THE RULE OF LIFE: FAMILY REUNIFICATION IN EU MOBILITY AND MIGRATION LAWS

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(This is a draft version of the chapter which will appear in M. Fletcher, E. Herlin-Karnell and C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice*, Forthcoming 2016, Routledge)

INTRODUCTION

Institutions are created in order to regulate social life and to aid human activity. Their existence is the product of socio-political activity and the main purpose underpinning their creation and maintenance is to enhance human life as suffused in social relations. Accordingly, norms are 'in politics', but are also a reflection of rules of life. They represent a vision of things from above but at their centre lays an intelligible plan to facilitate human flourishing, that is, to serve human beings-in-their relations. One such rule of life is the founding of a family and the protection of the family unit.

As Article 16(3) of the Universal Declaration on Human Rights states, 'the family is the natural and fundamental group unit of sociality and is entitled to protection by society and the state'. The entitlement to protection stems from the simple fact that individuals can only flourish by experiencing the love, care, protection and warmth that close, familial, relations emit. The continuity of this experience contributes to human beings' well-being. When continuity is disrupted by other contingencies, including border crossings and one's settlement in another state,

relations are under strain as personal and family lives become disentangled. The reunification of the family ends the disjunction and preserves the integrity of familial relations.

Although almost all international law instruments recognise these facts, the family reunification of migrant workers with their spouses and dependent children has not been recognised as a right in international law. Notwithstanding their positive obligations to facilitate family reunification, states enjoy a level of discretion in this area - a certain margin of appreciation, owing to their sovereign jurisdiction in migration and refugee matters.[1]

In contrast, European Union law recognises a concrete and full-fledged right to family reunification which all EU national migrant workers in the past, and now EU citizens, have. Since the early days of European integration, family unification was deemed to be an important aid to intra-Community mobility and necessary for the integration of the worker and his family into the host Member State. It has also been a manifestation of his/her equal treatment in relation to nationals of that state. The term 'family' was defined in the Council Regulation 1612/68 (Article 10(1)) which implemented the right to free movement for workers established by the Rome Treaty in 1957. It consisted of a worker's spouse, their descendants who are under the age of 21 or are dependants and dependent relatives in the ascending line of the worker and his spouse.[2] Directive 2004/38, which repealed Articles 10 and 11 of the Council Regulation 1612/68, broadened the definition of 'family member by including registered partners, if the legislation of the host Member State treats registered partnership as equivalent to marriage and in accordance with the conditions laid down in national law, and their descendants and dependent direct

[1] Compare Article 44(2) of the *International Convention on Migrant Workers*. The ECtHR has ruled that the obligations imposed on states by Article 8 ECHR do not extend to a general obligation to respect the choice by married couples of the country of matrimonial residence so as to require them to grant entry to the non-national spouse for settlement; *Abdulaziz v United Kingdom* (1985) 7 EHRR 471 at para 68; *Rodrigues Da Silva Hoogkamer v The Netherlands* (2007) 44 EHRR 34 at para 39; *Y v Russia* (2008) 51 EHRR 21 at para 103.

[2] European Council Regulation 1612/68 on *Free Movement of Workers* OJ Special Edition 475, OJ L257/2.

relatives in the ascending line.[3] It also provides for the facilitated entry of Union citizens' other dependant family members or members of their household or recipients of personal care by the Union citizen (Article 3(a) of the Directive). In addition, Article 3(b) recommends that Member States facilitate the entry of Union citizens' cohabitees.

By establishing a European Union law fundamental right to family reunification, the Court of Justice of the European Union has limited the Member States' sovereign prerogatives in the field of migration law and has tamed nationalist narratives. The right to family reunification has also been extended to third country nationals (TCNs) residing legally in the European Union following the adoption of Directive 2003/86.[4] But whereas 'communitarian egalitarianism' has characterised the European Union's law and policy towards the family reunification of EU citizens, the family reunification of third country nationals has been governed by a rival policy belief system; namely, by what may be termed 'restrictive collectivism'.

In this chapter, we examine the regulation of family reunification in EU internal mobility law, on the one hand (section I), and EU migration law (Section II), on the other, and contrast the policy priority of facilitating intra-EU mobility and recognising the reality of family life with those of migration control and of ensuring national cohesion. We make a case for rethinking the restrictive family reunification rules applying to EU migration law and for the coherent application of the normative standards pertaining to the right to family reunion without differentiation on the basis of the sponsor's nationality. If families are treated differently on the basis of contingent characteristics, such as the nationality of the sponsor, and differences are drawn on the basis of spouses' geographical location, then a legal order's normative commitment to respect for family life is not deep enough. One cannot separate the same from its other except by abandoning the norm altogether. In principle, all family units should be treated alike and the

[3] Council Directive 2003/86/EC of 22 September 2003 on *the Right to Family Reunification* [2003] OJ L251/12.
[4] Ibid.

continuity of family life and experience is equally valuable to all human beings so as to command protection.

