:**

Art 16: The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.

1950 European Convention on Human Rights and Fundamental Freedoms (ECHR50)/(EMK):

Art 8: *Provides the right to respect for everyone's private and family life*

Art 8(1): *Everyone has the right to respect for his family life, his home and his correspondence.*

Art 8(2): *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety, or economic well-being of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Art 12:

2. THE FAMILY REUNIFICATION DIRECTIVE

2.1 The family

2.1.1 Extended family

Member states may...authorize entry and residence to [Art 4(2)]:

- (a) First degree relatives...direct ascending line of sponsor/spouse and where they are dependent on them and do not enjoy proper family support in country of origin.
- (b) The adult unmarried children of sponsor/spouse...objectively unable to provide for own needs on account of their states of health

2.1.2 Unmarried Partners

Member states may...authorize entry and residence to who are/have:

- Attestable, stable long term relationship, registered partnership [Art 4(3)]
- Documentary evidence of family relationship [Art 5(2)]
 - certified copies of family members travel documents
 - Interviews, other investigations necessary
 - Evidence of family relationship: common child, previous cohabitation, registration of the partnership, other types of reliable proof

2.1.3. Same Sex Partners

Member states that authorize family reunification to these persons do not encumber other member states for providing similar authorization

2.1.4 Polygamy

If one spouse is already living with sponsor, states **shall not** authorize reunification of further spouse [Art 4(4)(par 1)]

Minor children of further spouse may be limited from reunification [(Art 4(4)(par 2)]

2.2 Criteria for qualification

2.2.1 Age

Limits reunification of children over the age of 12 whose primary residence is not with sponsor

- In order to *reflect the children's capacity for integration at early ages*
- In order to *ensure that they acquire the necessary education and language skills in school* [Preamble, recital 12 & Art 4(1)(d)]

Those above the age of 15 are not eligible for reunification

- *(By way of derogation)* State may request that application is handed in before the age of 15. (Art 4(6)).
- If application is handed in after the age of 15, *member states which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification (ibid.).*

2.2.2 Residence

The directive applies too sponsors who holds a one year or more residence permit and has reasonable prospects for obtaining right to residence. (Art 3(1))

Sponsor to have stayed...for a period not exceeding 2 years, before having h/her family members join her (Art 8(par 1))

-Refugees are exempt from this article.

2.2.3. Procedural Time Limit

If application for family reunification isn't submitted within 3 months after granting refugee status, refugees may be required to meet material conditions criteria in Art 4(Art 12(1) (par 3)).

2.2.4 Material Conditions

Material Conditions Criteria

- Art 7(1): *Member state may require person who has submitted application to provide evidence that sponsor has:*
 - (a): *Accommodation regarded as normal for a comparable family in same region...meets the general health and safety standards...*
 - (b) *Sickness insurance...for sponsor...and members of family*

(c) *Stable and regular resources...without recourse to the social assistance system...*

- Application may be rejected/ residence withdrawn if sponsor must recourse to social assistance [art 16(1)(a)].
- Member State shall take into account the contribution of the family members to the household income.
- Refugees are exempt from material criteria [Art 12(1)] except if application is handed in later than three months after reception of residence

2.2.5 Health

- Adult unmarried children of sponsor/spouse whom are objectively unable to provide for own needs on account of the health may be authorised entry/residence [Art 4(2)(B)]
- *Member states may reject...withdraw or refuse to renew...on grounds of public policy, public security or public health* [Art 6(1),(2)].
- May not withhold renewal and may not order removal due to illness disability suffered after the issuance of residence permit [Art 6(3)]

2.3 Criteria for Disqualification

- On grounds of public policy, public security or public health [Art 6(1),(2)].
- Sponsor has not sufficient resources without recourse to social assistance
- Sponsor and his or her family members do not/ no longer live in a real marital or family relationship
- Sponsor or the unmarried partner is married or in a stable or long terms relationship with another person. [Art 16(1)]
- False or Misleading information/documentation
- Pro forma relationships
- Sponsor's residence comes to an end, and family member does not have autonomous residence

2.4 Entitlement

- Art 14(1): *Sponsor's family members shall be entitled, in the same way as the sponsor, access to education, employment, self-employments, vocational guidance, initial and further training and re-training.*
- Art 14(2): *Member States may decide according to national law the conditions under which family members shall exercise employment/self-employment...*
- *Member States may examine the situation of their labour market before authorising family members to exercise employed/self-employed activity (Contradictory to Art 14(1)).*
- Art 14(3): *Member States may restrict access to employment/self-employment activity by first degree relatives in direct ascending line/adult unmarried children to whom Article 4(2) applies (Contradictory to Art 14(1)).*

