Hakemli Makale

FAMILY REUNIFICATION AS THE MOST COMMON FORM OF IMMIGRATION IN THE MEMBER STATES OF THE EU

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ABSTRACT:

Since family life is the fundamental unit of the society, it should be treated with great respect and care. Even though the concept of *"family"* is based on relations under private law, the protective interference of states should be required owing to its importance given. As a result of the international relations that became highly intense, the progress of free movement of persons and related issues such as immigration and asylum bring out the *"family reunification"* subject required to be dealt with. In this respect, several arrangements made by the competent authorities of the EU, in particular, to avoid the negative effects of immigration. The main point that should be taken into consideration is the balance between the protection of the Member States against mass influx or over population and the foundation of the free movement of people. The limitations to avoid the negative effects of immigration shall be arranged with a fair approach in line with fundamental human rights.

Keywords: Family Reunification, The Treaty of Amsterdam, The Council Directive 2003/86/Ec.

ÖZET:

Aile hayatı toplumun temel yapıtaşı olduğundan, saygıyla ve itinayla ele alınmalıdır. *"Aile"* kavramı özel hukuk ilişkisine dayanmasına rağmen, taşıdığı önem nedeniyle Devletin koruyucu müdahalesini gerektiren bir alan olarak yerini korumuştur. Uluslararası ilişkilerin zaman içinde artması sonucu, kişilerin serbest dolaşımı ve bununla bağlantılı olarak göç ve iltica hususları, çözümlenmesi gereken *"ailelerin yeniden birleşmesi"* konusunun ortaya çıkarmasına neden olmuştur. Bu çerçevede, AB'nin yetkili kurumları, özelikle göçün negatif etkilerini ortadan kaldırmak için düzenlemeler yaptılar. Burada dikkate alınması gereken en önemli husus; ülkelerin, kitlesel sığınmadan ve aşırı nüfustan korunması ile kişilerin serbest dolaşımının kurulması arasında dengenin sağlanmasıdır. Göçün olumsuz etkilerinden kaçınmak için yapılan sınırlandırmalar, temel insan hakları ile uyumlu adil bir yaklaşım içinde olmalıdır.

Anahtar Kelimeler: Aile Birliğinin Yeniden Kurulması, Amsterdam Antlaşması, 2003/86/Ec sayılı Konsey Direktifi.

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I. INTRODUCTION

Family life, the corner stone of a community, should be treated with respect and care, since the foundation of a stable and healthy society has been achieved through the unification of healthy families. Crucially, the protection of family life has become an essential issue throughout the development of human rights worldwide. This strong link has influenced not only the family life of EU citizens but also the life of third country nationals owing to the progress of free movement of persons and related issues such as immigration and asylum.

In Article 8 of the European Convention for the Protection of Human Rights, it is stated that *"Everyone has the right to respect for his private and family life, his home and his correspondence".* One of the main aims of this Article is to protect individuals against arbitrary interference by public authorities. Also under this provision, national authorities have to provide arrangements for supporting family life.[1] In this context, several arrangements have been provided by authorities of the EU for the improvement of family life including avoiding the negative effects of immigration.

In this study, the policy regarding free movement of persons provided by the Treaty of Amsterdam (ToA) will be explained and then I will attempt to analyze family reunification, an important issue introduced through the development of the free movement of persons, particularly after the arrangements of the ToA, under the scope of the Council Directive 2003/86/Ec. Finally, I will endeavor to suggest some solutions for preventing double standards between individuals sharing life in the community.

II. THE NEW POLICY OF THE TREATY OF AMSTERDAM

Although the freedom of movement for EU workers is arranged by the Treaty and secondary legislation, it is hard to have control over population displacements into and within the territories of the Member States. In some of the decisions of the ECj regarding Directive 68/360, it is allowed to legitimise the control of the population flowing into the Member States, even if one of the main aims of the EU is establishing a Union which is free of frontiers and internal border controls.[2] Therefore, the protection of the Member States against mass influx and over population has to be balanced with right to free movement of persons.

