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LAWYERS4RIGHTS
Lawyers for the protection of fundamental rights

A study on the application of the Charter of Fundamental Rights of the European Union in civil and administrative jurisdiction

The right to family reunification

edited by ALICE PISAPIA

IUSTITIAM COLIMUS
G. Giappichelli Editore

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INTRODUCTION

Under the framework of the Justice Programme, funded by the European Commission, a consortium composed by the Bulgarian Lawyers for Human Rights Foundation, Italian Association of Lawyers (Associazione Nazionale Forense, ANF), the Milan Bar Association (in particular the Commission for the protection of fundamental rights coordinated by Avv. Silvia Belloni), the Italian Federation of Liberal Professions (Fondazione Confprofessioni), the University of Burgos (Spain) and the General Council of Spanish Lawyers (Consejo General de la Abogacia Española) started the project Lawyers4Rights (JUST-JTRA-EJTR-AG-2017 - Grant agreement number 806974) to study the role of the EU Charter of Fundamental Rights (CFR) in face of emerging challenges such as migration and terrorism. The analysis of the CFR application has been focused into two main sectors: the right to family reunification, topic that belongs to civil law, the rights of defendants, pre-trial detainees and persons under investigation in the interest of criminal lawyers. Indeed, after the case Ebru Timtil in Turkey, it appear clearly that lawyers can play a relevant social role in the application of international legislative instrument to protect the fundamental rights. Consequently, the main scope of the European project funded by the European Commission was to implement a free program of training for legal practitioners with seminars, on-line trainings and written materials.

The key research question from which the work has been developed is about the role of the European Charter in the protection of fundamental rights. How has the CFR been integrated into the national systems? Which's the role of the CFR in the hierarchy of the international norms? Is the CFR a central tool for the protection of fundamental rights considering the multilevel system of protection designed at the supranational level?

In the present publication the work developed has been collected, thanks to the European funds, by the University of Burgos for what concerns the European norms and European case law, as well as the national application in Spain. For Italy and Bulgaria, the analysis has been carried out by national experts on the topic who are listed as authors of their respective contribution. The present publication with the review of the jurisprudence, national and European, applicable to the main area – family reunification and anti-terrorism measures – is only a part of the European project funded by the Commission. Indeed, the activities carried out by the partners includes training seminars in all the Member States involved and the adoption of a policy statement on the role of legal professions in the imple-

mentation of the CFR. About 450 persons will benefit from the project. Out of them, more than 300 are lawyers, practicing in the civil, criminal and fundamental rights fields; about 70 are academic staff in the field of human rights; and about 80 are staff of associations of liberal professions.

The objective of the project is to raise awareness on the CFR among legal professions and institutional bodies, improve the competency on human rights protection including mainstreaming of EU law among legal professions and trust in EU institutions, create feasible paths towards implementation of the CFR by doctrinal debate and jurisprudence review. Moreover, the project will aim at accelerating EU procedures towards human rights protection and related culture and enhancing inter-professional dialogue and mutual learning between legal professions, public institutions and bodies competent in human rights protection.

In order to answer the key research question mentioned above it is needed to recall the multilevel protection system designed at the supranational level: the UN system, purely international, the one of the Council of Europe (CoE) which is also participated by all the European Member States but not by the European Union per se and, finally, the one of the CFR, purely European. If it is somehow evident that the UN system is applicable only according the traditional tools of international law, the other two layers are more interconnected. Indeed, the European Court of Human Rights in Strasbourg is the guardian of the European Convention on Human Rights and Fundamental Freedoms and accepts complaints by individuals alleging a breach of one or more Convention articles by acts or omissions of the authorities of one of the forty-seven Contracting Parties of the Council of Europe, provided certain conditions of admissibility are met. The Court of Justice of the European Union, based in Luxembourg, is the guardian of the CFR and decides in specific cases whether acts or omissions of the EU institutions and/or certain acts or omissions of the authorities of one of the twenty seven Member States of the European Union are in conformity with the guarantees provided by the CFR. The entry into force of the Treaty of Lisbon in 2009, expressly mentioning the binding nature of the Charter (Art. 6 TUE), clarified definitively the binding legal basis for the protection of fundamental rights. However, even before 2009, the Court of Justice of the European Union referred to this document as a binding instrument for Member States and European institutions. The scope of the present study is to evaluate the CFR role as a core element in the national judicial system according to Artt. 6 and 51 of the Treaty of the European Union (TUE).

While there are differences in geographic coverage of the two juridical instruments and in the substantive scope of the protection provided by the two Courts, some cases can and have been brought before both supranational courts. It is needed to analyse in which way the two supranational systems of protection (ECHR and CJEU) interact and in which ways the national lawyers can invoke the documents and the international case-law in front of national judges. Considering such multi-level approach to the protection of fundamental rights, it is of the

utmost importance to provide adequate training to national judges and lawyers in order to understand the role of the CFR. Since the parallel existence of two supranational catalogues of fundamental rights and two supranational courts for their interpretation and enforcement is quite unique, the project compares some of the strengths and weaknesses of each of the two systems in the selected areas and attempts some proposals for a combined application in order to ensure the maximum protection. From what has been analysed we could say that a variety of approaches among Member States can also be found in the domestic treatment of EU law. One can identify several different paths used to ensure EU law's primacy. Some Member States embrace a monist vision of the relationship between orders, implying the unconditional acceptance of EU law (the Netherlands, Belgium, Luxembourg). Others expressly constitutionalize a set of limits to European integration (such as Germany and Sweden).

