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The Interpretation of Migration in the Family Reunification Jurisdiction of the European Court of the Human Rights

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Abstract. Family reunification or family reunion became a key form of migration towards Europe. Because there is no definite mention regarding the right to family reunification in the European Convention of Human Rights, the Court has the task to give guidelines in its judgements. The author argues that the Court's jurisprudence turned out to be very limited in its protection of migrants, and tried to conform the Member States' own migration policies with the right to respect for family life. The author highlights that the case law of family reunification developed with contradicting cases and this underlines the sensitive issue of migration in the immigration policy of the states.

Keywords: *family unity, family member, migration, children, European Convention on Human Rights, European Court of the Human Rights*

Introduction

Although the European Convention on Human Rights and its protocols have no provisions that express directly a right to family reunification, several articles constitute the ground for this right. If we look at article 8, it contains the protection to family life, namely the right to respect for private and family life, home and correspondence. The article also imposes negative and positive obligations to public authorities who either cannot interfere with the exercise of this right, or only when it is in accordance with the law and when necessary in a democratic society. Also, the article lists issues like the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms that shall be taken into consideration when a public authority makes steps to interfere with this right. I shall emphasise that the CJEU pointed out the essential object of this article, which is to protect the individual against arbitrary interference, where there

are positive obligations regarding an effective "respect" for family life though the notion's requirements will vary considerably from case to case.[1] Beside article 8, article 14 can be seen as another element when we try to define the right to family reunification as it prohibits 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 status. This is particularly relevant in terms of the different treatment between family unity conditions for beneficiaries of international protection and refugee. The third article that can be seen as the ground for the right to family reunification next to the above-mentioned two articles is article 25 as this article contains the provision about the right to bring individual claims to the Court and its decisions are binding on the states.

The documents and conventions born under the aegis of the Council of Europe and the judgements of the European Court of Human Rights offer directions regarding the application and interpretation of the Convention and the Protocols. Although the Council of Europe adopted several recommendations on family reunification, the soft law nature of the recommendation means these are non-binding.

Member states of the Council of Europe are obliged to respect the human rights of the Convention with regard to everyone, to ensure that all rights laid down in the Convention are respected and accessible on its territory but they have margin of appreciation to interpret and implement the Convention. That is to say although there are minimum boundaries within they have to approach family life but are also allowed to give more extensive rights than the ones set out in the convention. The provisions on family reunification are subject to the limitations imposed by the ECHR and Union law on national law restrictions on family reunification rights of international protection beneficiaries.[2]

The life situation of family reunification occurs when a family member joins another member of his/her family with the latter already living and working in

[1] See ECtHR, Marckx v Belgium, Application no 6833/74, Judgement of 13 June 1979, para 31.

[2] See Helene Lambert, "Family unity in migration law: The evolution of a more unified approach in Europe" in Vincetn Chetail and Celine Bauloz (eds.), *Research Handbook on International Law and Migration* (Cheltenham: Edward Elgar, 2014), 194-215; Anne Staver, *Family Reunification: A Rights for Forced Migrants?* (RSC Working Papers No.5) (Oxford: Oxford University Presss, 2008); James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: CUP, 2005) 533-560; Bernadette Rainey, Elizabeth Wicks and Claire Ovey, *The European Convention on Human Rights* (Oxford: OUP, 2014) 335-338.

another country habitually. But family reunification is often seen as the only option to guarantee respect for a refugee's right to family unity followed by separation caused by forced displacement, such as from persecution and war.[3]

According to the case-law, article 8 applies when a family member aims to join another member abroad, generally the breadwinner, with the aim of family reunification, or in case a member of the family is expelled or threatened with expulsion – often as a result of sanctions resulting from criminal proceedings – from the country where he/she and the family live.

In recent decades we could observe that a number of cases arose where the parties concerned have complained about a member state that efused the admission or residence, or expelled a person because the person wan not a national of the concerned state. Conventions concerning the status of migrants and migrants' families adopted under the frame of the Council of Europe apply to migrant nationals of States that are parties of these convention and but I shall point to out that there is no system of enforcement in cases of breach of obligations by parties. In the following we will analyse the elements of migration in the jurisdiction of the Court.

