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EU law and family reunion: a human rights critique [1]

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October 3, 2005, was the deadline for EU Member States to implement the EU's new Directive on family reunion for third-country [non-EU] nationals.[2] This is an opportune time to examine EC rules on family reunion for various categories of persons, which have been criticised for racism, class bias, sex discrimination, human rights breaches, homophobia and violation of children's rights.

Taking these points in turn, although there is clearly no direct race discrimination in EC family reunion law, critics of EC family reunion law have argued that indirect race discrimination resulted from the exclusion of third-country national sponsors (and EC national sponsors who have not exercised free movement rights) from EC free movement law rules on family reunion, which only cover the family members of EU citizens who have exercised free movement rights within the EU.[3] Following the adoption of the family reunion Directive, this argument is no longer valid. However, the highly graduated distinctions between sponsors on grounds of nationality, still evident after the family reunion Directive, clearly results in indirect race discrimination, since non-EU citizens have far fewer rights to have their family members join them under the family reunion Directive than EU citizens who exercise free movement rights have according to EC free movement law. Following the classic definition of indirect discrimination, there are more white people falling within the categories of sponsors with privileged family reunion law and more non-white people falling within the non-privileged categories. The EC's Council knows this full well, otherwise it would not have believed it necessary to exempt certain immigration matters from the scope of the EC's race discrimination directive.[4] But what of the European Court of Human Rights' rejection of the race discrimination argument as regards differential family reunion rules in the Abdulaziz case, along with later rejections of arguments based on Article 14 ECHR (the non-discrimination clause) in Moustaquim and C? [5] In Abdulaziz, the Court only compared the general rules for admission to the rules applicable to those sponsors with close links to the UK. It did not examine whether the UK could have different rules for different countries. In Moustaquim and C, the Court did accept that EU Member States could not just maintain different rules regarding nationals and non-nationals, but also regarding EU citizens and non-EU citizens, at least as regards expulsion. But it should be recalled that the Court condemned nationality discrimination strongly in its Gaygusuz judgment, concerning discrimination related to social security benefits.[6] Let us examine the arguments regarding admission and expulsion in turn.

As for admission, the Court argued in Abdulaziz against a finding of race discrimination on the grounds that the UK rules restricting family reunion being attacked in that case were an attempt to restrict primary immigration. In the Court's view, they were not directly discriminatory, and could not be regarded as discriminatory merely because more non-white people were affected than white people; this was simply the consequence of more non-white people wanting to immigrate to the UK. This finding was not affected by a favourable rule for those with UK ancestry, as these were considered exceptions for the benefit of those with close links with the UK, which do not accept the tenor of the general rules. This ruling confuses the separate issue of the rules on primary immigration (not as such covered by human rights law) with the family reunion rules which fall within the scope of Article 8 ECHR (which enshrines the right to private life and the right to family life); surely it is not beyond the powers of any court to distinguish between these two sets of rules. The reasoning as regards indirect discrimination does not follow the usual approach, which is to examine possible justifications once a differential effect is clearly made out. Nor is it clear why a specific part of the national rule should simply be disregarded. The underlying question evaded here was why two sets of sponsors should be in a different position as

regards the enjoyment of their right to family life.

A clearer answer to this question was offered in Moustaquim and C, based on the distinctions between sponsors who are home State or EC nationals on the one hand and all other sponsors on the other. Certainly there are distinctions between the sponsors, but can that justify distinctions as regards the enjoyment of family life? In Abdulaziz, the Court expressly noted that the sponsors did not have a secure right of residence in the host State. Obviously such sponsors cannot be compared with host State nationals or even EC nationals coming for a short stay, since the latter have the right to 'switch' to other free movement categories and to stay indefinitely if they meet the relevant conditions.[7] But there is far less distance between the status of long-term residents and the position of home State or EC nationals. In fact, at the 1999 Tampere European Council (summit meeting) the EU resolved to treat long-term residents the same as EC nationals 'as far as possible'. It could even be said that the EC's approach to long-term residents is part of its 'special legal order'. Alternatively, it is hard to see why the 'special legal order' criterion exists at all, unless it simply refers to the enhanced immigration status of EC national sponsors. Otherwise EU Member States would have carte blanche to justify any form of unequal treatment between EU and non-EU nationals as regards any of the rights in the Convention, including such matters as detention, fair trials and freedom of religion. It may even be questioned whether this concept is now implicitly overruled by the more recent judgments bringing the activity of EU Member States implementing EC law within the scope of the Convention.[8] Even if the 'special legal order' justification still exists, there is still insufficient distinction in the immigration status of EU citizens (considering that their citizenship status does not confer absolute prohibition of expulsion in all Member States) and long-term resident third-country nationals to justify any distinction as regards expulsion or admission of family members. This interpretation would also better respect the critical view of nationality discrimination expressed in Gaygusuz and Poirrez. The Strasbourg Court cannot take such a strong, principled position against nationality discrimination and at the same time shrug off any such discrimination the EC chooses to practice with the excuse that the EC is a 'special legal order'.