FROM VALUE COMMITMENT TO CONTENTION

The Court of Justice of the European Union has been proactive and uncompromising in establishing a Community law fundamental right to family reunification. Since the early days of European integration, family unification was deemed to be an important aid to intra-Community mobility and necessary for 'the integration of the worker and his family into the host MS without any difference in treatment in relation to nationals of that state'.[5] Third-country national spouses of initially Community workers, Community nationals in the early 1990s, and of Union citizens following the entry into force of the Treaty on European Union on 1 November 1993, have not fallen within the regulatory realm of, often restrictive, national migration laws, but have enjoyed derived rights as members of the worker's family. In addition, the EU's normative commitment in this domain has been enhanced by the fact that the Court of Justice of the EU has not hesitated to pronounce respect for family life (Article 8 ECHR) an integral part of the general principles of Community law. In *Commission v Germany*, the requirement of German law that made the issuing of residence permits to family members of Community workers on the fact that they live in appropriate accommodation for the duration of their stay in the host Member State, and not only at the time of their move into a dwelling, was found to contravene Article 10(3) of Council Reg. 1612/68.[6]

In the new millennium, aided by the institutional architecture of the partial formal basis of Article 6(2) TEU which stated that the Union 'shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms

[5] Case 249/86 *Commission v Germany* (Re Housing of Migrant Workers) [1989] ECR 1263, paras 10,11.
[6] Ibid.

signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the MS, as general principles of Community law' and the Charter of Fundamental Rights (Article 7) which was proclaimed in Nice on 7 December 2000[7], and being attuned to the debate about possible accession to the ECHR by the EU, the Court elevated the fundamental right of respect for family life at the expense of national migration laws. In *Carpenter*, it ruled that a derivative right of residence can be implied from the right to provide services (formerly Art. 49 EC), thereby overriding restrictive national immigration rules.[8] The Court's attribution of normative priority to respect for family life has been reiterated in subsequent rulings, such as *MRAX*, *Baumbast*, *Commission v Spain*, *Jia*, *Eind*, culminating in *Metock and Others*,[9] where the Court outlawed national legislation making the right of residence of third country national family members of EU citizens subject to prior lawful residence in another MS.[10] Notwithstanding the controversy associated with the latter ruling in Denmark, UK and elsewhere, the Court progressively sought to reduce barriers to the family reunification of EU citizens erected by restrictive national migration regimes. In the case of *Reyes*, for instance, the Court ruled that a third country national descendant, who is dependent on a Union citizen receiving a steady income, does not have to show that she tried unsuccessfully to find employment in the state of origin in order to obtain a residence permit in Sweden where her mother, an EU national, lived.[11] To impose such a requirement on a dependant family member would contravene the letter (Article 23) and the spirit of Directive 2004/38. And in the Cases C-456/12 *O and B* and C-

[7] [2000] OJ C364/1.

[8]Case C-60/00 *M. Carpenter*, Judgment of the Court of 11 July 2002. See G. Barret, 'Family Matters: European Community Law and Third Country Family Members' (2003) 40 *Common Market Law Review* 369 - 421, 406.

[9] Case C-459/99 *MRAX*, Judgement of the Court of 25 July 2002; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; C-157/03 *Commission v Spain* [2005] ECR I-2911; C-1/05 *Jia v Migrationsverket* [2007] ECR I-1; Case C-291/05 *Eind*, Judgement of the Court of 11 December 2007; Case C-127/08, *Metock and Others*, Judgement of the Court of 25 July 2008. See also the Commission's 5th Report on Citizenship of the Union which mentions the need to interpret the right to free movement in the light of fundamental rights, including the right to respect for family life, and the principle of proportionality; COM(2008) 85 Final, 15.2.2008.

[10] D. S. Martinsen, 'Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion' (2011) 18(7) *Journal of European Public Policy* 956.

[11] Case C-423/12 *Flora May Reyes v Migrationsverket*, Judgment of the Court, 16 January 2014.

457/12 S and G, the Court held that TCN family members of EU citizens enjoy derived rights of residence when Union citizens return to the Member State of origin following a period of residence in another Member State (*O and B*) as well as when they are travelling to another Member State as frontier workers (*S and G*).[12]

The Court's normative commitment to family reunion has been anchored on what may be termed communitarian egalitarianism. EU citizens and their life worlds need to be protected so as to be able to lead full and dignified lives. Pursuing this fundamental policy belief system with respect to EU citizens has not been always easy. This was not only due to intergovernmental reactions. It was also due to the fact that the Court had to tread carefully around what has been termed 'wholly internal situations' which are governed by national law because they do not involve cross-border activity in order to trigger the application of European Union law. Such cases involved the family reunion of Union citizens who had never exercised their free movement rights and thus did not fall within the scope of the Citizenship Directive (2004/38).[13] Although sedentary Union citizens could not invoke the free movement provisions of EU law, the Court could not ignore their plight at the end of the first decade of the new millennium as shown in the triptychon of *Zambrano*,[14] *McCarthy*[15] and *Dereci*[16] cases. Ruiz Zambrano was a Colombian national who had been residing in Belgium without a residence permit following the rejection of his asylum application but could not be deported to his country of origin, Colombia, owing to non-refoulement reasons. His wife gave birth to two children, Diego and Jessica, both Belgian nationals and EU citizens since the father failed to register the births with the Colombian embassy. Although Mr Zambrano and his wife could not leave Belgium and were denied work and residence permits, he nevertheless had taken up full time employment for five years in order

