THE RIGHT TO FAMILY REUNIFICATION IN THE EU AND THE CASE-LAW IN ACCORDANCE THEREWITH*

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FAMILY REUNIFICATION: LAYING THE FOUNDATIONS FOR THE FUNDAMENTAL RIGHTS OF IMMIGRANTS TO FAMILY LIFE

SUMMARY: 1. The protection of family life in the European Convention on Human Rights and in the Charter of fundamental rights of the European Union. – 1.1. The protection of private and family life in the European Convention on Human Rights, in accordance with the principles recognized by Article 8 of the Convention. – 1.2. The respect for private and family life in the Charter of Fundamental Rights of the European Union. – 2. The Council Directive 2003/86/ec of 22 September 2003 on the right to family reunification. – 2.1. Purpose of the Council Directive. – 2.2. Subject matter of the directive and compared application in the Member States. – 2.2.1. Family members to be reunified. – 2.2.2. Family members eligible for reunification. – 2.2.3. Requirements for reunification. – 2.2.4. Autonomous residence permit. – 2.2.5. Reasons for rejection. – 2.2.6. Right to Effective Judicial Protection. – 2.3. Conclusion of the Application of the Directive.

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1) Family law and rights of the child, and in particular the right to family reunification;

2) Criminal law, and in particular fight against terrorism and the relevant rights of defendants, of pre-trial detainees and persons under investigation.

These topics are explored respectively in the first part on "The right to family reunification in the EU and the case-law in accordance therewith", realized by professors Esther Gómez Campelo and Marina San Martín Calvo, and in the second part on "The fight against terrorism in the EU: Judicial cooperation in criminal matters and procedural rights", realised by professors Mar Jimeno Bulnes, Julio Pérez Gil and Félix Valbuena González with support by Cristina Ruiz López.

1. *The protection of family life in the European Convention on Human Rights and in the Charter of fundamental rights of the European Union*

1.1. *The protection of private and family life in the European Convention on Human Rights, in accordance with the principles recognized by Article 8 of the Convention*

The right to family life is a fundamental, internationally recognized right of every person that the European Convention on Human Rights and Fundamental Freedoms (hereinafter ECHR [1]) directly recognizes in Art. 8, which grants broad and generic protection to the family structure [2].

As a matter of fact, the first paragraph of Art. 8 of the ECHR enshrines rights that are closely connected to the sphere of personality, such as the right to privacy, family life and respect for domicile. On the other hand, the second section of Art. 8 of the ECHR, includes, in general terms, the protection of the individual against arbitrary or unjustified interference by public authorities.

The protection is extended in Art. 60 of the ECHR, which states that "*none of the provisions of said Convention shall be interpreted as limiting or prejudicing those human rights or fundamental freedoms that could be recognized according to the laws of any high contracting party, or in any other agreement in which it is a party*". The rights recognized in the ECHR impose on the State Parties not only negative obligations, to refrain from carrying out actions that limit them, but also positive obligations, to actively protect them against the damages that may threaten them.

In order to ensure the observance of these provisions, the European Court of Human Rights is created by virtue of Art. 19 of the ECHR as an instrument of control for the guarantee of human rights and fundamental freedoms recognized in the European Convention.

Also, the Court of Justice of the European Union (CJEU) has previously recognized the existence of fundamental rights as an integral part of the general principles of law and, therefore, of the normative hierarchy of the supreme law of the EU. Among the fundamental rights of general scope recognized by the Court of Justice of the EU, is the right to respect for private and family life, as well as the right to family reunification or family unity.

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[1] The European Convention on Human Rights (ECHR), was adopted by the Council of Europe on November 4, 1950 and entered into force in 1953. Its purpose is to protect human rights and fundamental freedoms of persons subject to the jurisdiction of the Member States, and allows judicial control of respect for these individual rights. It is expressly inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations on December 10, 1948.