Next, critics argue that EC rules contain a class distinction as regards family reunion, because the sponsors must exercise an economic activity or have sufficient funds in order to exercise their rights.[9] This argument is less valid in recent years given the willingness of the Court of Justice to rule that EU citizenship confers a right to social benefits, in at least some circumstances.[10] But the focus on the particular circumstances of the citizens in these judgments and the EU Court of Justice's references to the possible legitimacy of refusing benefits in other cases suggest that citizenship still does not entail a fully-fledged right to move to another Member State and obtain social assistance from that State as a sole source of income. So there still remain distinctions based on wealth and income, even for EU citizens and their families. Taking race and class together, third-country nationals with a need for social assistance will be entirely prevented from family reunion (unlike those EC nationals with some earned income supplemented by top-up benefits), and those with irregular and unstable work will (unlike EC nationals) have difficulty qualifying for family reunion. Moreover, there is a greater risk of family reunion being terminated later for third-country nationals since access to social assistance after family members enter will more likely lead to possible termination of their reunion rights.

As for sex discrimination, critics have argued that women are vulnerable after divorce if they are not EC nationals exercising economic activities, particularly since EC free movement law refuses to recognise unpaid caring or voluntary work as 'work'.[11] In the case of EC free movement law, this objection has been answered to some extent by the Baumbast and R judgment of the Court of Justice,[12] which expressly recognises the position of carers, although certain important issues (the position following divorce from other sponsors or where children are too young for education, the status of the family members in question) are still unresolved and the case would not benefit women who do not have children to care for. Access to social security by family members has also been improved,[13] and the broader access to social assistance as a result of the case law on citizenship rights may also be relevant in such cases.

But the position of Turkish women is weaker, in that they cannot usually separate (never mind divorce) from the family they were authorised to join for three years unless they can attain worker status in their own right, unusual facts such as Eyup apply,[14] or a Baumbast and R principle, protecting the migration status of the carers of the children of former workers, applies to the EC-Turkey agreement. As for the family reunion Directive, there is a clear autonomous right to stay after a certain period but with many limits and caveats, although the EC's long-term residents' Directive has improved this situation.[15] Since there is no automatic possibility to switch to the sponsor's

status, as there is for EC nationals and Turkish family members of Turkish workers, the dependence of the spouses upon the sponsor will be even further exaggerated. The Community has thus set up a graduated system of sex discrimination, with the position worsening in stages the further the sponsor and the family member gets from the EU national 'norm'.

It should not be forgotten, however, that men can face immigration difficulties, too.[16] The comparative situation of divorced men compared to divorced women has worsened following Baumbast and R, as men will rarely be able to claim the status of carer, although overall men will usually be more likely to maintain their immigration status through workforce participation given their lesser share of family responsibilities and (for third-country nationals) enhanced access by the sponsor to the labour market. Having said that, in practice a significant percentage of women exercising EC free movement rights exercise the right to participate in the workforce, although a greater percentage of them curtail such participation due to maternity.[17]