Cross-border aspects of the free movement of persons affect all member states. It was agreed that the Maastricht Treaty, in the third pillar, should

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1 Standley K., Family Law, 6th ed., (New york: Palgrave Macmillian, 2008), p. 14

2 Craig P. and Grainne de B., *EU Law; Text, Cases and Materials,* (3rd ed., New York: Oxford University Press, 2008), p. 750

provide for cooperation in fields such as external border controls, asylum, immigration, and movement across the internal borders by nationals from states outside the Union. However, cross-border crime and illegal immigration has grown despite those provisions. Moreover, the Eastern enlargement has led to a requirement for extensive and specific arrangement regarding these issues.[3]

According to the Article 7a of the TEU (Treaty on European Union), which was renumbered Article 14 by the Amsterdam Treaty, the Community shall progressively establish *'the internal market'*, which aims to provide an area without internal borders based on the free movement of goods, persons, services and capital. However, dispute with regard to the free movement of persons has arisen, since some of the Member States wish to keep frontiers under their control in terms of immigration policy with respect to third-country nationals. The Commission has clarified that issue since the abolishing of controls under Article 7a covers not only EU citizens, but also others regardless their nationalities.[4]

All policies regarding the free movement of persons such as controls on external borders, asylum, immigration and protecting the rights of third-country nationals were brought under the first pillar by the Treaty of Amsterdam. The Schengen Agreement and Convention included in the Treaty, which aimed to cease internal border controls and to establish visa policy, was signed by Member States except the UK and Ireland.[5]

In the view of the European Union, it is accepted that measures as regards asylum and immigration have to be adopted by the Council within the five years of the enforcement of the Treaty of Amsterdam. The time limit is not applicable for measures regarding the rights of citizens of non-member states, immigrants' conditions about entry and residence to Member States.[6] *"The Treaty moved asylum and immigration out of the inter-governmental decision-making and into the area where legally binding instruments of harmonization can be legislated by the Council of Ministers and a measure of judicial control exercised by the European Court of Justice".*[7]

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3 Pinder J. and Usherwood S., *The European Union: A Very Short Introduction,* (Oxford, Oxford University Press, 2007), p. 106

4 Supra 2, p. 750-751

5 The History of the EU, The EU Citizenship, (n.d.), Online at: http://www.historiasiglo20.org/europe/amsterdam.htm#, (Accessed 15 March 2009)

6 Europa, Activities of the European Union (n.d) Online at: http://europa.eu/scadplus/leg/en/lvb/a11000.htm#a11006, (Accessed 15 March 2009)

7 Goodwin- Gill Guy S. and Mcadam J., *The Refugee In International Law,* (3rd ed, New York: Oxford University Press, 2007), p. 1

Several measures for immigration policy were decided in some areas such as; *"conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion".*[8]

Even though EU Member States agreed the need for closer collaboration regarding immigration, asylum and visa issues, it was extremely difficult to gain agreement to move immigration from the third pillar, which is under the responsibility of national governments, to the first pillar, in which the policies are established by the leadership of EU Commission. For instance, Denmark voted 55-45 percent to approve the Amsterdam Treaty. One of the campaigns against the enlargement of the EU into Eastern Europe illustrated their view with a slogan *'Welcome to 40 million Poles in the EU'*. It was, indeed, surprising to see such fear about the 'immigration threat' in Denmark, a socially liberal country.[9]

As a result of the enlargement policy of the EU, the protection of immigration became more important due to the membership of Eastern Countries. It was such a bold policy with unpredictable results that some of the Member States were prejudiced against the Amsterdam Treaty, particularly, in terms of immigration and asylum procedure. Having this view, it was unlikely that there was a complete consensus to shift the title to the first pillar, where the EU Commission is more competent to describe the policy. The cooperation was supported among the Member States, although they were not willing to give up their national power of discretion on asylum and immigration rules.

III. FAMILY REUNIFICATION

Family reunification is the most common problem of migration in European countries. After workers or students flee to the Member States, they settle down there and begin to look for ways of reuniting with their families.[10]

In the view of international protection, family reunification in terms of children is arranged by the Convention on the Rights of the Child. In accordance with Article 10 of the Convention concerned, when an application is submitted to enter or to leave a State Party in order to provide family reunification, it shall be assessed *"in a positive, humane and expeditious*

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[8] Europa, Activities of the European Union (n.d) Online at: http://europa.eu/scadplus/leg/en/lvb/a11000.htm#a11006, (Accessed 15 March 2009)

[9] EU: Amsterdam Treaty, Migration News (1998) Online at: http://migration.ucdavis.edu/mn/more.php?id=1553 0 4 0, (Accessed 12 March 2009)

[10] *European Journal of Migration and Law 8,* the Netherlands, 2006, p. 215

manner". Furthermore, there must not be any contrary results for the applicants and their family members resulting from the application.[11]

On the other hand, neither the European Convention on Human Rights (ECHR) nor the Charter of Fundamental Rights of the European Union includes any special provision concerning family reunification on a general basis.