[2] CORTÉS MARTÍN, J.M., "Inmigración y derecho de reunificación familiar en la Unión Europea: ¿mínimo común denominador de las políticas nacionales?", *Anuario de Derecho Europeo*, no. 4, 2004, pp. 29-32.

1.2. *The respect for private and family life in the Charter of Fundamental Rights of the European Union* [3]

For a long time, the European Treaties did not include a written catalog of fundamental rights. Their scope was limited to referring to the ECHR. However, with the development of the EU and the adoption of the Treaty of Lisbon, the situation has given a considerable change, since the EU has a legally binding Charter of Fundamental Rights [4].

Thus, Art. 2 of the Treaty on European Union (TEU) states that the EU "*is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of people belonging to minorities*".

In addition, Art. 6 of TEU provides, in paragraph 1, the following: "*The European Union recognizes the rights, freedoms and principles set forth in the Charter of Fundamental Rights of the European Union of December 7, 2000, as adapted on December 12. 2007 in Strasbourg, which shall have the same legal value as the Treaties*".

It also establishes, in paragraph 2, that the EU shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Charter of Fundamental Rights of the European Union (CFREU) devotes two articles (Art. 7 and Art. 9) directly to the family, as well as others more indirectly to the same subject. In this way, Article 7 of the Charter, in relation to the respect for private and family life, establishes, similarly to the ECHR, that "*Everyone has the right to respect their private and family life, their home and their communications*".

Therefore, this is a fundamental right, recognized to every person, either a community citizen or a national of third countries, and therefore it must be guaranteed to everyone in the community territory and by all the Member States. Likewise, Art. 9 recognizes the right to marry, as well as to found a family. This article guarantees the right to found a family in accordance with the national laws that regulate the exercise of this right. Also, Art. 33 of the Charter, ensures the protection of the family in the legal, economic and social levels.

In light of the above, an important question arises. Is family reunification an absolute right or a relative one?

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[3] OJ C 202/389, 7.6.2016.

[4] The Charter of Fundamental Rights of the European Union (CFREU) was proclaimed by the European Parliament, the Council of the European Union and the European Commission on December 7, 2000 in Nice. A revised version of the Charter was proclaimed on December 12, 2007 in Strasbourg, before the signing of the Treaty of Lisbon. Once ratified this, the Charter is legally binding for all countries, with the exceptions of Poland and the United Kingdom. The Charter is not part of the Treaty of Lisbon (it was expected to be part of the European Constitution, but as this was not approved, the forecast was modified). However, due to the reference in Art. 6 of the Treaty of the European Union after Lisbon, it becomes binding for all Member States.

Human rights contained in international Treaties and national constitutions are generally not absolute, but are often qualified and subject to reasonable restriction. They have boundaries set by the rights of others and social concerns, such as public order, safety, health and democratic values. Since no right is absolute in order to balance individual and social interests, limitations on the rights are as important as its scope in determining its legal content [5].

So, Art. 52 of the Charter of Fundamental Rights, reflects this conflict of interests, trying to harmonize the interpretation by the jurisprudence of the European Court of Human Rights, regarding the provisions of the Charter with the regulations of Member States, stating that "*any limitation of the exercise of the rights and freedoms recognized by this Charter must be provided 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 recognized by the Union or the need to protect the rights and freedoms of others*".

Furthermore, Article 53 of the Charter, which refers to the level of protection established that none of the provisions of the said Charter may be interpreted as limiting or prejudicial to the human rights and fundamental freedoms recognized, in their respective scope of application, by the Law of the Union, international law and international conventions to which the Union or all the Member States are parties, and in particular the European Convention for the protection of human rights and fundamental freedoms, as well as the constitutions of the Member States. Consequently, the limitations that should be adopted, according to Arts. 52 and 53 of the Charter, cannot be absolute, but must have certain limits, as well as be adapted to the principle of proportionality.