Thus, the **Italian Constitutional Court** argued that domestic judges should give precedence to the question of constitutionality. Such a procedural priority was deemed to be necessary since a different approach would have threatened the effectiveness of the catalogue of constitutional rights and, even more, the power of the Constitutional Court to establish a centralized model of constitutional review, whose decisions are valid *erga omnes*. With its latest decision n. 20/2019, the Constitutional Court has clarified how its new doctrine applies to the case of '*dual preliminarity*', interpreting that procedural priority in a more EU-friendly way. Firstly, in this recent decision the Italian Constitutional Court reiterates that the precedence of the constitutional review cannot affect the power of the ordinary judge to lodge a preliminary reference to the CJEU, but at the same time the Court states that a referral decision under Art. 267 TFEU can be made by the judge "*at every stage of the proceeding and for every reason she may deem it for necessary*" (while in the 2017 decision such a possibility seemed to be limited for the referring judges to issues that the Constitutional Court had not dealt with). Secondly, the Constitutional Court paves the way to a less rigid model of interaction with the ordinary judges: they are not prevented any more from the prior involvement of the ECJ in the preliminary reference procedure when both national and European fundamental rights are at stake. In the 2017 decision, the Italian Constitutional Court seemed to have codified its preeminence by making its prior involvement a necessity for judges. The new approach demonstrated in decisions nos. 269/2017 and 29/2018 appears to reflect the Italian Constitutional Court's decision to focus, in its balancing exercise, more on the domestic parameters than on the European ones, so as to keep a conversation going between the specific features of national constitutional rights and those protected at EU level.

With regards to the implementation into the **Spanish system** of the European legislation on family reunification and, specifically, of the provisions contained in Art. 7 CFR and Art. 8.1 ECHR, this has been done correctly, but in a rather restrictive way, especially in some aspects, such as those related to the regulation of

the fundamental rights of immigrants, which could initially be opposed to the provisions of Art. 13.1 of the Spanish Constitution, which guarantees foreigners the same rights as Spaniards. These suspicions of unconstitutionality required the intervention of the Constitutional Court itself. However, this constitutionally recognized equality between Spanish citizens and foreigners does not extend to the right to family privacy, referred to in Art. 18.1 CE, in the sense that public authorities must guarantee foreigners a life in common with their relatives in Spain. The Constitutional Court has stated that this constitutional precept only refers to the prohibition of illegitimate interference by third parties in the family environment.

Finally, as far as **Bulgaria** is concerned, unfortunately, the Bulgarian case-law or legislation is not amended as a result of the ECtHR judgments against other Member States. There is no internal mechanism in place to follow and analyze the case-law of supranational tribunals, leading to due amendments of the relevant provisions and practices that lead to identical violations. The law and case-law in Bulgaria change only after a series of judgments against Bulgaria that have established violations.

In the present publication the reader will find at first the analysis and explanation of the legislative tools applicable at the European level with an illustration of their interpretation made by the Supreme Court of the European judicial system and of the Court of Strasbourg. After having designed the EU framework applicable there will be an analysis of the national legislative tool and their interpretation by the local court for what concern Italy, Spain and Bulgaria. Moreover, it will be illustrated if the CFR could be considered a core element of interpretation by the national judges and if the national decisions are implementing correctly the European case law.

ABBREVIATIONS

AAN	Order by National Court in Spain
AFSJ	Area of Freedom, Security and Justice
AN	*Audiencia Nacional* (National Court in Spain)
AP	*Audiencia Provincial* (Provincial Court in Spain)
appl./appls.	application/applications
Art./Arts.	Article/Articles
BOE	*Boletín Oficial del Estado* (Spanish Official Journal)
BOCG	*Boletín Oficial de las Cortes Generales* (Official Journal of the Spanish Parliament)
Cass.	*Corte di Cassazione* (Italian Supreme Court)
CE	*Constitución Española* (Spanish Constitution)
CFR/CFREU	Charter of Fundamental Rights of the European Union
CISA	Convention implementing the Schengen Agreement of 14 June 1985
CJEU	Court of Justice of European Union
CPC	Criminal Procedure Code
EAW	European Arrest Warrant
EAW FWD	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States
EEA	European Economic Area
ECHR	European Convention Human Rights
ECtHR	European Court on Human Rights
ed./eds.	editor/editors
e.g.	*exempli gratia*
esp.	especially
et al.	*et altera*
ex	according to
EEW	European Evidence Warrant
EIO	European Investigation Order, DEIO (Directive European Investigation Order)
EJN	European Judicial Network
EU	European Union
ff/*et seq.*	and the following
FGE	*Fiscalía General del Estado* (General Public Prosecutor's Office)
FWD	Framework Decision
GU	*Gazetta Ufficiale* (Official Journal in Italy)

i.e.	*id est*
JIT	Joint Investigation Team
LD	Italian Legislative Decree
LO	*Ley Orgánica* (Organic Law in Spain)
LOEDE	Law 3/2003, of March 14th, on European Arrest Warrant and Surrender
LOPJ	*Ley Orgánica del Poder Judicial* (Act on the Judiciary in Spain)
LRM	Act 23/2014, of 20 November, on mutual recognition of judicial decisions in criminal matters criminal in the European Union (*Ley de reconocimiento mutuo de resoluciones penales en la Unión Europea*)
n./No.	number
OJ	Official Journal of the European Union
op. cit.	*opus citatum*
para.	paragraph (*fundamento jurídico*)
SAN	Judgement by National Court (Spain)
SAP	Judgement by Provincial Court (Spain)
STC	Judgement by Constitutional Court (Spain)
STS	Judgement by Supreme Court (Spain)
TC	*Tribunal Constitucional* (Constitutional Court)
p./pp.	p./pp
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TS	*Tribunal Supremo* (Supreme Court in Spain)
vol.	volume

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

Esther Gómez Campelo, Marina San Martín Calvo

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

* The present report has been realized in the framework of the European project "Lawyers for the protection of fundamental rights" GA no. 806974) and specifically within the work package on the review of the European legal framework on fundamental rights. Against this background, the beneficiaries of the said project chose to focus the analyse on two specific topics:

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.

the attendance to integration courses, mainly based on language skills (Austria, Greece or Cyprus). Lithuania only requires a basic command of the language if the sponsor has the intention of applying for permanent residence. In France, the reunified relative must additionally sign a "reception and integration contract" which compels the undersigned to make an effort to fit in as a family member of a new State.