Existence of a family: the migration aspect

We can observe that the Court built up the notion of family life gradually. Article 8 presumes the existence of a family[4] and when married, family life normally involves cohabitation. This premise is strengthened by the existence of article 12 for it is scarcely conceivable that the right to found a family should not encompass the right to live together.[5] Though the cohabitation element is important but it is not an unconditional criterion[6]. Family life is rooted in real connections, not only in formal legal relationships. Family life exists in the case of relationships between married couples and non-married (stable) partners thus marriage is not a prerequisite to the

[3] UNHCR, *Family Reunification in Europe* (Brussels: UNHCR, 2015) 1.
[4] ECtHR, Marckx v Belgium, Application No. 6833/74, Judgement of 13 June 1979, para., para. 31.
[5] ECtHR, Abdulaziz, Cabales and Balkandali v UK, Application no 9214/80, 9473/81, 9474/81, Judgement of 28 May 1985, para. 62.
[6] ECtHR, Berrehab v the Netherlands, Application no 10730/84, Judgement of 21 June 1988, para. 21; Kroon and others v The Netherlands, Application no 18535/91, (27.10.1994).

enjoyment of family life, and an unmarried cohabiting couple may enjoy family life[7] and informal, religious marriages also fall under article 8. The ECHR institutions have, however, demonstrated a willingness, in more recent years at least, to construe these criteria more liberally to bring parents who have never married or even cohabited within the protective realm of article 8.[8]

The Abdulaziz, Cabales and Balkandali v the United Kingdom case[9], which was the first family reunification case, also strengthened that informal, religious marriages also fall under the scope of article 8. The Court has acknowledged that same-sex couples, even without cohabiting but in stable relationships enjoy family life together,[10] and this shows a more wider approach to its previous view that stated that the emotional and sexual relationship of a same-sex couple could not constitute "family life".[11] Instead, these couples have been given the lesser protection under "private life".[12]That is because the ECtHR established that sexual orientation is one of the grounds covered by Art. 14 ECHR,[13] which approach continued later on.[14]

Regarding refugees' spouses who married post-flight, the Court pointed out that refugees with post-flight spouses were similarly situated to migrant students

[7] ECtHR, Marckx v Belgium, Application no 6833/74, Judgement of 13 June 1979; ECtHR, Berrehab v the Netherlands, Application no 10730/84, Judgement of 21 June 1988; ECtHR, Keegan v Ireland, Application no 16969/90, Judgement of 26 May 1994; ECtHR, Kroonand others v The Netherlands, Application no 18535/91, Judgement of 27 October 1994; ECtHR, X, Y and Z v The United Kingdom, Application no 21830/93, Judgement of 22 April 1997; ECtHR, Al-Nashif v Bulgaria, Application No. 50963/99, 20 June 2002; ECtHR, Schalk and Kopf v Austria, Application no 30141/04, 24.05.2010.

[8] Helen Stalford, "Concepts of Family under EU law – Lessons from the ECHR", Int. J. of L., Pol. and the Fam. 16, (2002):417

[9] ECtHR, Abdulaziz, Cabales and Balkandali v UK, Application no 9214/80, 9473/81, 9474/81, Judgement of 28 May 1985, para. 63.

[10] ECtHR, Pajić v Croatia, Application No. 68453/13, Judgement of 23 February 2016 citing ECtHR, P.B. and J.S. v Austria, Application No. 18984/02, Judgement of 22 July 2010, paras. 27-30; ECtHR, Schalk and Kopf v Austria, Application No. 30141/04, 24 June 2010, paras. 91-94. See also ECtHR, Taddeucci v Italy, Application No. 51362/09, (30 June 2016, paras. 94-98

[11] ECtHR, X and Y v UK, Application no. 9369/81, 3.05.1983; ECtHR, S v UK, Application no. 11716/85, Judgement of 14 May 1986 and ECtHR, Mata Estevez v Spain, Application no 56501/00, Judgement of 10 May 2001.

[12] ECtHR, WJ and DP v UK, Application no 12513/86, Judgement of 13 July 1987; ECtHR, ZB v UK, Application no 16106/90, Judgement of 2 October 1990. See also ECtHR, C and LM v UK, Application no 14753/89, Judgement of 9.10.1989.

[13] ECtHR, Da Silva Mouta v Portugal, Application no 33290/96, 21.12.1999; ECtHR, Fretté v France, Application no 36515/97, 26.02.2002 and ECtHR, Karner v Austria, Application no 40016/98, Judgement of 24 July 2003.