Is EC family reunion law guilty of human rights breaches, due to defining the 'family' too narrowly, or failing to recognise the humanity of former spouses after divorce?[18] On the first point, certainly the definition of 'family' in EC family reunion law is narrower than that found in human rights law, where siblings and extended relatives and particularly unmarried partners (at least where a joint child exists) are considered to be family members. But it should not be forgotten that despite this wide definition, family reunion under the ECHR is only protected in limited cases as far as admission is concerned. So the definition in EC law is more problematic when it comes to expulsion, where it is clear from ECHR case law that an unmarried partner has protection from expulsion, at least as a parent. Within EC free movement law, this position is unexplored, although it has been suggested above that if the partner is allowed entry, the principles in the Baumbast and R judgment would apply.[19] As for admission, it would follow from the case law of the European Court of Human Rights that the limited obligation to admit family members could also apply to unmarried partners in the right case.

Apart from the definition of 'family', the EC free movement rules and association agreement rules are in many respects more generous than the human rights rules, not just as regards the clear right of admission under the free movement rules but also as regards issues of family members' status, which are not dealt with under the ECHR except as regards expulsion. Even the family reunion directive goes further than the case law of the European Court of Human Rights regarding admission in some respects, although it does not fully take on board the latest case law. Similarly it does not take on board recent cases as regards expulsion and remedies, so the compatibility of the Directive with human rights law can in several respects be doubted.[20] While it might be argued that this is begging the question, since a minimum standards Directive leaves Member States free to apply higher standards if necessary to meet their human rights obligations, it is submitted that the obligation to respect human rights based on the ECHR as general principles of Community law, set out in Article 6 ECHR, cannot mean that EC legislation can permit lower standards than the ECHR standard even on a discretionary basis. This could lead to confusion in Member States as to which standards they must follow and surely cannot be described as 'respecting' human rights obligations.

The more fundamental problem here is not with the EC rules, but with the family reunion judgments of the Strasbourg Court. There is no justification for that Court's conservatism regarding the admission of family members as seen in the Ahmut and Gul judgments, which accepted that Member States could deny admission for children to join their parents despite sound humanitarian arguments.[21] In particular, the argument that the refusal to admit family members is not in principle an interference with family life is unsustainable. Since the ECHR also requires respect for private life and includes the right to marry and found a family in Article 12 ECHR, the right to respect for family life should entail an obligation in principle to accept the private decisions of families as to where to carry out family life, in particular in the case where one of the family members is a national of or a long-term resident in an ECHR Contracting Party. In that case, an obligation to leave that State in order to enjoy a family life would clearly entail a refusal to respect the right to private life as defined by the Court, or (in the case of nationals) a breach of the right to live in one's own country as implied by the Fourth Protocol to the ECHR. This approach to the issue would still leave States the right to apply Article 8(2) ECHR, permitting limitation of Article 8 rights in the event of public security, *inter alia*, in particular cases where there is strong evidence to believe that a specific family member would commit serious crimes after admission, and would still leave States' discretion as regards primary immigration intact.

On the second argument, the failure to respect the dignity and humanity of former spouses (or potentially grown-up children, particularly if they are third-country nationals) requires a shift from a

focus on the protection of family life to the protection of individuals. Certainly the failure in EC free movement law to provide expressly for the acquisition of autonomous status results in such a lack of respect.[22] It cannot be argued that the 'right to human dignity' is not recognised in EC law, as the right is expressly set out in the EU Charter of fundamental rights and the Court has also explicitly accepted its existence as part of the general principles of EC law.[23] As set out above in the discussion of sex discrimination critiques, there is a limited move toward providing for autonomous status in the recent case law and legislation, but it is still ambiguous or insufficient.

As for homophobia,[24] it is true that the Court of Justice rejected in its Reed judgment in the 1980s the inclusion of any relationship outside formal marriage as a 'spousal' relationship,[25] and the more recent judgments of the Court in Grant and D v Council appear to consider that partnerships and presumably marriages between same-sex couples recognised by the law of a Member State cannot be considered as 'marriages' by EC law.[26] Here again, as in the case of race discrimination, EC discrimination law has attempted to protect immigration law against allegations of discrimination based on sexual orientation.[27] However, the Reed principle requiring equal treatment between home State national workers and EC national workers exercising free movement rights as regards entry of unmarried partners presumably applies equally to same-sex relationships between unmarried partners (or persons in a registered partnership). It is arguable that the principle applies to other categories of EC free movement law beyond the movement of workers,[28] and the principle definitely now applies in the general family reunion Directive, although only as an option for Member States. But the situation remains uncertain even for EC nationals and the option permitted Member States as regards third-country nationals leaves the position for them entirely up to national discretion. Sooner or later, the Court will be forced to choose between its support for abolishing obstacles to free movement of persons and its apparently unchangeable conservative instincts as regards same-sex and opposite-sex partners alike.