[12] Judgment of the Court (Grand Chamber), 12 March 2014.
[13] Directive 2004/38 of 29 April 2004 [2004] OJ L158/77.
[14] Case C-34/09 *Ruiz Zambrano v Office national de l'emploi (ONEM)*[2011] ECR I-0000.
[15] Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-03375.
[16] Case C-256/11 *Dereci, Heiml, Kokollari, Maduike and Stevic v Bundesministerium fur Inneres*, Judgement of the Court, 15 November 2011.

to support his family and contributed to the tax and social security burden of the Belgian commonwealth. But when, following his redundancy, he challenged the authorities' refusal to recognise his entitlement to unemployment benefit, he and his family faced the prospect of expulsion from Belgium and thus from the European Union. The Court ruled that Mr Zambrano was entitled to remain and work in Belgium without a work permit as the parent of EU citizen children who would have to leave the territory of the Union if their father did not have the right to live and work in Belgium. Advocate General A. G. Sharpston highlighted the importance of fundamental rights in the light of the legally binding Charter of Fundamental Rights,[17] but the Court premised its decision on EU citizenship rather than on fundamental rights. As the Court stated, 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside […] has such an effect.'[18] The refusal to grant a right to residence to the parents of the children would thus result in the children's departure from 'the territory of the Union' and the deprivation of the opportunity to exercise their EU citizenship rights.

But, in *McCarthy*, the Court could not sidestep national migration rules since Mrs McCarthy had never exercised her free movement rights. She was a dual national of British and Irish nationality and wished to secure a right of residence for her spouse, a Jamaican national, by invoking her newly acquired Irish nationality. The Court distinguished this case from *Zambrano*

[17] Case C-54/09, Opinion delivered on 30 September 2010. Notably, AG Sharpston had also stated that 'Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected by EU law, where at least equivalent protection is not available under national law' (point 144).

[18] *Ruiz Zambrano* at para. 43. For commentary, see also C. Lenaerts, '"Civis Europeaus Sum": From the Cross-Border Link to the Status of Citizen of the Union', *Online Journal of Free Movement of Workers Within the EU*, No. 2, European Commission, Publications Office of the EU, 2011, 12; D. Kochenov, 'A Real European Citizenship: The Court of Justice Opening a New Chapter in the Development of the Union in Europe', (2012) 18(1) CJEL, 55-109; M. Hailbronner and S. Iglesias Sanchez, 'The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status', (2011) 5 ICLJ, 498.

in that the restrictive UK migration provisions did not have the effect of necessitating Mrs McCarthy's departure from the territory of the Union (para 50) and thus not resulting in the deprivation of the genuine enjoyment of her rights or impeding the exercising of her freedom to move and reside freely within the territory of the MS under Article 21 TFEU (para 49). Similarly, in *Dereci and Others* the Court ruled that third country national family members of EU citizens (the latter were Austrian nationals) who had never exercised their right to free movement and did not rely on their spouses for their subsistence fell within the ambit of the internal situation doctrine. As both the family reunification directive (Article 3(3) 2003/86) and the Citizenship directive (Dir. 2004/38) did not apply, the Court was reluctant to extend the ambit of EU citizenship protection since the Austrian measures would not lead to the forced departure of the Austrian nationals from not only the territory of a MS but also the territory of the Union (para 66) thereby compromising or undermining the effectiveness of EU citizenship (para 67). Whether the Austrian measures had this effect was a matter for the referring court to verify (para 74), but, if they did not, the issues at hand would have to be addressed with reference to the protection of fundamental rights and the right to respect for private and family life (Article 7 of the EUCFR and 8(1) of ECHR) which would lead to the grant of a right of residence. It concluded that it was a matter for the referring court to establish whether the situation was covered by Union law (which would have been the case if Austria implemented EU law) thus necessitating the application of the Charter, or, if it was not covered, then Article 8(1) of the ECHR would be applicable. The Court (Grand Chamber) thus circumscribed the novelty of *Zambrano* and at the same time refrained from 'clarifying the substance of rights' doctrine as well as from commenting on the possible links between Article 20 and 21 TFEU and fundamental rights.[19]

[19] The association of fundamental rights and Union citizenship was discussed more explicitly in *Yoshikazu Iida v Stadt Ulm*, Judgement of the Court of 12 November 2012. For the proposal of linking the substance of rights doctrine of Union citizenship with fundamental rights thereby enabling EU citizens to activate a 'reverse Solange' situation and rebut the presumption that MS comply with fundamental rights by relying on Article 20 TFEU before national courts and the Court, see A. Von Bogdandy, M. Kottmann, C.