[14] ECtHR, Schalk and Kopf v Austria Application no 30141/04, 24.06.2010.

and workers, who were entitled to family reunification irrespective of when the marriage was contracted.[15] The similarity was rooted in the fact that as students and workers, whose spouses were entitled to join them were usually granted a limited period of leave to remain in the United Kingdom, the Court considers that they too were in an analogous position to the applicants for the purpose of article 14 of the Convention. Key elements in the Strasbourg court's assessment of whether such a couple enjoys this protection are the stability and intention of the parties.[16]

Requirement of family life: the migration aspect

The case-law formed the principal factors of family life which consists of effective and strong links between the family members concerned and the host country, the actual existence of family life, and the impossibility to reunite the family elsewhere. This was furthermore detailed in cases with migration elements such as the extent to which family life would effectively be broken and the extent of the ties in the host Member State[17]. The immigration control (for example, a history of breaches of immigration law), or considerations of public order weighing in favour of exclusion from the host state were taken into consideration, too. In cases concerning children, the best interest of the child is of utmost importance. Also the intention or knowledge of the family members involved in family reunification is taken into consideration: whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious.[18] There is a change in the Court's direction that family life shall be taken into consideration before the principle of state sovereignty in case of significant

[15] ECtHR Hode and Abdi v the United Kingdom, Application No. 22341/09, Judgement of 6 February 2013

[16] See Helen Toner, Partnership Rights, Free Movement and EU Law (Oxford: Hart Publishing, 2004).

[17] Jeunesse, paras. 107-109 and 120.

[18] See Abdulaziz, Cabales and Balkandali v UK, Application no 9214/80, 9473/81, 9474/81, Judgement of 28 May 1985, para. 68; ECtHR, Mitchell v the United Kingdom (dec.), no.40447/98, 24 November 1998; ECtHR, Ajayi and Others v the United Kingdom (dec.), no. 27663/95, 22 June 1999; ECtHR, M. v the United Kingdom (dec.), no. 25087/06, 24 June 2008; ECtHR, Rodrigues da Silva and Hoogkamer v the Netherlands, cited above, para. 39; ECtHR, Arvelo Aponte v the Netherlands, cited above, paras. 57-58; ECtHR, Butt v Norway, cited above, para. 78 and ECtHR, Nunez v Norway, para. 70.

difficulties obstructing family life in the country of origin.[19] When migrants must demonstrate that family life cannot be enjoyed "elsewhere" in order to show that the refusal of family reunification will violate article 8 of the Convention, there is a difference between refugees and non-refugees. While earlier judgments set an extremely high standard for family reunification, requiring applicants to demonstrate that reunification was the only way to (re-)establish family life, the standard now is that applicants must show that reunion is the "most adequate" way to family life.[20]

According to the case-law, there is no guarantee for family reunification in a given country, but the Court guarantees in general the right to continue family life wherever this can be realised, and there is no general obligation to respect the immigrants' choice regarding the country of residence and to permit family reunion in its territory, as it depends on the particular circumstances of the persons involved as well as the general public interest[21], with the emphasis put on the circumstances.

Admission and residence

While article 8 was more or less successfully invoked by family members in line of expulsion, the Court does not appear to be generally lenient in matters relating to admission. In Abdulaziz the application of article 8 was a significant milestone. The Court's decision confirmed that the immigration rules of the states and their specific application need to be thoroughly examined, but stated that no general obligation arises from the article for states regarding the admission of a foreign spouse in the light of the free choice of family residence.

Therefore, there is no presumption that under article 8 the state should ensure the residence of the spouse or the family member in the territory of the state

[19] Philip Czeck, "A right to family reunification for persons granted international protection? The Strasbourg case-law, state sovereignty and EU harmonisation", 17 Friday Jun 2016. http://eumigrationlawblog.eu/a-right-to-family-reunification-for-persons-under-international-protection-the-strasbourg-case-law-state-sovereignty-and-eu-harmonisation-2/#comments

[20] The Council of Europe Commissioner for Human Rights, Realising the right to family reunification of refugees in Europe. (Council of Europe, June 2017), p. 21

[21] See ECtHR, Gül v Switzerland, Application no. 23218/94, Judgement of 19 February 1996; ECtHR Hode and Abdi v the United Kingdom, Application No. 22341/09, Judgement of 6 February 2013 and ECtHR Tuquabo-tekle v the Netherlands, Application no. no. 60665/00, Judgement of 1 March 2006.

concerned. The Convention does not in itself guarantee the right for individuals to reside and settle in the territory of another state. Nor does it provide a level of protection for family life which allows family members to choose freely which Member State they wish to live in.