In the European Union law, the legal regime applicable to the right to family reunification will depend on the nationality of the subject who requests it. In fact, when we talk about family reunification, we should not think only of a subject from a third State residing in the European Union who tries to regroup his family, but it can also be a citizen of the Union, which aims to regroup relatives of third States. In practice, a different regime for family reunification is foreseen, depending on whether the applicant is a citizen of the EU or, on the contrary, a national of a third State (not a member of the EU). In the first case, we are dealing with the European family reunification regime included in Directive 2004/38/EC89 applicable to citizens of the EU and, in the second case, we are dealing with the immigration regime contained in Directive 2003/86/CE [6], applicable to third-country

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[5] KLEIN, L., KRETZMER, D., "The concept of human dignity in human rights discourse", *Global Jurist Topic*, no. 3, 2003.

[6] GÓMEZ CAMPELO, E., "El derecho a la reagrupación familiar según la Directiva 2003/86/CE", *en Actualidad Administrativa*, no. 13, 2003, pages 1551-1560.

nationals. We are, therefore, faced with two different procedures that establish a more beneficial regime for European citizens than for third-country nationals [7].

2. *The Council Directive 2003/86/ec of 22 September 2003 on the right to family reunification*

2.1. *Purpose of the Council Directive*

The Council Directive 2003/86/CE of 22 September 2003 on the right to family reunification [8] discusses, after legal recognition, the need to establish the material conditions to its enforcement under common guidelines among the Member States.

Throughout 18 Recitals, the Preamble outlines the philosophy of the European legislators on integration policy for citizens legally residing in the territory and the rules to be enforced for its exercise. It therefore assumes that the respect to family life and the obligation to protect it is present all through the specific measures on reunification: "*Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty*" (Recital 4).

From its very first principles, this Directive aims at sanctioning legal acknowledgement as a circumstance assumed *ab initio* and, incidentally, elucidating its restrictive approach*:* "*This Directive shall not affect the possibility for the Member States to adopt or maintain more favorable provisions*" (Art. 3, 5).

The chief purpose of a council rule is to adopt harmonized procedural criteria, and this Directive is no exception. Following the principles of subsidiarity and proportionality [9], it intends to achieve the defense and exercise of a global interest that has not necessarily need to match with those of each Member State.

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[7] LAPIEDRA ALCAMÍ, Rosa., "La familia en la Unión Europea: el derecho a la reunificación familiar", *en la Revista Boliviana de Derecho*, no. 20, 2015, pages 216-217.

[8] OJ L251, of 3 October 2003. It applies to all Member States except Ireland, United Kingdom and Denmark and has been in force since 3 October 2003, acquiring legal status in the countries of the EU before 3 October 2005.

[9] "*Since the objectives of the proposed action, namely the establishment of a right to family reunification for third country nationals to be exercised in accordance with common rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the Community, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives*" (Recital16). See QUIRÓS FONS, 2003, on the national process of communiterisation of national alien rights.

2.2. *Subject matter of the Directive and compared application in the Member States*

Throughout its articles, the Directive seeks to regulate exhaustively the institution in question, but highly considering the principles above-cited by sometimes offering general rules, at times vague, and occasionally so thorough that they even become case-specific. The legislator does not seem to have intended to build a stringent solution model, but actually to provide patterns to reach national harmonized answers.

Through the Report on the application of the Directive on the right to family reunification [10], an analysis of how the Member Stated have adapted its internal regulatory scheme to the prescriptions of the Directive is provided. We will now focus on the different aspects that make up the text, an examination that will allow us to know the legislative approaches of each country, their political philosophy on immigration and the means to adapt it to the council demands.

2.2.1. *Family members to be reunified*

The Directive stipulates to authorize the reunification of some relatives of the sponsor, although it does not allow them to exercise their discretionary power. Throughout Chapter II – made up by an only but lengthy article - the eligibility for reunification of the different members is reviewed. Needless to say, both the sponsor and the relatives to be reunified must be third-country nationals, because if any of them were nationals of a Member State of the EU, the Directive 2004/38/CE [11] would need to be enforced.