2.5 Refugees

- Refugees are provided *more favourable conditions* due to the fact that flight from persecution hinders refugees from maintaining the family unit (Preamble, recital 8)
- Expanded understanding of the family unit, based on dependency [Art 10(2)]
- Application may be confined to relationships that predate entry into State [Art 9(2)]
- Waiting period of three years also applies to refugees seeking family reunification applicants, as those who have to come forth with a secondary need for protection often bear secondary probabilities for being granted residence due to protective needs.

Minor Children:

- *Member States shall authorize entry and residence to minor children including adopted children of sponsor where the sponsor has custody and children are dependent on him or her.*
- *May reunify when custody is shared provided other party sharing custody has given h/her agreement) [Art 4(1)(c)]*

Submissions of Documents:

- *Art 11(2): If refugee can't provide documentary, Member States shall take into account other documents, to be assessed in accordance with national law. Cannot reject application solely based on fact that documentary evidence is lacking.*
- *UNHCR commends the fact that the FRD adopts flexible criteria as regards proof of family relationships for refugees, allowing alternative means of proof where the necessary documentary evidence is not available (UNHCR, comments on proposal on FRD:1)*
- Refugees are exempt from material criteria Art 12(1) except if application is handed in later than three months after reception of residence

Unaccompanied Refugee Minors:

- **shall** authorise entry and residence for family reunification of first degree relatives **without** applying the conditions laid down in Art 4(2)(a) [Art 10(3)(a)]
- **Elimination of hierarchal importance to family unit:** Art 10(3)(b): *may authorise...family reunification for legal guardian/ any other member of family, where refugees have no relatives in direct ascending line or such relatives cannot be traced.*

2.6 Subsidiary/ Temporary Protection

- The Directive does not apply for sponsors who have temporary of subsidiary protection [Art 3(2)]
- Directive does not affect state's possibilities to adopt more favourable positions [Art 3(5)].

2.7 Women's Rights

- Grant status independent from sponsor especially in cases of [Preamble, recital 15] :
 - break up of marriage/partnership
 - Access to education, employment and vocational training
- Breakdown of marriage: may grant residence permit [Art 15(1)(par 2)]
- Ensure better integration and prevent forced marriages:

- **May** require sponsor and spouse to be of minimum age, and at maximum age of 21 years, before joining each other. [Art 4(5)]
- Art 16(1)(a): *Member States **may** reject an application for entry and residence for the purpose of family reunification... or withdraw/refuse to renew family members residence permit, in the following circumstances:*
- (a): *...where sponsor has not sufficient resources without recourse to social assistance...Member State **shall** take into account the contribution of the family members to the household income.*
- (b) *where the sponsor and his or her family members do not/ 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 in a stable or long terms relationship with another person.*

3. EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

According to Lambert, who provided a study of case law surrounding the application of ECGH art 8 in the ECtHR:

- Court recognizes application of article ECHR50 8(1)(2)
Especially in cases dealing with permanent removal
- Court balances right of individuals to private and family life versus the interests of the community.

3.1 Interference Requirements (Lambert):

- How does one prove to the ECHR that the state has interfered with family/private life by refusing an applicant entry into the territory?
 1. There must be effective/strong family life as defined by the court.
 2. The state in which the proceedings have been brought must be the author of the violation.
 3. Obstacles must exist against carrying continuing a **family life elsewhere**, including the non-citizens country of origin (Lambert, 438).

3.2 Assessment possibility of family life elsewhere:

- Elsewhere is usually the country of origin, however for asylum seekers, the possibility of leading a normal life in the country of origin cannot be presumed (Jastram & Newland, 580).
- Courts is restrictive with regards to family creation; never lived together/ lived apart for a very long time, rather than continuation of already existing family life (see Abdulaziz, Cabales and Balkandali vs. UK).
- Court systematically upholds that article 8 can't be applied to coerce the state to respect the choice by the married couple of the country of their matrimonial residence and to authorise family reunion in its territory (Lambert, 438).