Taking into account the EU, the family reunification right has been practised by workers since 1961 controlled under Regulation No. 15[12], it was then issued within the framework of Regulation 1612/68[13]. When the Treaty of Amsterdam introduced policies concerning the free movement of persons, more detailed legislation for the protection of third-country nationals' rights became necessary. Negotiations have been initiated to prepare a directive to provide rights for family reunification. Article 8 of the ECHR and Article 7 of the Charter which protect the right to family have been considered the legal basis of family reunification and these Articles were mentioned in the Preamble of the Directive.

However, the first proposal of the Directive in 2000 was not successful, since the Member States did not want to lose control of the immigration issues surrounding third country nationals.[14] The second proposal prepared on 2 May 2002 was adopted by the Council on 22 September 2003 and the Directive entered into force on 3 October 2003.

IV. THE COUNCIL DIRECTIVE 2003/86/EC OF 22 SEPTEMBER 2003 ON THE RIGHT TO FAMILY REUNIFICATION

The object of the Directive is to determine the right to family reunification of third country nationals, who reside lawfully in the territory of a Member State.[15]

Additionally, the Directive sets out the conditions for family members who demand to enter and to reside within a Member State and also it covers the rights of family members who have been accepted by the Member State.

"The right to family reunification should not be limited to persons who are recognized as refugees in accordance with the 1951 Convention but be extended

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[11] Hodgkin R. and N. Peter, *"Implementation Handbook for the Convention on the Rights of the Child"*, (New York: Unicef, 1998), p. 131

[12] Regulation No. 15 of 12 June 1961, OJ 26 August 1961

[13] Reg. 1612/68 [1968] Spec. Ed. 475

[14] ECRE, 'Information Note on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification', (n.d), Online at: http://www.ecre.org/files/frdirective.pdf (Accessed 16 March 2009)

[15] Arnull A., Family Reunification and Fundamental Rights, 611-612, EURLR, 31(5), 2006, p. 1

to all persons granted complementary protection on the basis of a need for international protection".[16] However, the directive shall not apply to asylum-seekers and persons granted temporary protection or subsidiary protection. The 2001 EU Temporary Protection Directive and the 2004 EU Qualification Directive were enacted in terms of temporary protection and subsidiary protection in line with Article 63 of the Treaty of Amsterdam which provides protection invoked as *"qualification"* and temporary protection for displaced persons and others. The 2004 EU Qualification Directive, interpreting the 1951 Convention and 1967 Protocol refugee definition arranges provisions for subsidiary protection.[17] Since the eligibility and status of *"others"* in need of protection shall not be merely left to the decision of the States, the international instruments have to be arranged more effectively to cope with the issues. Therefore, the 2001 and the 2004 Directives are crucial steps, although still not sufficient in many ways. Temporary protection and subsidiary protection are the regional response of the EU to the refugee problem emanating from recent developments despite the political concerns. However, those Directives do not include sufficient provisions for family reunification.

Under Directive 2003/86, another arrangement regulating others' rights in terms of family life, is limited to reunification of the nuclear family only. This means the spouse and unmarried minor children of the sponsor shall enjoy this right. It falls within the exclusive discretion of each member state as to whether to extend this right to other categories of family members. A sponsor should have accommodation which meets general health and safety standards, sickness insurance and stable and regular resources, which are sufficient for himself and family members, in order to enjoy the reunification right. Also, it is stipulated that legally accepted spouses and children shall have same rights to employment and education as the sponsor. It should be pointed out that the UK, Ireland and Denmark are not bound by the Directive.[18]

V. PROTECTION ON THIRD-COUNTRY NATIONALS

Thanks to the European system granted on the principles of the universality of human rights and non-discrimination, which are capable of preventing discrimination on the basis of nationality, in the preparation process of the

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[16] *Position on Refugee Family Reunification by the European Council on Refugees and Exiles,* European Council on Refugees and Exiles, July 2000, p. 3, Online at: http://www.ecre.org/files/family.pdf, (Accessed 16 March 2009)

[17] Supra, fn. 7, p. 40

[18] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, (n.d.), Online at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0086:EN:NOT, (Accessed 15 March 2009)

Directive, it was intended to develop common policies in the field of family reunification to ensure better integration through fair treatment of third-country nationals as result of the principle of non-discrimination. Moreover, the Directive aims to provide uniform rights for all individuals in the community avoiding discrimination. As to the second recital of its preamble, the Directive 2003/86 *"respects the fundamental rights and observes the principles recognized in particular in Article 8 of the European Convention... and in the Charter of Fundamental Rights of the European Union".*[19]

Inevitably, it has to be emphasized that family reunification has a crucial role for the stabilization of the community and it is also crucial to make it easier for third country nationals to integrate into a foreign environment along with their family members. However, once the conditions and restrictions in the Directive have been analyzed, it is obvious that the provisions of the Directive have not provided a completely comprehensive protection for third-country nationals.