Members of the *nuclear family*, which according to the Directive is limited to the spouse and the minor children, would be eligible. The possibility of reunifying other relatives pursuant to domestic legislation, provided this regulatory national criterion does not imply any acceptance or commitment of the rest of the States, could be assessed. Historical tradition, the extent to which the status of blood ties is weighed up, or the commitment degree with regard to the social integration of foreigners are factors that will affect the each country's decision, thus letting each

[10] Report from the Commission to the European Parliament and the Council. COM (2008)610 final. Brussels, 8.10.2008. Article 19 of the Directive requests the Commission to periodically inform the Parliament and the Council about the development of its application, suggesting, if applicable, the necessary modifications. The Communication "A common immigration policy for Europe", of 17 June 2008 COM (2008)359 final has been drawn up and further research has been carried out by the Odysseus Network, (2007) and the European Migration Network (2008).

[11] Directive 2004/38/CE 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.

country interpret its own regulatory schemes providing a minimum as for the concept of *nuclear family* [12] stipulated by the Directive is applied.

a) *The spouse*

The right of the spouse is widely accepted in all legislations, and the European law could not be an exception in this regard. The status of unmarried spouse is presumably equivalent to spouse providing that the stability of the relationship can be verified [13].

The CJEU, in its court's decision dated 17 April 1986 (Case 59/85 Reed [14]) defended the equivalence pursuant to the principle of non-discrimination as long as the receiving State would keep the same principle.

The generous and current interpretation of the principle is also regarded by the Spanish Constitutional Court (TC, for its abbreviation in Spanish) which, working on the basis that marriage and common-law unions are unequivocally different terms, states that "marriage and stable common-law unions shall be equivalent when the rules exclusively or predominantly provide for a situation of cohabitation and emotional nature" (STC 222/1992, 11 December). Other countries such as Sweden, the Netherlands, Denmark and the United Kingdom have also extended this criterion that allows reunification of common-law couples including, by extension, same-sex couples.

This guideline is subject to the regulations of each state under the provisions of its values, principles or particular rules. And so does the Directive which stipulates on the one hand that the "*Member States shall authorize the entry and residence […] of the sponsor´s spouse*" (Art. 4, 1-a), and on the other hand specifies

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[12] In the Spanish Law, family protection is regarded as a guiding principle of social policies. So is asserted in Art. 39 of the Spanish Constitution and in several court's judgments (S, for its abbreviations in Spanish) of the High Courts of Spain's autonomous regions (TSJ, for its abbreviation in Spanish), for which we provide the following examples:

STSJ no. 52/2001, Madrid, 15 January 2001 (JUR 2001/132153).

STSJ no. 654/2001, 6 April 2001 (JUR 2001/209838).

STSJ no. 764/2001, Madrid, 4 May 2001 (JUR 2001/302294).

STSJ no. 1595/2001, Madrid, 12 September 2001 (JUR 2001/314413).

[13] Concerning the possible equivalence between marriage and common-law couples, the following Spanish court's judgments can be reviewed:

STS, 6 May 2000 (RJ 2000/5582).

STS, 6 June 2000 (RJ 2000/6119), in which some Constitutional Court judgments are cited, among them: 19 November 1990 (RJ 1990/8767), 21 October 1992 (RJ 1992/8589), 11 December 1992 (RJ 1992/9733), STS 20 March 2003 (RJ 2003/2422).

The interpretation of extramarital relationships has also been assessed by our Courts of Justice:

STSJ, Murcia, 5 October 1998 (RJ 1998/32067).

STS, 15 December (RJ 1998/ 29922).

STS, 9 March 2000 (RJ 2000/5397).

[14] State of the Netherlands v. Ann Florence Reed, 1986.

that "*The Member States may […] authorize the entry and residence […] of the unmarried partner […]*" (Art. 4, 3) [15].