Subsequently, in *O, S and L*[20] the Court reflected on the applicability of the Zambrano doctrine to the cases of reconstituted families where the step-parent of an EU citizen child has no parental or financial responsibility over him or her. In *O and S*, a Ghanaian national, who had been married to a Finnish national with whom she had a child of Finnish nationality and had sole custody of the child before and after her divorce, remarried a third-country national (an Ivory Coast national), O, and had another child with him. When O applied for a residence permit, his application was refused on the ground that he did not have sufficient means of subsistence. The same refusal of a residence permit took place in *L*, where an Algerian national, who married another Algerian national following her divorce from a Finnish national with whom she had a child of Finnish nationality who was under her sole custody. Although it was suggested that the denial of resident permits to the step-fathers would not result in the forced departure of the children from the territory of the EU[21] and the Court left this matter to the national court, it urged the latter to examine 'all the circumstances of the case'[22] and to note that what would compel the child's departure would be the relationship of 'legal, financial or emotional dependence'.[23] If, on the other hand, the Zambrano doctrine could not apply, under the Family Reunification Directive (2003/86)[24], the third-country national mothers could be viewed to be 'sponsors' of their third-country national husbands within the meaning of Article 2(c) of the Directive and the Member States have 'precise positive obligations with corresponding clearly defined individual rights … to authorise the family reunification of certain members of the sponsor's family, without being left a margin of appreciation'.[25] Their decision must also comply with the *Chakroun* ruling on the

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Antpohler, J. Dickschen, S. Hentri and M. Smrkolj, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489-520.

[20] Joined Cases C-356/11 and C-357/11 *O, S and L* (ECJ, 6 December 2012).

[21] Joined Cases C-356/11 and C-357/11 *O, S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*, Opinion of AG Bot delivered on 27 September 2012, points 44–46. The Advocate General stressed that such decision would be 'freely' taken by the mother for a reason linked to the preservation of family life.

[22] ibid [53].

[23] ibid [56] and AG Bot's Opinion (n 67) point 44.

[24] Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L251/12.

[25] *O, S and L* (n 68) [70].

meaning of the requirement the possession of 'stable and regular resources' by the sponsor under Article 7(1)(c) of the Family Reunification Directive[26] and with the Charter of Fundamental Rights. In particular, Article 7 on the right to respect family life must be read in conjunction with the obligation to take into account the best interests of the child recognised in Article 24(2) and his or her interest to maintain a personal relationship with both parents on a regular basis Article 24(3). As the Court stated:

The Member States must not only interpret their national law in a manner consistent with European Union law but also make sure that they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the European Union.[27]

The above mentioned judgements reveal the Court's attempts to strike a balance between national regulatory competences and the evolving dynamics of Community law and EU citizenship while preserving the EU's value commitment to respect for family life. Its rulings may unavoidably lead to differentiated results and somewhat inconsistent action. But, at the same time, they draw attention to the need for more comprehensive solutions to intra-EU family migration issues in the future. Calls to preserve the normative integrity of family reunification are bound to increase given the fact that the EU Charter of Fundamental Rights has been upgraded to a constitutional guarantee. And this upgrading calls into question the dependence of effective family reunification on the mobility status of Union citizens. Both Carlier[28] and Groenendjik[29] have pointed out that the Commission's proposed draft directive on Family reunification (Dir. 2003/86) included the provision that sedentary Union citizens should be governed by the rules of Community law relating to free movement for the purposes of family reunification. Since the

[26] Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-1839.
[27] *O, S and L* (n 68) [78].
[28] J.-Y. Carlier, 'La libre circulation des personnes dans et vers l'Union europeenne' (2013) *Journal de droit europeen*, pp. 103-114.
[29] K. Groenendijk, 'Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin' in E. Guild, C. Gortazar-Rotaeche and D. Kostakopoulou (eds.), *The Reconceptualisation of EU Citizenship* (Brill/Nijhoff, 2014), pp. 169-188.

latter is a necessary condition for leading a stable and healthy life, another institutional solution might be the future activation of the so-called 'elastic clause' of Article 25 TFEU resulting in a new explicit template of respect for family life stating: 'The European Union and the Member States shall respect the right of family reunification for all Union citizens'.[30]

Critics might argue here that the present environment in Europe is not conducive for enlightened and liberal migration reforms in this domain and in the area of Freedom, Security and Justice, in general. The ethical embedding of family reunification will not transcend certain Member States' rival policy belief in migration restriction and interest in electoral victories. For the time being, it seems that the European Convention of Human Rights (Article 8) could provide a solution, if the Charter of Fundamental Rights were not applicable. And although the context of justification for the recognition of a right to family reunification for EU citizens remains unchanging, that is, human welfare becomes undermined without the care, support and warmth of the loved ones, at present mobility status serves to categorise EU citizens into privileged and less privileged classes. Communitarian egalitarianism therefore co-exists with prioritarianism.