In particular, the immigration issue brings about a dilemma which has highlighted the protection needs of third-country nationals and the struggle with issues within the scope of the supranational pillar of the Union, while the Member States have insisted on using their own discretion emanating from their states' sovereignty. Considering several derogations in Article 4(1), 4(6) and 8 or references in Article 7(2) and 15(4) to national law of Member States, it can be asserted that the Directive is not sufficient to provide common standards for the harmonization of national laws in respect of family reunification. Furthermore, an opportunity has been given to the Member States to turn down the family reunification applications in terms of public security or public health requirements.

Thanks to provisions including those conditions, the member states enjoy extreme discretion which could run contrary to fundamental human rights. The Member States are allowed to take integration measures by applying integration tests which could be considered discriminatory, since third country nationals are forced to disclose their religious, ethical, ethnic, ideological views. Also, Articles 8, 13 and 15 provide time limitations with regard to the waiting period of the sponsor, the first residence permit for family members and the waiting period for family members to get independent residence status.

According to the initial proposal, unmarried couples shall have right to entry and residence permit under certain conditions. However the wording of the directive gives member states discretionary power by using the word *"may"* in place of *"shall"*. In addition, where the person has married below the age of

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[19] Supra, fn. 15, p. 2

21, his partner is not allowed family reunification. The logic of this limitation is preventing forced marriages and facilitating the integration process. However, it must be remembered that there is no similar condition sought for citizens. Moreover, in view of employment rights of family members, the Directive gives Member States discretion to set a waiting period up to one year before entitling access to employment. The proposal does not include a similar restriction.[20]

The most controversial provisions of the directive are concerning limitations for children. Article 4(1) provides derogation with regard to imposing integration tests or other requirements for children above the age of 12. Moreover, in Article 4(6), which allows derogation for children above the age of 15, the Member States may request the submission of an application for minor children below the age of 15. Although, these provisions are conditional and only the Member States which have provisions already in their existing legislation can apply these provisions, they are subject to criticism since they could lead to discrimination. Also, *"Article 8 permits a Member State to require the sponsor to have stayed lawfully in its territory for up to three years before being joined by members of his or her family. The Parliament argued that those provisions were incompatible with the rights to family life and non-discrimination, as guaranteed in particular by Articles 8 and 14 of the European Convention on Human Rights".*[21]

The second preamble of the Directive clearly stated that the Directive would respect the fundamental rights and observe the principles recognized, in particular, in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union. The European Parliament applied to the Court of Justice for annulment of Articles 4(1), 4(6) and 8 of the Directive. The Parliament alleged that those provisions were incompatible with the rights to family life and non-discrimination. Surprisingly, the Court ruled that the derogations which limit family reunification for third-country nationals regulated in the Directive do not breach fundamental rights.[22] This decision demonstrates that the Court will fail to support a determined approach, especially, regarding children's rights owing to the Member States' influence on the Council.[23]

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[20] Brinkmann G., 'The Immigration and Asylum Agenda', pp. 182-199, European Law Journal, Vol. 10, No. 2, March 2004, p. 191

[21] Supra, fn. 15, p. 1

[22] Case C-540-03, Parliament v Council, [2006] 27 June 2006

[23] Drywood E., 'Giving With One Hand, Taking With the Other: Fundamental Rights, Children and the Family Reunification Decision', 396-407, EURLR, 32(3), 2007, p. 8

It must be emphasized that the negotiators involved in the preparation process for this Directive tended to ignore the Court's role in the development of free movement of workers. This was due to the fact that many of them were civil servants and the only thing they wanted to acquire from the negotiations was to minimize the effects of the Directive on their national legal decisions. This propensity even continues to be evident after the entry into force of this Directive; for example, in the implementation in Germany. Immediately after the new government in Germany came to power, it took the view that rules to control the access of third national countries to the labour market should fall within the scope of national government and parliament. This indicates how strongly the member states resist against the binding substantive law of the Community and case-law of the Court.[24]