3.3. Assessment of interference at point of entry (seeking entry into territory):

- Restrictive interpretation of Art 8(1) with reference to possibility of family life elsewhere
- Balance is bound to come out in favour of the state because it will be difficult for the individual to show close ties to state and weak ties to country of origin (Lambert: 440), which will be linked to supporting continuation of family life, rather than creation.
- At point of entry, assessment of interference is made early with regards to art 8(1), while later with regards to 8(2) with cases of removal.

3.4 Assessment of Interference at Point of removal (seeking not to be removed)

- More liberal: decision for removal may constitute interference if the 3 interference requirements are met.
- With regards to citizens seeking not to be removed, in contrast to cases seeking entry, courts will evaluate balance between individual rights and community rights only after establishing the existence of a family, a lack of respect for family life, and if this lack of respect or interference is necessary in a democratic society in light of art 8(2) (See Belgium, Beldjoudi vs. France, Nasri vs. France and Boughanemi vs. France).
- More liberal approach towards 'integrated non-citizens,' including refugees and persons granted residence on the basis of art 3, particularly in the case of removal. (Lambert).
- Once ECtHR has shown that family/private life exists, deportation, expulsion or exclusion are seen as interference.

4. DUBLIN REGULATION

4.1 Family Unit

Family members' means family already existed in country of origin [Art 2(i)]:

- spouse of asylum seeker/his or her unmarried partner in stable relationship [Art 2(i)(i)]
- minor children of couples referred to in (i) are only eligible if they are unmarried and dependent. This is regardless of whether they were born in or out of wedlock or adopted under the national law [Art 2(i)(ii)].
- father, mother or guardian when applicant/refugee is a minor or unmarried [Art 2(i)(iii)]
- State with largest number of family members are responsible for examining application [Art 14(a)]
- If 14(a) fails, responsibility lies with member state that has oldest family member [Art 14(b)].

4.1 Responsibility Criteria

- Responsible to upholding the principle of non-refoulement: Main principle in assessing responsibility criteria has been that of non-refoulement, but 2 categories have been added, of which protecting the family unit has been one of those criteria's.
- States are allowed to derogate from their **responsibility criteria** so that family members can be brought together *where this is necessary on humanitarian grounds* (Preamble, recital 7).

4.2 Humanitarian Clause

- Humanitarian Clause (Council Regulation)
State, may bring together family members and dependent relatives, ***on humanitarian grounds based in particular on family and cultural considerations.*** [Art 15(1)].
- Humanitarian grounds in terms of family considerations are assessed based on
 1. Health (dependency)
 2. Unaccompanied Minor
- Council and Commission Regulation lack mention of what is relevant under 'cultural consideration.'

4.3 Health:

- Provided that family ties existed in country of origin, in cases where person is dependent on the assistance of other due to pregnancy, newborn child, serious illness, severe handicap or old age, Member States **shall** keep/bring together asylum seeker with relative in another member state [Council Regulation, Art 15(2)]
- shall apply regardless of whether or not the asylum seeker is dependent on the assistance of a relative in another member state, or if the relative in another member state is dependent on the assistance of the asylum seeker [Commission Regulation, Art 11(1)].

4.4 Assessing dependency:

- *Objective criteria, ie medical certificates [Commission Regulation, Art 11(2)]. convincing information supplied by persons concerned (ibid.)*

4.5 Necessity and appropriateness criteria

The following points shall be taken into account when assessing the necessity and appropriateness of bringing together the persons concerned [Commission Regulation, Art 11(3)]:

- *Family situation which existed in family of origin*
- *The circumstances in which the person concerned were separated*
- *The status of ...asylum procedures...on aliens...in Member States: once again left under the discretion of the Member State*
- *States shall be subject to the assurance that the asylum seeker/relative will actually provide the assistance needed [CR, Art 11(4)].*
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5. COMMENTS AND CRITIQUE

5.1 Objectivity and dependency criteria's

The correlation between dependency (either based on economy or health) and family reunification is one that appears repeatedly throughout the criteria's laid down by the family reunification directive. The exploration of objectivity and dependency criteria's provide a vantage point from which to explore the family reunification directive in light of international human rights.

Art 4(2)(a) allows reunification for first degree relatives where they are dependent on the sponsor, while Art 4(2)(b) allows entry and residence of adult unmarried children of sponsor whom are *objectively* unable to provide for their own needs on account of their state of health.