2.2.4. *Autonomous residence permit*

Delving into the right, we observe that one of the consequences arising from family reunification is the access to a job for the foreign relatives. That is in fact the aspect that shows the initial dependence of the reunified relative on the sponsor (length of initial residence permit that cannot exceed the length of the sponsor's; limitations on the exercise of a remunerated economic activity). It is necessary to point out that the exercise of a profitable activity on a self-employed or on an employee basis is a legitimate claim of the reunified relative. The expectation of this right clearly exists, but each country will determine the conditions and "*shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labor market before authorizing family members to exercise an employed or self-employed activity*" (Art. 14, 2 *in fine*), a situation that will give rise to the economic and legal dependency of the reunified relative, as the issuance of an autonomous residence permit is conditional on an working permit [30].

This optional clause has allowed seven Member States to limit the access to a job by making the authorizations conditional on the verification of their labor markets (Austria, the Czech Republic, Germany, Greece, Hungary, Slovenia, and Slovakia). The Directive does not authorize excluding certain members of the reunified family during the periods immediately after admission in the territory. However, that is the case of countries contravening the principles of the Community text such as Germany, Hungary and Slovenia. By the time being, Finland, France, Estonia, Lithuania and Luxembourg have not introduced any restrictive measure in connection with the labor market that could affect a foreigner under a regulated status in their territories. Currently, a total of 28 Member States apply a maximum period of 5 years, although this can be reduced to 3 in the cases of France, the Netherlands, the Czech Republic and Belgium. Hungary, Romania and Finland do likewise state national specifications regarding this period.

Article 15, 4 of the Directive refers to the national legislation when specifying the conditions relating to the granting and duration of the autonomous resi-

[30] Art. 19 in Organic Law 14/2003 of 20 November, after the enactment of Organic Law 14/2003 of 20 November.

dence permit. The absence of a law that, in addition to what Art. 15, 4 stipulates, could guarantee the granting of an autonomous residence permit, was the result of the hindering task of the 8 Member States who agreed on each country's competence to decide on their course of action. The consensus reached by Bulgaria, Estonia, Finland, Hungary, Italy, Romania, Poland and Slovenia has granted a wider scope for action to the Member states that is both common and legally unacceptable.

2.2.5. *Reasons for rejection*

The application for entry and residence for the purposes of family reunification and the renewal of a residence permit already granted might be rejected on assessed grounds, particularly the following: public policy, public security or public health. The severity of the offence against public policy or public security committed by the relative shall be assessed by the pertinent legal system [31]. The assessment shall be made through the implementation of proportionality and weighing criteria together with the evaluation of personal circumstances. When concerning public health, illness or disability are not deemed to be compelling reasons for the withdrawal or rejection of a residence permit (nevertheless, Member States as Estonia [32], Slovenia and Romania do regard these conditions as weighty grounds).

The accuracy arising from Art. 6 of the Directive is stated when referring to Art. 17, stating that when rejecting an application, withdrawing or refusing to renew a residence permit, "*Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin*". This provision clearly shows a willingness to grant more maneuver power to the state competent authorities when it comes to decision making, appraising through principles of transverse nature, a myriad of circumstances established in the interest of the family to be guarded by each State that could affect the decision either favorably or unfavorably.

In its report on the application of this Directive of October 2008, the European Commission considers with worry the case of the Netherlands and its strict enforcement of the requirements demanded by this "horizontal clause" (level of income, having passed the integration test, age limit, etc.). With regard to this circumstance, the Commission likewise considers the regulations of Luxembourg,

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[31] SANZ CABALLERO, 2008. The specific assessment of the circumstances by each state's legal system has contributed to the coining of the term "sovereignty clause" to refer to these three grounds. See FERNÁNDEZ SÁNCHEZ, 2006.

[32] Estonia applies a criterion that goes too far from the Directive provisions: "a threat for other people", a statement inaccurate and void of legal certainty.

Austria and Slovakia. In this way, the necessity and proportionality principles are held as essential factors to consider in the decision reached by the national competent authorities.

By way of derogation, and with regards to the particular reception capacity of the State in question, the second paragraph of Art. 8 of the Directive states: "*a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members*". If we add this waiting period to the maximum period of 2 years that a country demands to the sponsor, it is utterly clear how the acknowledged right to family reunification cannot be exercised in practice during a period of 5 years. What is more, the State cannot guarantee that a favorable decision will be reached after this period if its reception capacity is limited.

The right to family life and respect of their own private life granted to all foreigners living in a country, under the requirements regarded in this Directive, makes a realistic, committed and deficient in demagogy approach absolutely imperative [33]. In any case, the reaction was immediate and the European Parliament, in the aforementioned Case C-540/03, filed an action for annulment of Art. 8 as it considered that similar cases could be subject to different judgments depending on the principles based on the reception capacity of each country. According to the Parliament, it stands as a disproportionate measure that hinders the necessary balance between conflicting interests.

The CJEU, in the above-mentioned court's judgment of 27 June 2006, did not deem the principle to be in detriment of the respect to family life regarded in Art. 8 of the ECHR. The margin for appraisal of the State is reckoned to be limited and reasonable and guarantees reunification in good condition. The determining factors for the exercise of such right are stipulated by the Spanish Law and Regulations of Immigration in a restricted sense and under a strict principle of *numerous clausus*, and therefore its compliance unfailingly implies the suitability of the subject for the right. The ambiguous and unclear statement "reception capacity" of the sponsoring country is not mentioned in any case, probably because it is assumed that above all the uncertain and vaguely defined state interests, the so frequently acclaimed right to the development of family life shall prevail [34].

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[33] The following court's decisions bring to light the fact that family reunification is a right of human nature that entails a great social significance:

STS of 24 April 1993 (RJ 1990/11942).

STS of 19 December 1995 (RJ 1995/9883), of 2 January 1996 (RJ 1996/252), of 12 May 1998 (RJ 1998/4958), of 21 December 1998 (RJ 1999/374) or of 28 December 1998 (RJ 1999/375).

Judgment of the ECTHR of 28 November 1996 (RJ 96/12146).

[34] The importance of this right explains that "[…] in any case, the most favorable interpretation to family reunification shall prevail […]", as stated in the STJS Valencia, 259/2001 of 14 March 2001 (JUR 2001/162985).