BETWEEN MIGRATION CONTROL AND RIGHTS

Whereas communitarian egalitarianism has characterised the European Union's law and policy towards the family reunification of EU citizens, the family reunification of third country nationals (TCNs) has been governed by a rival policy belief system; namely, by restrictive collectivism. This is mainly due to the fact that the Member States had competence over this area under the diluted intergovernmentalist framework of the Justice and Home Affairs pillar (- the so called third pillar) of the Treaty on European Union (1993) and thus their policies were characterised by restriction, tight controls on border crossings and the depiction of family migration as an obstacle

[30] D. Kostakopoulou, 'Co-creating EU Citizenship: Institutional Process and Crescive Norms', *The Cambridge Yearbook of European Legal Studies*, 2013, Vol. 15, pp. 255-282, at p. 276.

to societal integration. One should not forget that family migration presents one of the biggest challenges to liberal states: on the one hand, fundamental rights norms make it difficult to deny or stop the reunion of family members; on the other hand, there a fewer and fewer possibilities to enter EU territory by legal means. As a result, family reunification has become one of the main channels to get to the EU and, therefore, challenges the policy goals of many governments, which have sought to curb down and 'manage' migration by choosing who enters and resides on their territory.[31] In 2006, family migration made for 62 per cent of Portugal migration flows, 59 per cent for France, 47 per cent in the Netherlands, 40 per cent in Austria and Italy, 23 per cent in Germany and 18 per cent in Denmark.[32] In 2012, these numbers were down in almost all countries, but still migration continued. France and Portugal remained among the highest ones (with 38 and 37 per cent respectively), followed by Italy (32 per cent). The Netherlands were down to 20 per cent, similar to Austria (15 per cent) and Germany (14 per cent). Denmark reached very low figures, with only 8 per cent of migrants coming through the family reunification route.[33] The UK has maintained a relatively low proportion of migrants coming through family reunification (18 per cent in 2006, 12 per cent in 2012).

Following the partial Communitarisation of the Justice and Home Affairs pillar and the establishment of a new Migration Title at Amsterdam (1999), the European Council at Tampere identified four key elements for the development of a common migration policy between 1999 and 2004; namely, a) partnership with the countries of origin; b) a common European asylum policy, c) the fair treatment of TCNs and d) the fair management of migration flows.[34] The Tampere's commitment to policy priority (c), that is, the fair treatment of resident TCNs and the development of a vigorous integration policy by granting long-term resident TCNs rights and

[31] C. Boswell and A. Geddes, *Migration and Mobility in the European Union* (Houndmills: Palgrave MacMillan, 2011), p. 103 et seq.
[32] OECD (2008), *International Migration Outlook 2008*, OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/migr_outlook-2008-en.
[33] OECD (2014), *International Migration Outlook 2014*, OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/migr_outlook-2014-en.
[34] *Tampere Presidency Conclusions*, European Council 15-16 October 1999, SN 200/99 Brussels.

obligations comparable to EU citizens, created the preconditions for greater symmetry in the treatment of Union citizens and their family members and of resident TCNs. A visible manifestation of the emerging symmetry was the Commission's proposed directive on family reunification (1999)[35] which sought to harmonise national legislations in this area by granting the right to family reunification to all third country nationals - including refugees under the Geneva Convention of 1951 and persons enjoying temporary protection, who resided lawfully in a Member State and held a residence permit for at least a year regardless of the purpose of their residence[36]. It also covered Union citizens who had not exercised their right to free movement whose situation had hitherto been subject solely to national rules, as we argued above. The Commission's proposals did not meet the Member States' approval and were adjusted in order to fit with national migration rules. Accordingly, the final draft included provisions on integration conditions and measures: Article 7(2) of the Family Reunification Directive states that 'Member States may require third country nationals to comply with integration measures in accordance with national law'. These could take place before or following the entry into the host Member State. The former policy is known as pre-departure integration or integration abroad. Although this provision was not among the contested provisions in *European Parliament v Council*,[37] the Court, nevertheless, noted the obligations that the Member States have under Article 8 ECHR and invited national courts to use the preliminary ruling reference procedure if they faced interpretational difficulties.