Together with the above said, for public order reasons, even when polygamous marriage is accepted in the foreign country under the provisions of the state law, family reunification could only benefit one spouse, any of them but only one. The Directive asserts: "*In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorize the family reunification of a further spouse*". This exception is likewise admitted in article 17, 1-a of the Immigrant Law 4/2000 by stating: "*Under no circumstance may a further spouse be reunified even when the personal law of the foreigner allows that marriage form*".

The right to family life to be guaranteed to the spouse residing and working in any European country, and which according to their state law would need a more complex cohabitation model, shall adapt to the rules that approve the marriage as a monogamous institution [16]. In this regard, Recital 11 of the Directive deals with the adoption of "*restrictive measures against applications for family reunification of polygamous households*".

Following this, and notwithstanding the different approaches, the authenticity of the marriage is a requirement always present in the mind of the Community legislator who shall be particularly sensitive to the emergence of white marriages or convenience ones.

Such concern is also reflected on the provisions of the Directive, particularly in Art. 16, sections 2-b and 4. Therefore, the Member State concerned may reject an application for entry and residence or to renew the residence of the family with the purpose to family reunification if a marriage is deemed vitiated, that is to say, if the marriage has been taken with the sole purpose of allowing the person in question to enter or reside in a country. Similarly, the Member States shall be allowed to undertake controls and specific checks if suspicion of fraud is considered, being in like manner allowed to draw up rules to prevent reunification if the purposes of the union are deemed unlawful.

However, some rules are liable for certain dangerous presumptions of culpability when a spouse is a third-country national. In this instance, in the Netherlands and Austria, an immigration officer personally evaluates each application. Due to

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[15] Underlining not included in original Article. On the concept of spouse, the following court's judgments might be reviewed:

STS, 23 March 1999, (RJ 1999/17206) on mutual help.

STSJ, Galicia, 6 May 1999 (RJ 1999/18870), on length of bond.

STSJ, Valencia, 13 October 1998 (RJ 1998/31874; RDGRN – Judgment of the General Directorate for Registries and Public Notaries, for its abbreviation in Spanish, 27 September 2000 (BIMJ – Informative Gazette of the Spanish Ministry of Justice, for its abbreviation in Spanish, no. 1881, 15 November 2000) on marriage of convenience.

[16] Gómez Campelo, 2008 and Solanes Corella, 2008.

the Community sensibility that this issue raised, a Council Resolution [17] on the measures to be adopted when combating marriages of convenience was drawn up. Fighting against this matter between citizens of the EU and third-country nationals residing in a Member State with a citizen of a third country is one of the main goals of the Resolution with a view to preventing the avoidance of the rules relating to the entry and residence of third country nationals.

In fact, that must have been the teleology lying behind Art. 4,5 of the Directive, which allows the Member States to make a favorable reunification conditional on a minimum of age of the foreign sponsor and his/her spouse set at 21 years. It is expected from the States to demand a minimum of age when reunifying the resident and his/her spouse, who under no circumstance shall be younger than the age of 21, being this requirement devised to ensure couple integration and, above all, to avoid any forced marriage. Many countries including Belgium, Lithuania, the Netherlands and Cyprus have already enforced this additional requirement with regard to age. In fact, Cyprus requires a minimum length of a year of marriage before applying for reunification.

b) *Children*

As for minor children, one of the issues that nowadays causes more controversy raises when relating the polygamous family and the right to reunify the children from all of the spouses. Even if the Directive allows the reunification of all minor foreign children only if the sponsor has their custody and if these are dependent on him/her (Art. 4, 1-c), the fact is that, as a general rule, the children of the spouses not considered as such by the reception legislation shall be excluded from this right, unless acting in the interest of the children prevailed, pursuant to the Convention on the Rights of the Child (1989). Where the article 4, 4 says *in fine* "[…] *Member States may limit the family reunification of minor children of a further spouse and the sponsor*", we may proceed to interpret it in connection with the above cited Recital 11, therefore not deeming as spouse a person bound to the sponsor by links not regarded in the regulations of the Member States. When the child to be reunified is older than 12 and is separated from the family, the Directive allows the Member State to check whether he/she meets the conditions for integration before authorizing entry and residence (Art. 4, 1-d *in fine*).