2.2.6. *Right to Effective Judicial Protection*

The length of the process (Art. 5, 4) shall be as short as possible and its decision shall be put into effect without delay with regards to the legitimate expectations of the person, establishing a maximum period of nine months from the date on which the application was submitted. Whichever the decision reached, this shall be provided in writing. In this way, in case of rejection of application due to any of the circumstances regarded by the Directive, the sponsor and relatives shall be duly informed about their right to mount a legal challenge[35]. This guideline highlights the regulatory discrepancies of the Member States as for the material scope of the contents and the affected parties entitled to those legal challenges; this does not prevent countries such as Germany, Cyprus, Greece, Italy, Poland, Latvia and Slovakia from not offering legal aid.

2.3. *Conclusion of the Application of the Directive*

The analysis of Directive 2003/86/CE provided in the previous pages has patently shown the intention of the Community legislator when faced with the importance of an optimal control and management of the migration flows. It shall not be forgotten that this Directive constitutes the first legislative tool for immigration in the EU, hence its theoretical significance and practical relevance. However, if we are to analyze its real approach in the autonomous legislations from a realistic and practical perspective, the aim of the harmonization of such a sensitive issue – due to its attachment to national legislations, subject to so many state situations of all kinds and tightly bound to the traditions of the country and its sensitivity towards such a knotty matter – is not producing the expected results, at least for now.

The implementation of the Directive has so far caused several problems probably attributable to its binding nature that allows the States to adapt their regulations with excessive leeway, or arising from its mistaken application that can affect the respect to family life as a fundamental right, a situation that needs to be periodically examined and controlled by the European Commission[36]. Years after its drafting, the need to "*assess the implementation and the need for modification of Council Directive 2003/86/EC on the right to family reunification*"[37] is still claimed.

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[35] Art. 18.

[36] La Spina, 2007.

[37] Stated in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Common Immigration Policy for Europe: principles, actions and tools, COM(2008)359 final. Brussels, 17.6.2008.

The specification of these rights and its further implementation so as to bring them into line with the restrictive measures on obtaining the state authorizations to enter European territory remains a complex undertaking whose forthcoming analysis will arouse the interest of many.

THE CJEU CASE-LAW IN THE RIGHT TO FAMILY REUNIFICATION

1. *Introduction*

It is widely known that Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereinafter, the Directive) is one of the most significant documents of those approved within the European Union in this matter. This chapter addresses the analysis of such CJEU case law in the field in order to interpret the above-mentioned legal framework.

First, I have addressed the study of the judgments that I considered the most significant for the purpose of this work. Then, I deemed appropriate to classify its content by subject, following the numerical order established by the Directive itself. In all the case law analyzed we will examine compliance with the applicable legal framework.

2. Family Reunification of minors and refugees (Article 2 (F) in relation with Article 10 (3)(A) Directive)

2.1. Case C-550/16, A, S (2018)

Case *A, S v Staatssecretaris van Veiligheid en Justitie*[38] gave the Court the opportunity to rule on the protection to be granted to persons who enter the European Union as minors, obtain refugee status when they have attained the age of majority while their application for protection is being considered, and, after having obtained that status, initiate a family reunification procedure.

In the present Case, the referring court asks whether Article 2(f) of the Directive shall be construed to mean that a third-country national or stateless person below the age of 18 at the time of his/her entry into the territory of a Member State and of the submission of his/her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is, thereafter, granted asylum with retroactive effect to the date of his or her application shall be regarded as a *minor* for the purposes of the Directive.

The applicants, A and S, consider that question calls for an answer in the affirmative, whereas the Netherlands and the European Commission take the opposite view. More specifically, the Netherlands Government submits that it is for Member States to define the relevant moment for determining whether a refugee must be regarded as an *unaccompanied minor* within the meaning of Article 2(f) of Directive. Conversely, the Commission considers that this moment may be determined on the basis of the Directive.

Finally, the CJUE resolves this issue proclaiming, in the same vein as the Advocate General did[39], that:

> "*Article 2(f) of Directive 2003/86/EC of 22 September 2003 on the right to family reunification, read in conjunction with Article 10(3)(a) thereof, must be interpreted as meaning that a third-country national or stateless person who is below the age of 18 at the time of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a 'minor' for the purposes of that provision*".

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[38] Case 550-16, *A, S v Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2017:824. This reference for a preliminary ruling concerned the interpretation of Article 2(f) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. The request was made in proceedings between A and S, who are Eritrean nationals, and the Staatssecretaris van Veiligheid en Justitie (State Secretary for Security and Justice, Netherlands) concerning the latter's refusal to grant them and their three minor children a temporary residence permit for the purposes of family reunification with their elder daughter.

[39] Opinion of Advocate General Bot, delivered on 26 October 2017.

3. *Accreditation of stable and regular resources without recourse to the social assistance system of the Member State concerned (Article 7 (1)(C) Directive)*

In Article 7, the Council Directive determines the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States. When a family member applies for authorization to join a resident, a Member State may require the latter to have stable and regular resources sufficient to maintain the family, "*without recourse to the social assistance system of the Member State concerned*". In this regard, there have been several sentences pronounced by the CJEU in relation thereof.

The most significant ones in our view are stated below.

3.1. *Case C-578/08 Rhimou Chakroun (2010)*

In *Case Chakroun v Minister van Buitenlandse Zaken*[40] the husband has regular and sufficient resources to cover subsistence expenses generally necessary, but this does not deprive him of being able to receive certain types of special assistance benefits. In this framework, the Raad van State (Council of State) asks for a more detailed clarification of the criterion "*without resorting to the social assistance system*" and questions whether the Directive allows a distinction to be made according to whether the family link arose before or after the entry of the resident in the Member State.

The Court understands that the expression "*resort to the social assistance system*", mentioned in Article 7 (1) (c) of the Directive, must be interpreted as meaning that it does not allow a Member State to adopt regulations on regrouping family members who have been denied the residence permit but whose sponsor has shown sufficient stable and regular resources for his own support and that of his spouse, but who, given the amount of his income, may nevertheless be entitled to claim special assistance benefits in case there are specific and individually determined expenses necessary for their subsistence, to deductions granted by the municipal authorities based on income support measures within the framework of municipal basic income policies.