The economic interests of the host state may be a legitimate consideration, both in defining the principles of the general immigration policy and in considering individual applications. The burden of proof is on the applicant to point out that family life cannot be reasonably expected to be continued in another country.[22] In Sen and Boultif, the Court's position appears to be somewhat relaxed regarding the entry and establishment of family members. In the Sen case, a 12-year-old child settled in the Netherlands when joining his family. Five years later, he married a Turkish citizen in Turkey and his started a family. The wife then moved in with her husband in the Netherlands, and their daughter was left in Turkey, raised by the wife's relatives. In 1990, already in the Netherlands, another child was born, and in 1992 they applied for their firstborn child to join them. Their application was rejected on the grounds that the family bond between the 12-year-old girl and her parents was broken. The parents explained with spousal disagreement the late date of their submission. However, a third child was born in 1994, before the rejection decision was made. The parents then lodged a complaint, alleging the violation of their right to family life under article 8. The ECtHR decision was based on the argument that it would be unreasonable to expect children born and raised in the Netherlands to move to Turkey and to continue there their family life and decided in favour of the family's further residence in the Netherlands. In the present case, the Court further emphasized that the obligation on member states under Article 8 is not only to refrain from expulsion but also to allow entry, even if this obligation is not accepted as a general rule.[23] This change of approach is also reflected in the Boultif case, which, although not one of the classic admission cases, carries such elements, given that Mr Boultif, an Algerian national, applied abroad for an extension of his Swiss residence permit, but the request has been denied due to previous crimes. Important to the case is the fact that Mr Boultif's wife was a Swiss national living in Switzerland who had no other connection to Algeria than her husband. Referring to the violation of her family rights, Mr Boultif turned to the Court. It decided that it would be disproportionate to expect a Swiss wife to move to Algeria with her

[22] See Abdulaziz et al.
[23] ECtHR Sezen v. NL, Application no. 50252/99, Judgement on 31 July 2006.

husband and gave importance to the husband's low degree of danger to public order. The Sen and Boultif cases show a new direction and it seems to be put less emphasis on expectations that families shall settle in 'another country'.

Admission and expulsion

It must be underlined that the ECtHR made clear distinction between cases concerning admission or expulsion. Respect for family life presupposes primarily the protection of family unity. In other words, this a fundamental right is to ensure primarily the effective coexistence of family members. The expulsion from the territory or the ban on entry may lead to the separation of spouses or parents and children and such decisions have been subject to a review for decades under article 8.

In the case of Abdulaziz among others, the ECtHR explained the different approach of admission and expulsion cases. Expulsion has in principle been found to be an interference with family life where a state seeks to expel a person who has established family life there. This was in Boultif v Switzerland, where the Court held that the state had a negative obligation not to expel non-nationals,[24] and a positive obligation, seen as in Gül v Switzerland and Ahmut v Netherlands, that is stricter. Couples arguing that a Member State has an obligation of admission have been much less successful than in cases where a member of a family stands the risk of expulsion.[25] The ECtHR follows the principle of international law that a sovereign state has a right to control the entry of non-nationals into its territory and states that there is no general obligation to respect the married couple's choice of residence for the family and to accept the non-national spouse to settle in that country.

Member states have a wide margin of appreciation and a state's obligations to admit family members will vary according to the particular circumstances as seen

[24] ECtHR Boultif v Switzerland, Application no 54273/00, Judgement of 20 December 2001.