Be that as it may, the application of the subject matters of the Directive has been somewhat hostile, particularly its literal contents. In fact, the European Parliament filed an appeal against the Council of the European Union [18]. In the Case

[17] Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience. OJ C 382, OF 16 December 1997.

[18] Action brought on 22 December 2003. The Judgment of the CJEU was reached on 27 June 2006. CJEU/2006/177.

C-540/03, the annulment of the last subparagraph of Art. 4(1), Art. 4(6) and Art. 8 of this Directive was claimed. In regard to the content of Art. 4, the Parliament deemed it discriminatory in respect to human rights, particularly the right to family life and deemed it to incur discrimination based on the age of the affected parties. Moreover, and due to the fact that the Directive does not explicitly define the concept of "integration", the States could substantially restrict its content [19].

Three years after and having undertaken a detailed analysis of the grounds given by the appellant, the CJEU delivered judgment in favor of the maintenance of the cited principles as it deemed them to comply with the Community goals without interfering with the integration policy and the international Treaties in force. For the High Court, the absence of a definition of such a vague concept as "integration" could not lead – and in fact does not lead – to an arbitrary exercise of the Member States against the fundamental rights of their citizens; the assessment of the interests, the weighing of the objective circumstances (family bonds, social links or the degree to which the person will get involved in the new society) will reveal the national body in charge the compromise of the sponsors under proportionality and respect principles [20].

2.2.2. *Family members eligible for reunification*

Furthermore, the Directive allows but does not force the Member States to extent the reunification to other relatives "excluded" from the concept of nuclear family. This way, relatives in the ascending line, dependent children of legal age or unmarried couples shall be eligible for reunification providing the national legislation deems it applicable. Art. 4(2) alludes to:

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[19] ÁLVAREZ RODRÍGUEZ, 2004.

The previously cited judgment by the CJEU, reads: "The Council observes that Article 8 of the Directive does not in itself require a waiting period and that a waiting period is not equivalent to a refusal of family reunification. The Council also submits that a waiting period is a classical element of immigration policy that exists in most Member States and has not been held unlawful by the competent courts. It pursues a legitimate objective of immigration I - 5837 JUDGMENT OF 27. 6. 2006 – CASE C-540/03 policy, namely the effective integration of the members of the family in the host community, by ensuring 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" (Finding 93).

[20] The Advocate General, J. Kokott, defended the effectiveness and full validity of the questioned principles. Nevertheless, a consistent body of authors has shared, totally or partially, the disputable arguments of the European Parliament. See MONEREO ATIENZA, 2007; CANEDO ARRILLAGA, 2006; ÁLVAREZ RODRÍGUEZ, 2006; or IGLESIAS SÁNCHEZ, 2007.

In its Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment, the Commission of the European Communities, COM(2003) 3.6.2003, states: "the right to family reunification is, by itself, an indispensable instrument for integration." (See page 5).

a) *Relatives in the ascending line*

"*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*". In contrast, Article 17, 1-d of the Immigration Law only refers to the concept "*Relatives in the ascending line*".

Nowadays, half of the Member States allow the parents of the sponsor and his/her spouse the exercise of this right. Among them we find Belgium, the Czech Republic, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Sweden and Spain.

b) *Children of legal age*

This section refers to children of legal age of the sponsor or spouse who are unmarried and are evidently unable to provide for their own needs owing to their health condition. The state of dependency, of material inability to manage on their own is a firm requirement.

c) *Unmarried couples*

Art. 4(3) mentions the registered partnership – without going deeper into this matter –, and the unmarried partner with whom the sponsor has a stable and proven relationship, meaning that (Art.5, 2) the application shall be submitted together with documents that attest the bond. Belgium, Germany, Finland, the Netherlands, Sweden, Portugal and Lithuania explicitly consider both these possibilities. In the Spanish Law, the judgment law of the High Court and the Supreme Court allow a wide interpretation in spite of the lack of legal concretion.