In the Court's opinion, since authorization of family reunification is, under the Directive, the general rule, the faculty provided for in Article 7(1)(c) shall be ac-

[40] Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken* (Reference for a preliminary ruling from the Raad van State), ECLI:EU:C:2010:117. In this case-law, the main dispute concerns the request of a Moroccan citizen to meet her husband, also a Moroccan national and a legal resident in the Netherlands since 1970, with whom he had married in 1972. The provisional residence permit was denied because the husband lacked sufficient resources. In fact, Mr. Chakroun's unemployment benefit amounted to € 1,322.73 net per month, including holiday pay, that is, an amount lower than the income standard applicable to the formation of a family, established at € 1,441.44.

curately interpreted. Furthermore, the room for maneuver that the Member States are granted must not be used in a manner that would undermine the objective of the Directive, which is to promote family reunification and its effectiveness thereof. In addition to that, the Directive, in particular Article 2(d), shall be construed to preclude national legislation which, in applying the income requirement set out in Article 7(1)(c) of that directive, draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State [41].

Having regard to that lack of distinction intended by the European Union legislator, based on the moment when family is constituted, and taking account of the necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness, the Member States do not have discretion to reintroduce that distinction in their national legislation transposing the Directive. Furthermore, the ability of a sponsor to have regular and sufficient resources to maintain himself/herself and the members of his/her family within the meaning of Article 7(1)(c) does not depend on whichever manner on the moment when the family was formed.

3.2. *Case C-558/14, Mimoun Khachab (2016)*

A different situation arises when the sponsor no longer has stable and sufficient resources at the time of submitting the application. This is the situation of Case *Mimoun Khachab v. Subdelegación del Gobierno en Álava* [42], in which the Court declares that the competent authority of the Member State concerned, in this Case-law the Spanish authorities, may withdraw an authorization of family reunification where the sponsor no longer has stable, sufficient and regular resources, as referred to in Article 7(1)(c). The license to withdraw an authorization means that the national authority may require the sponsor to have such resources beyond the date of submission of his/her application [43]. As a result, the Court rules the following:

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[41] Opinion of Advocate General Sharpston, delivered on 10 December 2009. Case C-578/08*, Rhimou Chakroun v Minister van Buitenlandse Zaken.*

[42] Case C-558/14, *Mimoun Khachab* (2016), ECLI:EU:C:2016:285. Request for a preliminary ruling under Article 267 TFEU from the High Court of Justice of the Basque Country, Spain, made by decision of 5 November 2014, received at the Court on 5 December 2014, in the proceedings Mimoun Khachab v. Subdelegación del Gobierno en Álava.

[43] In this case, the High Court of Justice of the Basque Country has doubts regarding the interpretation of Article 7(1)(c) of Directive 2003/86, pursuant to which the right to family reunification is conditional upon the applicant having, at the time of submitting the application for reunification, *"stable and regular resources which are sufficient*". It questions, in particular, the compatibility with that provision of the Spanish legislation which allows the national authorities to refuse an application for family reunification where, on the basis of the pattern of the claimant's income in the

"*Article 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as allowing the competent authorities of a Member State to refuse an application for family reunification on the basis of a prospective assessment of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources which are sufficient to maintain himself and the members of his family, without recourse to the social assistance system of that Member State, in the year following the date of submission of that application, that assessment being based on the pattern of the sponsor's income in the six months preceding that date*".

Consequently, Article 7(1) of Directive 2003/86, read in conjunction with Article 16(1)(a) and Article 3(1), does not preclude the Member States from permitting their competent authorities to carry out a prospective assessment of the resources of the family reunification claimant; that is to say, to take account not only of the resources the sponsor has when the application for family reunification is submitted, but also of the resources he/she will have after submitting the application.

3.3. *Joined cases C-356/11 and C-357/11 O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L (2012)*

The established case-law doctrine experiments a substantial change when minors are involved, as in *Case O. and S. v Maahanmuuttovirasto and Maahanmuuttovirasto v L.*[44]. When this happens, the CJEU considers that Article 7(1)(c) of the Directive shall be interpreted as meaning that, while Member States have the faculty of requiring proof that the sponsor has stable and regular resources sufficient to maintain himself/herself and the members of his/her family, this faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter of Fundamental Rights of the European Union.

These Articles require the Member States to examine applications for family reunification in the interest of the children concerned and also with a view to promoting family life and avoiding any undermining of the aim and the effectiveness of the Directive. In addition to this, the Court emphasizes that the authorization of family reunification is the general rule; so, the faculty provided for in Article 7(1)(c) of the Directive shall be strictly interpreted. The margin that the Member States are recognized to have must not therefore be used in a manner that would undermine the objective and the effectiveness of the Directive.

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six months preceding the date of submission of the application for family reunification, it is likely that this claimant will be unable to retain, in the year following that date, the same level of resources as he had on that date, so as to ensure that he will be in a position to continue to maintain his family after it is admitted to the Member State's territory.

[44] Joined Cases C-356/11 and C-357/11 *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L* (2012), ECLI:EU:C:2012:776.

The Court accepts that Articles 7 and 24 of the Charter, while emphasizing the importance of family life for children, cannot be construed to deprive the Member States of their margin of appreciation when examining applications for family reunification. However, in the course of an examination and when determining in particular whether the conditions laid down in Article 7(1) of the Directive are met, it insists that the provisions of the Directive must be interpreted and applied regarding Articles 7 and 24(2) and (3) of the Charter of Fundamental Rights of the European Union, which require the Member States to examine the applications for reunification in question in the interest of the children concerned and with a view to promoting family life. It is therefore for the competent national authorities, when implementing the Directive and examining applications for family reunification, to make a balanced and reasonable assessment of all the interests at stake, taking particular account of the interests of the children concerned.