According to the Family Reunification Directive, the sponsor, that is, the third country national lawfully residing in a MS and applying, or whose family members apply, for family reunification, must have a resident permit of at least one year's validity and reasonable prospects for obtaining permanent residence there. And (s)he must be 21 years of age, able to provide adequate accommodation for his/her family, be covered by health insurance and must have

[35] COM(1999) 638 final CNS 1999/0258, Amended Commission Proposal COM(2000) 624 final.
[36] In this respect, it differs from include the 1993 Resolution, *supra*, n. 37.
[37] Case C-540/03, 27 June 2006, [2006] ECR I-5769.

sufficient stable and regular resources to sustain himself/herself and all family members. Unlike the definition of family members pertaining to EU citizens, Article 4 of the Directive confines family reunification to the nuclear family of the third country national: the spouse and natural or adopted children who are unmarried and minors. First degree relatives in the ascending line, adult unmarried children and cohabitees do not have a right to family reunification: they fall within the category of eligible family members and are thus subject to the Member States' discretion. In all cases, the Member States may request the sponsor to meet a two year residence requirement prior to applying for family reunification. This requirement does not apply to refugees (Article 12(2) of the Directive). A similar derogation exists for third country national researchers under Directive 2005/71,[38] who do not enjoy a right to family reunification but have the expectation that a MS will facilitate their family reunion,[39] and highly skilled migrants under Directive 2009/50[40] who enjoy the most favourable rules on family reunification, such as the prohibition of the application of 'integration-abroad' measures (Article 15(2)), a decision on family reunification within six months (Article 15(4)) and immediate access of family members to the labour market of the host state.[41] Public order, public security and public health concerns can constitute grounds for the rejection of an application for family reunion, according to the Family Reunification Directive.

In the years that followed the adoption of the Family Reunification Directive, the Commission broadly maintained its rights-based approach: '[it] is a necessary way of making a success of the integration of third country nationals residing lawfully in the MS. The presence of family members makes for greater stability and deepens the roots of these people since they are enabled to lead a normal family life'.[42] The Communication on *Immigration, Integration and*

[38] Directive 2005/71/EC *on a specific procedure for admitting third-country national researchers for the purpose of scientific research* [2005] OJ L 289/15.
[39] Recital 18 of the Preamble to the Directive.
[40] Directive 2009/50/EC *on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment* [2009] OJ L155/17, 18 June 2009.
[41] For an excellent discussion, see A. Wiesbrock, *Legal Migration to the European Union: Ten Years After Tampere* (Nijmegen: Wolf Publishers, 2009), p. 225 et seq.
[42] COM(99) 638, final, 3.

Employment[43] thus explicitly stated that 'even though the role of the family varies from one culture to the other, it generally plays a central role in the integration process as it represents a fixed point of reference for immigrants in the host country. Family reunification with the nuclear family is a key tool in this respect'. [44] And the 2007 Communication, entitled 'Towards a Common Immigration Policy', emphasized the fact that 'integration policy should therefore be seen as a continuum, running from entry through to settlement and to social and economic inclusion'.[45] Following the 2007 Communication and the European Council's meetings in December 2007 and Spring 2008[46] which underlined the need for the development of a comprehensive European migration policy, the Commission issued a new Communication on *A Common Immigration Policy in Europe: Principles, Actions and Tools*.[47] The latter outlined ten common principles upon which a future common immigration policy would have to be based, which were grouped under three main strands of European policies, namely, prosperity, solidarity and security. Each of these principles was accompanied by actions. The third section of the Communication called for a common strategy on immigration governance and the development of new tools to strengthen the monitoring and evaluation of the implementation of these principles. 'The positive potential of immigration can only be realized if integration into host societies is successful. This requires an approach that does not only look at the benefit for the host society but takes also account of the interests of the immigrants: Europe is, and shall continue to be, a welcoming environment for those who have been granted the right to stay, be they labour immigrants, family members, students or persons in need of international protection'.[48] Interestingly, the Communication also mentioned the assessment of 'the implementation and the

[43] COM(2003) 336 final, 3 June 2003.
[44] Ibid, at page 25. It echoed the 1999 Communication: '[it] is a necessary way of making a success of the integration of third country nationals residing lawfully in the MS. The presence of family members makes for greater stability and deepens the roots of these people since they are enabled to lead a normal family life'; COM(99) 638, final, 3.
[45] COM(2007) 780 final, at p. 8.
[46] Presidency Conclusions, Brussels 13/14 March 2008, point 14.
[47] COM(2008) 359 final, 17.6. 2008.
[48] Ibid, at page 3.

need for modification of the Council Directive 2003/86/EC on the right to family reunification'. [49] It reiterated the latter in its Communication '*on an Area of Freedom, Security and Justice serving the citizen'*, which aimed to influence the adoption of the new multi-annual programme, the so-called Stockholm Programme, which was adopted in December 2009.[50] The Communication called for the development of a dynamic immigration policy based on 'respect for fundamental rights and human dignity'.[51]

Notwithstanding the Commission's normative response to the family reunification of TCNs,[52] the Member States continued to pursue their restrictive policies and to subject applicant spouses to integration tests, which became de-territorialised. Certain Member States, such as the Netherlands, which pioneered this policy in 2005,[53] Britain, Denmark and Germany for instance, required spouses to meet linguistic requirements and/or to pass civic orientation tests abroad in order to gain authorisation of their entry to the country. This requirement cannot but interfere with the normative structure of the right to respect for family life (Article 8 ECHR) since failure in an exam or a test would preclude the grant of a temporary entry visa to the spouse of a sponsor. The European Committee of Social Rights shares the view that such integration requirements 'constitute a restriction likely to deprive the obligation laid down in Article 19(6) of the European Social Charter, which guarantees the right to family reunion, of its substance and is consequently not in conformity with the Charter'.[54]