2.2.3. *Requirements for reunification*

The right to reunification forces the applicant to have a stable administrative status and a legal residence pursuant to the provisions of the state law [21].

Interviews and other informative meetings intended to clear up any possible doubts about the sponsor and his/her relatives are carried out in all countries. Occasionally, DNA tests are performed with the purpose of justifying those family bonds in countries such as Spain, the Netherlands, Lithuania, Italy, France, Austria, Finland, Belgium and Germany. In Lithuania and Belgium, the sponsor assumes the cost of the test. In the Netherlands, the sponsor shall assume those costs if no kinship is evidenced, but the national authorities, as all countries that consider this procedure, shall take on them if otherwise proven.

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[21] On this matter, see the Council Regulation (EC) no. 1030/2002M of 13 June 2002 laying down a uniform format for residence permits for third country nationals. OJ L157, 15 June 2002.

The authorization to the sponsor to reside in the country for a period of validity of one year is a firm requirement and, cumulatively, the sponsor "*has reasonable prospects of obtaining the right of permanent residence*"[22] (Art.3, 1). Moreover, the Directive asserts "*Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her*[23] "(Art. 8). This is however not what Article 18, 2 of the Organic Law 14/2003 of 20 November[24], amending Organic Law 4/2000, states: "*applicants shall exercise their right to family reunification in Spain after having residing legally for a period of one year and are authorized to stay for at least one more year*"[25].

What seems unquestionable is the more favorable approach of the Spanish text, that is its lower level of exigency and its unwillingness to exhaust the two years allowed by the Directive and its legal certainty provided by the absence of vague legal terms such as "reasonable prospects" found in the Directive. This problematic circumstance is shared with Luxembourg, Lithuania, Malta and Cyprus[26]. In the case of France, a minimum period of 18 months of residence is required, whereas Sweden and the Czech Republic demand a permanent permit.

a) *Procedure*

The procedure to be followed is stated in Chapters III (Art. 5) and IV (Art. 6, 7, 8). Among all the Member States, only four lack of a specific procedure to carry out reunification. It is the case of the Czech Republic, Hungary, Latvia and Poland that prefer to proceed by applying its general regulations on immigration.

Apparently acting from a quite different perspective to that of the Spanish Law, the Directive allows the Member States to determine who shall submit the application for entry and residence in person, the sponsor or any other member of

[22] To know the regulation in force of the residence permits to which the Directive refers, see Council Regulation (CE) 1030/2002 of 13 June 2002, laying down a uniform format for residence permits for third country nationals. OJ L157, 15 June 2002.

[23] As detailed in the previously mentioned Report from the Commission on the application of this Directive, the European Convention on the Legal Status of Migrant Workers (1977) states a waiting period that shall not exceed twelve months. Its scarce ratification by France, Italy, the Netherlands, Portugal, Spain and Sweden, together with other countries out of the European Union such as Albania, Turkey, Moldavia and Ukraine, has extremely limited its approach. Words in bold not included in the original Article.

[24] Spanish Official Journal (BOE) no. 279 of 21 November 2003.

[25] Author's translation.

[26] The Report from the Commission on the application of this Directive shows the problematic of Cyprus that requires a permanent residence permit to apply for reunification and states a rule of four-year maximum residence after which permits are not renewed, apparently excluding third-country nationals from the right to apply for family reunification.

the family to be reunified. Almost all countries require the sponsor to proceed in person, but some exceptions are found in Hungary and Austria, where this possibility is only granted to the relative to be reunified. The case of Portugal is somewhat exceptional as it only allows the relative to personally hand in the application, provided he/she is within Portuguese territory (invoking the exception stated in Art. 5, 3 that allows the application to be submitted by relatives already in its territory).