4. *Use of misleading information, false or falsified documents (Article 12(2)(A) Directive)*

4.1. *Case C-557/17, I.Z (2019)*

A different case arises when the residence permit has been fraudulently obtained. This is the situation of ***Case C-557/17, I.Z.*** [45], in which the right to family reunification was obtained on the basis of fraudulent information provided by the sponsor, even when the holder of that permit was unaware of the fraudulent nature of that information.

In these circumstances, the CJEU is categorical in stating that Article 16(2) (a) shall be construed to mean that in the event that the documents submitted had been counterfeited for the purpose of issuing residence permits to family members of a third-country national, the fact that they were not aware of the fraudulent nature of the documents does not prevent the Member State from withdrawing those permits pursuant to this provision. However, in accordance with Article 17 of the same Directive, the Court allows the competent national authorities to carry out,

[45] Case C-557/17, *I.Z.* (2019), ECLI:EU:C:2019:203. In this case, the issuing authority (Council of State, Netherlands), enquires whether a residence permit issued to a family member of a third-country national under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, obtained on the basis of fraudulent information provided by the sponsor, can be withdrawn where the holder of that permit was unaware of the fraudulent nature of that information. In a similar vein the referring court asks whether, in order to lose long-term resident status, as it arises under Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, the holder of that status must have been aware of the fraud, in so far as the status in question would have been obtained on the basis of fraudulent information. See Opinion of Advocate General Mengozzi, delivered on 4 October 2018.

beforehand, an individualized examination of the situation of the family members, performing a reasonable assessment of all the interests involved.

5. *Right to entry and residence for family members of citizens of Eu (Article 3(2) (A) of Directive 2004/38 8/EC 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 and Directive 2008/86/EC)*

5.1. *Case C-83/11, Rahman and others (2012)*

Case Rahman and others [46] provides the Court for the first time with the opportunity, in the words of the Advocate General, to rule on the scope of the provisions of Article 3(2) of Directive 2004/38/EC 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 [47].

The reference for a preliminary ruling arouse from a dispute between M.S. Rahman, F.R. Islam and M. Rahman, both Bangladeshi nationals, and the Secretary of State for the Home Department (UK), following the refusal by the latter to issue residence permits for the United Kingdom to the former as dependent members of the family of a national of a Member State of the European Economic Area (EEA) [48]. In order to review the conformity of the United Kingdom legislation with Directive 2004/38, the Upper Tribunal (Immigration and Asylum Chamber), London, considered it necessary to refer to the Court for a preliminary ruling.

The applicable legal framework in this judgment was, on the one hand, Article 7 of the Charter of Fundamental Rights of the European Union, which states that "*everyone has the right to respect for his or her private and family life, home and communications*" and, on the other one, Directive 2004/38 that recognizes, in accordance with a graduated system, a right of residence for *'family members'*,

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[46] Case C-83/11, *Rahman and others v Secretary of State for the Home Department* (2012), ECLI:EU:C:2012:519.

[47] Opinion of Advocate General Bot, delivered on 27 March 2012.

[48] Mahbur Rahman was a Bangladeshi national, working in the United Kingdom, who married an Irish national on 31 May 2006. Muhammad Sazzadur Rahman, Fazly Rabby Islam, and Mohibullah Rahman, respectively the brother, half-brother and nephew of Mahbur Rahman, applied for residence permits for the United Kingdom as members of the family of a national of an EEA Member State. Those applications were refused by the Entry Clearance Officer in Bangladesh on 27 July 2006 as the respondents in the main proceedings had been unable to demonstrate that they were dependent on Mr and Mrs Rahman in Bangladesh. After the Secretary of State for the Department of the Interior rejected that request, they appealed to the Immigration Judge, who granted his request, considering that they were "dependent".

who are defined in Article 2(2) thereof as the spouse or the partner with whom the Union citizen has contracted a registered partnership, which is recognized as equivalent to marriage by the legislation of the host Member State, the direct descendants who are under the age of 21 or are dependent and those of the spouse or partner, as well as the dependent direct relatives in the ascending line and those of the spouse or partner.

Directive 2004/38 also takes account of extended family members, requiring the Member States, under certain conditions, to facilitate their entry and residence in their territory. In this regard, Recital 6 in the preamble to Directive 2004/38 states:

> "*In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen*".

Finally, the Court, following the criteria of the Advocate General, resolved that:

1. The Member States are not required to grant every application for entry or residence submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of that Directive (spouse, direct descendants under the age of 21, the dependent direct relatives in the ascending line and those of the spouse or partner as defined), even if they prove to be dependent on that citizen.

2. In order to fall within the category, referred to in Article 3(2) of Directive 2004/38, of family members who are "*dependants*" of a Union citizen, the situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he/she applies to join the Union citizen on whom he is dependent.

3. On a proper construction of Article 3(2) of Directive 2004/38, the Member States may, in the exercise of their discretion, impose particular requirements relating to the nature and duration of dependence.

5.2. *Case C-635/17, E. (2017)*

A different situation raises when right to family reunification is denied relying on the lack of official documentary evidence of the family relationship, as the most recent case rules on the matter in **Case C-635/17, *E. v Staatssecretaris van***

Veiligheid en Justitie[49]. A. was an Eritrean national benefiting from subsidiary protection in the Netherlands, who claimed to be the aunt and guardian of E., a minor of Eritrean nationality residing in Sudan.

On this basis, A. lodged, on behalf of E., an application for family reunification with the competent Netherlands authorities (16 April 2015). In support of that application, she submitted a document from the Eritrean Liberation Front (ELF) of 6 April 2015, according to which she is E.'s aunt and his guardian since the death of his biological parents, an event that occurred when he was five years old. She also claimed that, after they fled Eritrea, which occurred in 2013 when E. was ten, he had lived with her in Sudan until she left for the Netherlands. At this moment, E. was residing in Sudan with a foster family, with whom he had not family ties.

The Dutch authorities rejected the application for family reunification on the basis that no official documentary evidence had been provided to substantiate the family relationship between E. and A., since the only document provided, the ELF statement, was not authorized. On the other hand, the Secretary of State was of the opinion that a sufficient explanation had not been given of the impossibility of providing official documentary evidence, since Eritrea issues documents of that type, such as death certificates or certificates of guardianship, that could prove that E.'s parents had died and that the applicant was his legal guardian.