The Court of Justice of the EU did not have an opportunity to rule on the compatibility of 'integration abroad' or pre-entry tests with the Family Reunification Directive (Article 7(2) of Dir. 2003/86) until recently. The first case which reached the Court of Justice of the EU in 2001,

[49] Ibid, at page 8.
[50] COM(2009) 262/4, 10 June 2009, Brussels.
[51] Ibid, at page 34.
[52] Compare, D. Thym, 'EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook', 2013, *Common Market Law Review* 50, pp. 709-736.
[53] The Act (*Wet inburgering in het buitenland*) was adopted on 22 December 2005 and entered into force on 15 March 2006.
[54] ECSR, Conclusions 2011General Introduction, January 2012, statement of interpretation on Article 19(6)).

Imran, was withdrawn before the Court ruled on the matter because the Dutch government gave a visa to the sponsor's spouse[55]. However, Bonjour and Block noted that the Commission issued a statement declaring the Dutch 'integration abroad' tests incompatible with the Directive, which – despite its non-binding effects – did have some informal influence on German national courts.[56] More recently, the President of the Court ordered A*yalti*, which was a request for a preliminary ruling from the Verwaltungsgericht Berlin, to be removed from the register.[57] On 9 July 2015, the Court considered a preliminary ruling reference from the Dutch Council of State of 1 April 2013 on whether the term 'integration conditions' contained in Article 7(2) of the Family Reunification Directive allow national authorities to impose linguistic and civic integration testing before granting a TCN family member permission for entry and residence.[58] In both cases, the District Court in the Hague (Rechtbank's – Gravenhage) had ruled that it was contrary to the Family Reunification Directive to require that K, an Azerbaijani national who had health problems, and A, a Nigerian national who suffered from psychological problems, satisfy civic integration requirements abroad before being allowed to reunite with their spouses in the Netherlands. The Dutch Minister for Foreign Affairs appealed against this decision and the Council of State sought the Court's guidance on the meaning of Article 7(2) of the Directive. The Court ruled that since family reunification is the general rule, the first subparagraph of 7(2) of Directive 2003/86 must be interpreted strictly (para 50). The Member States should not use this provision in order to undermine the objective and effectiveness of that directive (paras 50 et seq). The Court also noted that the principle of proportionality requires that, in addition to attention being paid to specific individual circumstances, any conditions relating to civic integration testing and any associated costs imposed by national authorities must not make family reunification impossible or

[55] Case C-155/11 PPU *Imran* of 10 June 2011.
[56] L. Block and S. Bonjour, 'Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands' (2013) 15(2) *European Journal of Migration and Law* 203-224.
[57] Case C-513/12 *Aslihan Nazli Ayalti v Federal Republic of Germany* of 13 November 2012. The case closed by an Order of the President of the Court of 15 March 2013.
[58] Case C-153/14 *Minister van Buitenlandse Zaken v K. and A.*, Judgement of the Court of 9 July 2015.

excessively difficult (paras 63-71). It was made clear that 'integration measures' 'must be aimed not at filtering those persons who will be able to exercise their right to family reunification, but at facilitating the integration of such persons within the Member States' (para 57).

On the other hand, national courts have ruled that integration abroad tests are not a disproportionate interference with family life and are thus justified.[59] This reasoning is based on the belief that such measures prepare spouses for integration at a very early stage and increase their employability. However, the conditionality attached to them makes such arguments debatable. Hardly anybody would dispute the fact that facilitating one's employability and settlement are legitimate social interests, thereby meeting the suitability test required by the principle of proportionality. But it is doubtful whether the tests of necessity and adequacy or reasonableness (proportionality *stricto sensu*) that proportionality entails are met. This is because the above mentioned legitimate objectives could be achieved by less restrictive means, that is, by providing opportunities for language class attendance on arrival and/or participation in targeted training programmes designed to equip spouses with the skills and knowledge required in order to exercise specific professions. Being essentially admission requirements, integrations tests abroad serve as a device of migration control.

One notices the clear juxtaposition of two rival policy beliefs; on the one hand, in the EU legal framework governing the free movement of EU citizens, family reunification is a right that is associated with, and enhances, the right to cross-border mobility, whereas, with respect to TCNs, restrictive collectivism subsumes respect for family life to political expedience, migration control and to vague notions of integration, on the other.[60] In EU free movement law, integration has always been firmly situated within the host Member State and has been intimately connected with processes of equalization so that an EU citizen becomes part of the fabric of the host society.