Indeed, *"...The use of family reunion, or in reality family formation, by children of migrants has been particularly discouraged in Germany; for Turks in both Germany and the Netherlands, it is the main form of family migration. Germany is particularly severe in the conditions stipulated for entry of family members. It has brought down the age at which children can join parents to 16 years, which is lower than the norm of 18 years that prevails in other European countries..."*[25]

The Nederland's language test can be considered as another example. While the family member who has failed the test is not granted a visa for entry, the government does not provide any language training abroad. This situation no doubt contradicts the principles of proportionality and effective legal protection.[26]

VI. ASSESSMENT OF THE DIRECTIVE

In a nutshell, the basic deficiencies of the Directive and reconsideration of provisions are stated as follows;

- According to Article 4, it is allowed that only a sponsor's spouse and minor children can enjoy a right to family reunification. It does not include adult children and elderly parents in the reunion. Taking into account cultural differences, the Directive should have included those persons as well.

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[24] Supra, fn. 10, p. 221- 222

[25] Kofman E., Phizacklea A., Raghuram P. and Sales R., Gender and International Migration In Europe, (London: Routledge, 2000), p. 66, Online at: http://books.google.com/books?id=sy-u02qezLQC&dq=GENDER+AND+INTERNATIONAL+MIGRATION+IN+EUROPE&printsec=frontcover&source=bn&hl=tr&ei=Fw xSaNkx4P4Bo3N6MgP&sa=X&oi=book result&ct=result&resnum=4, (Accessed 15 March 2009)

[26] Supra, fn. 10, p. 224

- Article 4(1) provides derogation with regard to imposing integration tests or other requirements for if *"a child is aged over 12 years and arrives independently from the rest of his/her family"*. Moreover in Article 4(6), the Member States may request submission of an application for minor children below the age of 15. According to the European Parliament, these provisions breach the fundamental rights of minors and these kinds of restrictions upon the right to benefit from the Directive granted on the age of children also breach the right to respect for family life. Also, the Articles concerned are assessed as a damage against the best interest of the child and result in discrimination.[27] Therefore, these limitations have to be reconsidered and arranged in a more respectful form in accordance with Art.6(2) TEU.
- As to Article 4(3), the Member States may provide entry or residence for e unmarried couples. Taking into account the modern broader concept of the family, this provision has to include binding terms to the advantage of unmarried couples such as; *"The Member States shall authorise..."* as mentioned in the initial proposal.
- According to Article 4(5), where the person married under the age of 21, his partner is not allowed family reunification. Although this provision aims to prevent forced marriages, there must be some other criteria to indicate those situations, since the age of marriage is traditionally under the age of 21 in several states.
- As to Article 6, the Member States may refuse family reunification applications in terms of public security or public health. For example, in this provision, the Directive gives huge discretion to the Member States which may easily cause breaches of human rights in general. The limits to their authority must be drawn, even if it affects their sovereignty.
- Articles 8, 13 and 15 provide time limitations. Article 8 allows the Member States to require the sponsor to have stayed lawfully in its territory for up to three years before being joined by family members. Also, Articles 13 and 15 provide time limits regarding first residence permit for family members and waiting period for family members to get independent residence status. In particular, Article 8 breaches the rights to family life ensured by Articles 8 of the European Convention on Human Rights. Therefore, time limitations shall be arranged with a fair approach in line with fundamental human rights.

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[27] Supra, fn. 23, p. 3

- Also, the Directive allows Member States to arrange integration measures such as integration tests. For instance, some Member States require a language test to be taken by family members without providing any prior opportunity for language training. Considering the wife or a minor child of a worker of an uneducated family from an undeveloped country, it is impossible to reunite their family in a Member State which requires a language test. Therefore, this may be considered another implicit reason for refusal.

VII. CONCLUSION

It is essential to formulate the restrictions more attentively, since the right to family life is defined as a fundamental right in the ECHR. Therefore, the limitations of the Directive in terms of family reunification have to be interpreted in a narrow context.

Varied implementations and deficiencies in uniform arrangements may be able to destroy the reliability of Community Law and respect for family reunification at the Community level. The existence of broad distinct approaches between EU citizens and third country nationals brings about discrimination in terms of enjoying and exercising fundamental rights. Therefore, although the immigration and asylum issue was shifted to the first pillar as a result of enlargement policy, it is not sufficient to protect the right of third country nationals.

Consequently, the legislations prepared in the light of ToA have to be applied in line with ECHR and EU Charter of Fundamental Rights and the Directive concerned has to be rearranged without the pressure of the Member States which have fears regarding the loss of their discretion by right of their sovereignty.

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