In order to give a decision, the applicable legal framework was Article 11 (2) of Directive 2003/86, which states:

> "*Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.*"

As a result, the Court rules:

> "*Article 11(2) of Directive 2003/86 must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, in which an application for family reunification has been lodged by a sponsor benefiting from subsidiary protection in favour of a minor of whom she is the aunt and allegedly the guardian, and who resides as a refugee and without family ties in a third country, that application from being rejected solely on the ground that the sponsor has not provided official documentary evidence of the death of the minor's biological parents and, consequently, that she has an*

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[49] Case C-635/17, *E.v Staatssecretaris van Veiligheid en Justitie* (2019), ECLI:EU:C:2019:192, request for a preliminary ruling under Article 267 TFEU from the *Rechtbank Den Haag Zittingsplaats Haarlem* (District Court, The Hague, Netherlands). In this case-law, the question that arises is whether a national authority could reject the application for family reunification introduced by a beneficiary of international protection where the beneficiary has failed to explain in a plausible manner the reasons as to why he cannot provide any official records attesting to the existence of a family relationship. See, Opinion of Advocate General WAHL, delivered on 29 November 2018.

actual family relationship with him, and that the explanation given by the sponsor to justify her inability to provide such evidence has been deemed implausible by the competent authorities solely on the basis of the general information available concerning the situation in the country of origin, without taking into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin" [50].

6. *Establishment by national law of the conditions relating to the granting and duration of the autonomous residence permit (Article 15 (4) Directive)*

6.1. *Case C-484/17, K (2018)*

In other cases, the referring court is given the competence to assess the implementation of the requirements established by the Directive. Such is the Case C-484/17*, K v Staatssecretaris van Veiligheid en Justitie* [51], request for a preliminary ruling from the Raad van State (Council of State from Netherlands), in application of Article 15(1) and (4) of the Directive.

In this case-law, the CJEU establishes that:

Article 15(1) and (4) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification does not preclude national legislation, such as that at issue in the main proceedings, which permits an application for an autonomous residence permit, lodged by a third country national who has resided over five years in a Member State by virtue of family reunification, to be rejected on the ground that he has not shown that he has passed a civic integration test on the language and society of that Member State provided that the detailed rules for the requirement to pass that examination do not go beyond what is necessary to attain the objective of facilitating the integration of those third country nationals.".

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[50] The judgment handed down on 13 mars 2019, does not support the theories of the Advocate General, which, in a thoughtful report, propose that the Court answer as follows: *"Article 11(2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as not precluding national legislation under which the beneficiary of international protection is obliged, for the purposes of the assessment of his application for family reunification, to explain in a plausible manner the reasons why he is not able to provide official documentary evidence of a family relationship, provided that the competent national authority considers his explanations in the light not only of the relevant general and specific information concerning the situation in his country of origin but also of the particular situation in which he finds himself".* See Opinion of Advocate General, WAHL, delivered on 29 November 2018.

[51] Case C-484/17, *K v Staatssecretaris van Veiligheid en Justitie* (2018), ECLI:EU:C:2018:878.

However, the CJEU emphasizes the need for such requirements to be confirmed by the referring court, always and in any case.

6.2. *Case C-257/17, C and A (2018)*

A similar situation arises in Case C-257/17, *C and A v. Staatssecretaris van Veiligheid en Justitie* (State Secretary for Security and Justice, Netherlands), concerning the State Secretary's rejection of C and A's applications to change their fixed-term residence permits and, in respect of C, the withdrawal of her fixed-term residence permit [52].

In the present case, the CJEU likewise understands that Article 15 (1) and (4) of the Directive does not exclude the national legislation that allows an application for an autonomous residence permit, submitted by a third-country national who has resided for more than five years in a Member State by virtue of family reunification. In the opinion of the Court, the application may be rejected if the applicant has not proven to have passed a civic integration test in the language and society of that Member State, provided that the detailed rules for the requirement to pass that examination do not go beyond what is necessary to achieve the objective of facilitating the integration of third-country nationals.

Therefore, the legislation of the Member State, in this case the Netherlands, which requires a certain level of knowledge of the Dutch language within a period of three years, should be observed.

6.3. *Case 138/13, Naime Dogan (2014)*

The CJEU had issued a resolution radically opposed to the previous ones in Case 138/13, *Naime Dogan* v *Bundesrepublik Deutschland* [53], in which Ms. Dogan, who was illiterate, had been denied her visa for the purposes of family reunification by the German Embassy in Ankara, considering that Naime Dogan "*chose her multiple choice answers at random and also learned and reproduced three standard sentences by heart*". In the words of Advocate General, Mr. Mengozzi, "*An established case of*

[52] Case C-257/17, *C and A v. Staatssecretaris van Veiligheid en Justitie* (2018), ECLI:EU:C:2018:876. In this Case, the Court consider, on one side, Article 15 (1) of Directive 2003/86 that states: *"Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor".* Likewise, the Court remark Article 7 (1) and (2) of the Wet Inburgering (Law on Civic Integration), that reads as follow: *"A person subject to the civic integration requirement must acquire spoken and written knowledge of the Dutch language at least to level A2 of the Common European Framework of Reference for Languages, and knowledge of Dutch society within three years".*

[53] Case C-138/13 *Naime Dogan v Bundesrepublik Deutschland*, ECLI:EU:C:2014:2066.

illiteracy may – having regard to, inter alia, the interested person's age, economic circumstances and social background – constitute an obstacle which is difficult to overcome. Making authorisation of family reunification for a spouse conditional on his/her literacy may, therefore, depending on the circumstances, be disproportionate to the objective of integration pursued by the measures adopted under Article 7(2) of Directive 2003/86 and frustrate the effectiveness of that directive"[54].

Accordingly, with the established criteria of the Advocate General, the CJEU considers that such a regulation inhibits family reunification, as it hardens the conditions of admission into the territory of the Member State concerned. That restriction must be considered ineffective, unless it could be justified by an overriding reason of general interest, favors the legitimate objective pursued and does not go beyond what is necessary to achieve it. In this sense, the German law goes beyond what is necessary to attain the intended objective, given that the lack of proof of the acquisition of sufficient linguistic knowledge automatically leads to the denial of the request for family reunification, without considering the specific circumstances of each case.