In spite of this, both Art. 17 of the Immigration Law and Art. 1 of the Directive make equally clear that, in general terms, the right to reunification shall only be exercised by a third-country national residing in a Member State; in other words, the sponsor shall be a holder – and not an applicant – of a residence permit. Despite this condition established by the Community legislator, countries such as the Czech Republic, Finland, Portugal and Poland do not mention this basic requirement.

This determining factor required by the Spanish legal system theoretically hinders what the already mentioned Art. 5, 3 *in fine* stipulates when establishing that "*By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory*". This points out that the general rule requires the relative to be residing out of the sponsoring country at the moment the application is initiated. However, different situations might be considered, and such is the case of Austria, where the presence of the relative is allowed under humanitarian circumstances. On the other hand, Cyprus' legal system admits no exception.

The Directive makes no allusion to the administrative charges to be paid by the applicant, and in the cases when payment is required (that is the case of all Member States except for Italy and Portugal), it is not specified if those charges arise from the issuance of the visa for family reunification or from the application as such. The minimum charge, almost symbolic in Spain and Belgium, amounts to € 35 in the Czech Republic and Estonia whereas it can reach the amount of € 1368 in the Netherlands [27].

b) *Material Requirements*

With reference to the material requirements for the exercise of the right, the foreign sponsor shall, when submitting the application, prove [28] a series of particulars that are discretionarily left to the determination of each Member State:

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[27] The Report from the Commission on the application of this Directive explains that an application for a visa for family reunification costs € 830, the integration test € 350 and the issuance of a residence permit for a temporary stay € 188.

[28] BLÁZQUEZ RODRÍGUEZ, 2003.

1. "[...] *stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family*" (Art. 7, 1-c), the kind and regularity of the documentary evidence will be determined by each State. Increasing amounts based on number of relatives to be reunified are expected, which sometimes implies such a high demanding level that could even seriously hinder the exercise of the right, particularly in the case of the youngest foreigner sponsors (in Finland, an amount of € 450 must be provided for each reunified child, a figure that is doubled for each member in Estonia).

2. This principle does also require sickness insurance for the sponsor and his/her relatives (Art.7, 1-b). For half of the Member States, this is an enforceable requirement obligatory, whereas Hungary allows an alternative to insurance or enough means to face an illness. It remains arguable whether this last condition, not considered in the Directive, could be incorporated to a national legislation.

3. "*Accommodation regarded as normal*" in terms of size, security and salubriousness (Art. 7, 1-a), so that the expenses are not chargeable to the sponsoring country without having recourse to the social assistance system of the Member State. The requirements regarding the housing conditions may vary, and whereas many countries simply demand accommodation regarded as "normal", others call for a specific number of squared meters dependent on the number of people to be accommodated. Austria and Belgium require the sponsor to meet this condition before the arrival of his/her relatives, an aspect that poses practical doubts as for the reunification procedure, which could extend over time and bring costs sometimes impossible to cover by the sponsor. In Poland, this condition is so demanding that accommodation is a requirement even for refugees (a demand that contravenes Art. 12 of the Directive).

c) *National Integration Measures*

Among the requirements to exercise the right to reunification, some countries demand third-country nationals to comply with certain integration requirements specified in Art. 7.2. It is thus an optional condition that, if applicable, can be included in the national legislation and, as in the case previously stated, can lead to confusion due to its lack of accuracy. The integration policies include education and training as fundamental pillars of the procedure.

The Netherlands, Germany and France have already incorporated and slightly modified[29] these measures as a firm requirement. In all cases, basic language competence is a requirement that can be particularly considered in each case. Other states call for this requirement once reunification has been verified through

[29] JAULT-SESEKE, 1996. For instance, Germany offers integration courses, imposing fines amounting to € 1.000 to the attendants in case of repeated no-show. Activities aimed at encouraging participation of the immigrants in social life are also common. In the Netherlands, the knowledge of the customs and traditions in the Dutch society is a determining factor that shall be verified in a test, whose mark is not challengeable but can be repeated until the applicant proves knowledge of these contents.