[59] England and Wales High Court, *Chapti and Others v Secretary of State for the Home Department*, Judgement of 16 December 2011 [2011] EWHC 3370 (Admin); German Constitutional Court, Case 2 BvR 1413/10, 25 March 2011.
[60] D. Kostakopoulou, The Anatomy of Civic Integration, 73(6) *Modern Law Review*, 2010, pp. 933-58.

In EU migration law, on the other hand, integration-testing is more about controlling, testing, restricting mobility and less about 'integration'. It is not based on a sustainable theory of integration or on how community building works.[61] Instead, it is based on a number of problematic assumptions, such as that integration can be objectively determined, can be measured and can be captured once and for all by a paper and pen exercise and thus the award of a passing score. Interestingly, in the first case on integration requirements for third country nationals under the long-term residence Directive (2003/109), while the Court ruled that the Dutch requirement to attend a civic integration course did not contravene the Directive, it also observed that the level of knowledge required, the level of registration fees, the accessibility of the courses and the material to be studied and other 'specific individual circumstances' might undermine the aims of the Directive and thus deprive it of its effectiveness.[62]

Perhaps, a clear manifestation of the tensions surrounding the co-existence of the two rival policy beliefs can be seen in *Dogan v Germany*.[63] The case concerned the refusal of family reunion to the spouse of a Turkish national company director on the ground that she was illiterate and her written German was not satisfactory. Although the referring court in Berlin raised two questions about the compatibility of the national rule with the 1970 Protocol to the EC-Turkey Association Agreement which prohibits the introduction of new restrictions on establishment or the provision of services (Article 41(1)), on the one hand, and with Article 7(2)(1) of the Family Reunification Directive, on the other, the Court confined its reasoning to the former question, which it addressed by activating EU mobility law's normative commitment to family reunion. In the Court's view, the national immigration rule constituted a restriction upon the enjoyment of the right of establishment exercised by Mr Dogan since it made family reunion 'difficult or

[61] See D. Kostakopoulou, 'Liberalism and Societal Integration: In Defence of Reciprocity and Constructive Pluralism', 43(2) *Netherlands Journal of Legal Philosophy*, 2014, pp. 127-139; *The Future Governance of Citizenship* (Cambridge: Cambridge University Press, 2008).
[62] Case C-579/13 *P and S v Commissie Sociale Zekerheid Breda, College van Burgemeester en Wetouders van de gemeente Amstelveen*, Judgment of the Court, 4 June 2015.
[63] Case C-138/13 *Dogan v Germany*, Judgement of the Court of 29 August 2014.

impossible', thereby in effect prompting Mr Dogan to choose between his activity in Germany and his family life in Turkey. In brief, it made family reunion more difficult and thus violated Article 41(1) of the Protocol (the standstill clause). It is the simple act of living which we all enjoy that has prompted, and prompts, the Court to overcome the contradictions imposed by restrictive national migration rules and practices and to sediment a pro-family normative commitment. By so doing, it simply makes dignified and wholesome human living go on.

CONCLUSION

The discussion in this chapter has provided an overview of the norms underpinning the evolution of EU family reunification laws. It revealed the discrepancies between a norm of 'communitarian egalitarianism' – deriving from the original principles of Community law based on freedom of movement – and a conflicting norm of 'restrictive collectivism' – based on traditional understandings of sovereignty and migration controls. These two norms continue to coexist both at the EU and nationals level and are most visible when they reach the arena of judicial politics. It is, therefore, often left to courts to decide the borders between these two norms. As we have seen, as soon as 'communitarian egalitarianism' has left its natural domain of freedom of movement, it has been put to the test. We have now a three-tier system with EU citizens that exercise (or would be deprived from exercising) their right to move freely across the Union benefiting from more rights and easier conditions to reunite their family, while 'sedentary' EU citizens and long-term resident third-country nationals have to face more stringent tests to benefit from their right to family life and are often left at the Member States' discretion.

On this basis, although European and national courts have allowed citizens and third-country nationals to test the strength of these two principles, we cannot yet speak of a full and generalised recognition of respect for family life as a fundamental right in the European Union. Certainly, the existing rules have served to, at least, lock in some minimum standards and

prevented further attempts to restrict migrants' rights[64]. However, as discussed above, there exists a generalised trend downwards in the proportion of people coming through family reunification. In most Member States, the application of the Family Reunification Directive has halved the proportion of permanent migrants that come through the family channel. This means that, generally, Member States have used the Directive to introduce and legitimise further restrictions in their national laws. Indeed, Member states have been reluctant to re-open a discussion on the directive and, in order to address its manifold weaknesses, the Commission has sought to provide some guidance for its correct implementation.[65] In the current political and social climate, there does not seem to be much optimism for the adoption of a consistent approach to family reunification.

[64] S. Bonjour and M. Vink, 'When Europeanization backfires: The normalization of European migration politics' (2013) 48(4) *Acta Politica* 389-407.
[65] COM(2014) 210 final, 3 April 2014, Communication on guidance for application of Directive 2003/86/EC on the right to family reunification.