Finally, as for children, critics argue that they have not been given autonomous rights within the free movement rules of the EC.[29] But as noted above, there has been in recent case law recognition of children's autonomy at a later stage, upon entry into or graduation from vocational training.[30] The Court of Justice also implicitly accepts that secondary school pupils who move are exercising EU citizenship rights,[31] and the logic of the Baumbast and R judgment is that a parent carer and migrant worker's child are mutually dependent on each other—with the child taking a lead role in the perspective of EC free movement law. Next, the Avello judgment then expressly accepted children's status as EU citizens and their corresponding right to non-discrimination on grounds of nationality.[32] Finally, the Court of Justice confirmed that under EC free movement law, babies who are EU citizens have a right to free movement before they can even walk or crawl.[33] However, the family reunion Directive clearly treats third-country national children as secondary to sponsors, with only a limited prospect that Baumbast and R might apply to protect the carers of children, or that they might otherwise attain autonomous status. Furthermore the education and training rights in the Directive are weak and the Directive provides for no other social benefits for children as members of families.

The EU's legislators and judiciary have taken some tentative efforts to address the criticisms of EC family reunion law. It cannot now be said that third-country nationals are not covered by any EC rules, that former spouses will always face expulsion after divorce, that unmarried partners will never be successful in obtaining entry, that only the already economically successful can ever rely on free movement law or that children are fully ignored as autonomous agents by EC law. However, on many of these points, EC law still has a long way to go. As far as we know, there is still no right at present to bring unmarried partners to all Member States when exercising free movement rights, regardless of the impact on free movement law or the indirect discrimination on grounds of sexual orientation which results. Neither are divorced spouses, in particular men, always going to be protected in the event of family breakdown. Nor will the economically less advantaged always be able to rely on the concept of citizenship of the Union to surmount the obstacles which EC free movement law places upon them. But in each of these cases, the position would be ameliorated if the family consists entirely of EU nationals, since access to autonomous status is inherently far easier to accomplish. The fundamental distinction between EC nationals and third-country nationals still remains, despite the application of the family reunion directive, because of the extremely low standards set by that Directive. It has been accentuated by the EU's decision to give preference to its wealthy neighbours as regards free movement of persons by way of its association agreements.[34] And the stark result of that distinction is that many non-white people in the European Union cannot enjoy the human right to respect for their family life in the same way as the white majority, even if they are long-term residents

of a Member State. This unethical situation, has, to its lasting shame, been endorsed by the European Court of Human Rights. It can only be hoped that greater judicial courage and political will may result in narrowing and eventual abolition of this unjustifiable distinction in the years to come.

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References

1. This paper is an adapted excerpt from Peers, Family Reunion and Community Law" in Walker, ed., Towards an Area of Freedom, Security and Justice (OUP, 2004).

2. Directive 2003/86 (OJ 2003 L 251/12).

3. See Hervey, 'Migrant Workers and their Families in the European Union: the Pervasive Market Ideology of Community law' in Shaw and More, eds., New Legal Dynamics of European Union (OUP, 1995) 91.

4. Art. 3(2) of Directive 2000/43 (OJ 2000 L 180/22).

5. See Abdulaziz and others v UK (Series A, no. 94), Moustaquim v Belgium (Series A, no. 193) and C v Belgium (Reports 1996-III).

6. Reports 1996-IV; see also Poirrez v France (judgment of 30 Sep. 2003, not yet reported).

7. This is a separate question from the question of whether the sponsors are the correct comparator at all when the right at issue is an autonomous right of residence for the family member (see discussion in Peers, n. 1 above).