[25] ECtHR Gül v Switzerland, Application no 23218/94, Judgement of 19 February 1996, ECtHR Ahmut v Netherlands, Application no 21702/93, Judgment of 28 November1996.

in Abdulaziz. That is to say, the Court's case by case analysis can lead to the right to family reunification regarding the admission, and the Court as well require member states to apply a balancing test in cases where expulsion threatens the continuation of family life.[26]

The Court reiterated the ruling of the Boultif case in several other cases that concerned again the violation of article 8. In the Amrollahi case, the ECtHR decided that the Danish wife and children of an Iranian drug dealer expelled from Denmark, cannot be expected to follow him to Iran,[27] while in Sezen it was also found that family members of third-country drug traffickers were not expected to settle in a foreign country. Moreover, the Yildiz case brought a new element, namely, that the court imposed the burden of proof on the state. This all shows the progressive move from Abdulaziz, where applicants had yet to prove on reasonable ground that family reunification is not possible in another country.

Controversial cases with migration aspect

The contradictions in the case law of the Court can be seen in two cases, namely, in Tuquabo-Tekle v the Netherlands and in Gül v Switzerland. In Tuquabo-Tekle v the Netherlands, a daughter was left behind when her mother fled Eritrea to seek asylum, following the death of her husband. She did not receive refugee protection, but rather another form of (less secure) humanitarian protection. The Court held that the authorities' allegation that she left her daughter on her own free will was questionable, and decided that the state was obliged under article 8 to admit her daughter to the territory, so that to ensure family life.[28]

However, in Gül v Switzerland, the Court found no violation for refusal to grant admission to a son to re-join his father in Switzerland. The father had sought asylum, but was merely granted a residence permit on humanitarian grounds and

[26] See more Peers et al.: *The Legal Status of Persons admitted for Family Reunion. Comparative Studies of Law and Practice in some European States*. Centre for Migration Law, University of Nijmegen (Strasbourg: Council of Europe, 2000), and Kees Groenendijk, Guild Elspeth and Dogan Halil, *Security of Residence of Long-term Migrants. A comparative study of law and practice in European countries* (Strasbourg: Council of Europe, 1998)

[27] ECtHR Amrollahi v. Denmark, Application no. 36811/00, Judgement of 11 July 2002.

[28] ECtHR Tuquabo-tekle v the Netherlands, Application no. no. 60665/00, Judgement of 1 March 2006

after some time the father made several visits to his son in Turkey. The Court held that there were no longer "strong humanitarian grounds" for the father to remain in the state, thus rebuilding family life in Turkey would be possible and found no violation of article 8 because in view of the length of time the parents have lived in Switzerland, and there were no obstacles preventing them from developing family life in Turkey, in the cultural and linguistic environment of the child.[29]

In line with the above case, in Ahmut and Ahmut vs. the Netherlands the Court held that the decisions of the authorities to refuse to admit a 9-year-old child who lost his mother in Morocco - to live with his father - a well-established immigrant who at the time of application had acquired Netherlands nationality - did not constitute a violation of article 8 of the Convention. The Court stated that the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest and where immigration is concerned, article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory, article 8 does not guarantee a right to choose the most suitable place to develop family life.[30]

Concluding Remarks

The Convention does not guarantee the right to reside and establish for individuals in the territory of another member State. Nor does it provide a level of protection for family life which would allow family members to choose freely the member state they wish to live in. This is confirmed by the ECtHR's decades-long practice: there is no breach of article 8 where there can reasonably be expected from a family to settle elsewhere in order to preserve the unity of the family. It is important to emphasize that the economic interests of the host state may be a legitimate consideration both when defining the principles of the general immigration policy and when considering individual applications. In a complaint regarding a violation of family life, the ECtHR considers more than one factor, thus

[29] ECtHR Gül v Switzerland, 53/1995/559/645 Court's judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 159 Gül vs. Switzerland, 53/1995/559/645, para. 42.
[30] ECtHR Ahmut and Ahmut vs. the Netherlands 21702/93, Judgement of 17 May 1995, paras. 67 and 71.

of the person's relationship with the host country or country of origin, possible criminal lifestyle and the country's general immigration policy. Also, it does not guarantee family reunification in a given country, but guarantees in general the right to continue family life wherever this can be realised. With regard to the latter, it should be pointed out that a series of measures relating to expulsion or refusal to admission on the ground of economic well-being of a country could be deemed necessary, when these measures are taken simply in the context of the country's immigration policy. As for the member states, cases with similar issues show the states unwillingness to follow good faith, whereas the Court will certainly move in a more permissive direction in the field of immigration policy as seen in cases like Boultif and Yildiz.

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