Criteria for dependency and objectivity are also connected to that of the health of the applicant. Objective criteria proving an individuals health needs may prove challenging for family members whom are part of refugee diasporas. Such objective criteria's may also pose challenges for individuals whom originate from countries with dilapidated or non-existent bureaucracies which are unable to account for its citizens via documentation.

Art 4(3)'s requires that unmarried partners provide proof of "stable, attestable long term relationship," in order to verify the legitimacy of their relationship. Such attestation also requires documentation such as registration of partnership. In addition to the above mention difficulties surrounding documentation, the directives criteria's reflect a western understanding of the concept of partnership. The directive fails to take into consideration the fact that most individuals seeking family reunification in Europe are to some degree connected to refugee Diasporas, a phenomenon which is inevitably concentrated in non-western countries. Basing reunification on a limited western understanding of partnership not inevitably unfairly excludes certain groups/individuals from their right to reunify with their family.

According to the directive, the limitations surrounding family reunification of spouses and minor children of polygamous relationships seems to be at odds with the underpinning notion that family reunification should be applied *in proper compliance... particularly with respect for the rights of women and children* (Preamble, Recital 11). Prohibiting women and children whom originate from patriarchal cultures to be reunified with the head of family may leave them in an inhumane situation. One could argue that the consequences of this prohibition could even amount to Article 3 breaches of the European Convention of Human Rights.

The family reunification allows for the refusal to reunify of children above the age of 12, whose primary residence is not with the sponsor. This limitation seems to be grounded in the child's own integrative needs surrounding for example acquisition of education and language skills. This limitation fails to incorporate an understanding of minor children's limited possibilities for education in most parts of the non-developed and developing world [Preamble, recital 12 & Art 4(1)(d)]. The fact that the Directive does not further define the "objective" criteria's Member States when age requirements on minor children also raises possible questions surrounding breach of the Convention of the Rights of the Child.

The directive applies to sponsors who *hold a one year or more residence permit and has reasonable prospects for obtaining right to residence*. (Art 3(1)). The explanatory memorandum attached to the directive states that the limitation is applied in order to exclude persons who stay temporarily within a territory (such as student and au pair). The UNHCR has criticized this article and has recommended that the requirement of ‘reasonable prospects of obtaining right to residence’ would not apply to refugees.

When analyzing both Art 3(1) and Art 8(par 1) together (see section 2.2.2), one sees that these articles provide negative consequences for beneficiaries of subsidiary protection or temporary residence. Given that beneficiaries of subsidiary protection are not eligible for family reunification, they often have to wait until they are provided permanent residence. In Norway for example, applications for permanent residence are permissible only after 3 years of continuous stay within the territory. The fact that the sponsor has to have lived **less than 2** years in the territory before becoming eligible for applying, while requiring that the sponsor has to have “reasonable prospects,” leaves it to the discretion of the state whether h/she is eligible for family reunification at all.

The directive penalizes refugees with a material condition criterion if they have not submitted applications for reunification within three months after being issued refugee status [Art 4(Art 12(1) (par 3)]. In the context of international human rights principles, individuals are seen as bearer of rights, while States are seen as safe-keepers of these rights. This article places the onus of rights knowledge on the applicant. It also explicitly disregards and penalizes the applicant for the realities surrounding refugee displacement, whereby family members are not always able to control the moment in which they are able to locate each other.

Criteria’s set out to fulfill material conditions² [Art 7(1)] may be analyzed in light of Article 14(2), in which Member State’s may decide whether/not to allow family members access into the labor market. Renewability of permits is based on the sponsor’s economy. The State’s possible limitation of family members ability to contribute to the sponsors economy, garners for negative consequences for prospects of renewability. Employment limitations also open for a debate from the perspective of women’s rights that is worth exploring.

It is commendable that the Directive incorporates a more expansive understanding of the family in conjunction with the refugee. This is seen in relation to criteria’s set surrounding submission of documents and exemption from material conditions criteria.

6. SOURCES

H. Lambert, “The European Courts of Human Rights and the Right of Refugees and other Persons in Need of Protection to Family Reunion” (1999) 11 International Journal of Refugee Law

UNHCR, Comments to the Commission Proposal for a Council Directive on the Right to Family Reunification (COM (1999) 638), 9 March 2000.

UNHCR, Comments on the Amended Proposal of the European Commission for a Council Directive on the Right to Family Reunification (COM (2002) 225 final, 2 May 2002), Geneva: 10 September 2000.

² In which refugees are exempt

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979, Chap VI.

UNHCR, Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007