8. For instance, see Bosphorus Airways v Ireland, judgment of the European Court of Human Rights of May 31 2005, with further references (not yet reported).

9. See Hervey (n. 3 above).

10. See Peers, s. 3.4 above.

11. See Hervey (n. 3 above); Ackers, 'Citizenship, Gender and Dependency in the European Union: Women and Internal Migration' in O'Keeffe and Hervey, eds., Sex Equality Law in the European Union (Wiley, 1995), 221; Hervey, 'A Gendered Perspective on the Right to Family Life in European Community Law' in Neuwahl and Rosas, eds., The European Union and Human Rights' (Kluwer, 1995) 221; Moebius and Szyszczak, 'Of Raising Pigs and Children' 18 YEL (1998) 125; and Ackers, 'Women, Citizenship and European Community Law: The Gender Implications of the Free Movement Provisions' 4 (1994) JSWFL 391.

12. Case C-413/99 Baumbast and R [2002] ECR I-7091; see also Case C-200/02 Chen and Zhu [2004] ECR I-9923.

13. Case C-308/93 Cabanis-Issarte [1996] ECR I-2097.

14. Case C-65/98 [2000] ECR I-4747. This case concerns a couple who were married, divorced (but still lived together) and then remarried. On the status of family members under the EC-Turkey association agreement, see Peers (n. 1 above), s. 4.

15 OJ 2004 L 16/44; see Peers, "Implementing Equality? The Directive on long-term resident third-country nationals", 29 ELRev. (2004) 437.

16 See cases discussed in Peers (n. 1 above), ss. 2, 3 and 4, which concerned the possible expulsion of fathers following family breakdown, divorce or divorce proceedings.

17. Ackers, 'Citizenship' (n. 11 above) at 228-237.

18. For the first argument, which is sometimes confined to arguing that the concept of family is too narrow without suggesting an ECHR breach, see Hervey (n. 3 and 11 above); Ackers, 'Women' (n. 11 above); Lundstrom, 'Family Life and the Free Movement of Workers in the European Union' 10 IJLPF (1996) 250; and Stalford, 'Concepts of Family Under EU Law—Lessons from the ECHR' 16 IJLPF (2002) 410. For the second argument, which obviously crosses over with the sex discrimination argument, but does not confine itself to the position of women, see Weiler, 'Thou Shall Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals—A Critique' 3 EJIL (1992) 65. Woods ('Family Rights in the EU—Disadvantaging the Disadvantaged?' 11 (1999) CFLQ 17) covers both arguments.

19. See s. 3.4 of Peers (n. 1 above).

20. See the Opinion of 8 Sept. 2005 in Case C-540/03 *EP* v *Council*, pending, which challenged the validity of parts of the family reunion Directive in light of human rights law.

21. See Ahmut v Netherlands (Reports 1996-VI) and Gul v Switzerland (Reports 1996-I).

22. See s. 3 of Peers (n. 1 above).

23. Case C-377/98 Netherlands v EP and Council [2001] ECR I-7079 and C-36/02 Omega [2004] ECR I-

9609.

24. See Lundstrom and Stralford (both n. 18 above). For an exploration of the issue before the judgments in Grant and D, see Waaldijk, 'Free Movement of Same-Sex Partners' 3 (1996) MJ 271.

25. Case 59/85 Reed [1987] ECR 1283.

26. Case C-249/96 [1998] ECR I-629 and Joined Cases C-122/99 and C-125/99 [2001] ECR I-4319.

27. Art. 3(2) of Dir. 2000/78 (OJ 2000 L 303/16).

28 See s. 3.2 of Peers (n. 1 above).

29. Stalford, 'The Citizenship Status of Children in the European Union' 8 IJCR (2000) 101.

30 On entry into vocational training and status after vocational training, see Peers (n. 1 above), ss. 3 & 4.

31. Case C-224/98 D'Hoop [2002] ECR I-6191.

32. Case C-148/02 Avello [2003] ECR I-11613).

33. Chen and Zhu (n. 12 above).

34. See s. 4 of Peers (n. 1 above), as regards the EC-Switzerland agreement on free movement of persons and the European Economic Area.

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