7. National law requiring the sponsor and his/her spouse to have reached the age of 21 by the date on which the application for family reunification is lodged (Article 4(5) Directive)

7.1. Case C-338/13, Marjan Noorzia (2014)

Article 4(5) of the Directive allows Member States, in order to ensure better integration and to prevent forced marriages, to require the sponsor and his/her spouse to be of a minimum age, that in any way can't be under 21 years old, before the spouse is able to join him/her.

The minimum age fixed by the Member States by virtue of Article 4(5) of the Directive corresponds with the age at which, according to the Member State concerned, a person is presumed to have acquired sufficient maturity not only to refuse to enter into a forced marriage but also to choose voluntarily to move to a different country with his or her spouse, in order to lead a family life with him or her there and to become integrated. It is, therefore, a measure that can be adopted by Member States to ensure a greater degree of integration of applicants for residence permits, as well as to avoid forced marriages.

In Case Marjan Noorzia[55], the Court considers that "*by not specifying whether national authorities must, in order to determine whether the minimum age condi-*

[54] Opinion of Advocate General Mengozzi, delivered on 30 April 2014, Case C-138/13, *Naime Dogan versus Federal Republic of Germany.*

[55] Case C-338/13, *Marjan Noorzia v Bundesministerin für Inneres*, (2014), ECLI:EU:C:2014:2092, request for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria). Marjan Noorzia, born on 1 January 1989, was an Afghan national who, on 3 September

tion is satisfied, consider the matter by reference to the date when the application seeking family reunification is lodged or the date when the application is ruled upon, the EU legislature intended to leave to the Member States a margin of discretion, subject to the requirement not to impair the effectiveness of EU law" [56].

In this regard, the Court rules:

> "*Article 4(5) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as meaning that that provision does not preclude a rule of national law requiring that spouses and registered partners must have reached the age of 21 by the date when the application seeking to be considered family members entitled to reunification is lodged*".

This minimum age is supposed to provide sufficient maturity not only to refuse to enter into a forced marriage, but also to choose voluntarily to move to a different country with his/her spouse and lead with her/him a family life.

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2010, applied for a residence permit for the purpose of family reunification with her spouse, born on 1 January 1990, who was also an Afghan national and who resides in Austria. By decision dated 9 March 2011, the Bundesministerin (Austria) rejected this application on the ground that, even though Mrs Noorzia's spouse had reached the age of 21 on 1 January 2011, he had not yet reached that age by the date when the application was lodged with the Austrian Embassy in Islamabad (Pakistan) and that, consequently, a specific condition for reunification was not satisfied.

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ECtHR: 28 November 1996 (RJ 96/12146).

THE RIGHT TO FAMILY REUNIFICATION UNDER SPANISH LAW AND THE CASE-LAW THEREOF *

Esther Gómez Campelo, Marina San Martín Calvo

FAMILY REUNIFICATION UNDER SPANISH LAW FOLLOWING THE IMPLEMENTATION OF COMMUNITY LEGISLATION

1. *Introduction*

Signed in Rome on 4 November 1950 under the auspices of the Council of Europe, the European Convention on Human Rights (ECHR) was ratified by all

* The present report has been realized in the framework of the European project "Lawyers for the protection of fundamental rights" GA no. 806974) and specifically within the work package on the review of the European legal framework on fundamental rights. Against this background, the beneficiaries of the said project chose to focus the analysis on two specific topics:

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.

The present report explores the first topic on "The right to family reunification under Spanish Law and the Case-Law thereof", realized by Prof. Dr. Mª Esther Gómez-Campelo y Prof. Dr. Marina San Martín-Calvo, from University of Burgos.

Translation and review by Prof. Alba Fernández Alonso.

Member States of the European Union (EU). Its original system of protection of rights was based on the strict judicial control of individual rights.

Its Article 8, paramount in the subject matter of the present work, reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.".

The family is an integral part, constitutive of the social structure of a state, an attribute that constitutes an essential criterion of its identity. To the extent that the ECHR is an instrument of international law necessarily acknowledged by each Member State, respect for family life becomes a principle of *jus cogens*, an imperative international right that compels countries to specify its content under rules of rigorous respect for the norm cited. The manner it is carried out, its scope and effectiveness, extension, guarantees and limits shall be autonomously set by each State following a series of common basic parameters.

The principle guarantees the right to family life, so that exceptions are only tolerated when necessary, that is, when required by law and for appropriate purposes, with the aim of achieving a balance between the particular right and the interest of the State.

Having said this, considering the ECHR an international instrument seeking the transnational protection of human rights through the establishment of criteria or minimum standards of action requires good understanding of the object of such protection, the limits within it is framed. The creation and integration of a family is one of the inherent rights of the person that define the inviolable content of the rights proper to the dignity of the human being, an essence that is to be reflected in each internal norm. Thus, Title I of the Spanish Constitution (hereinafter CE) and, specifically, its Art. 18.1 – as far as the subject is concerned – enshrines the right to personal and family integrity and privacy. These rights, essential to guarantee human dignity and the development of personality, are also extended to foreigners as shared rights.

The Universal Declaration of Human Rights (UDHR) states in its Art. 16.3 that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State". In like manner, Art. 16 of the European Social Charter speaks of the family as "a fundamental unit of society".

The constant amendments of the legislation on foreigners have turned the study of this matter into a test of obstacles. Good proof of this are not only the changes that have taken place since the entry into force of the Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their

social integration [1] (hereinafter LOEx) together with its correlative Regulation (hereinafter RLOEx), but also one of its most important amendments, that of the LOEx 14/2003 and the adaptation carried out with the last Regulation (Royal Decree 557/2011), concerned with incorporating into the legal system the *acquis* of the EU in such complex matter.

The Community legislator's interest in the importance of proper control and management of migratory flows has been demonstrated by the analysis of Directive 2003/86/EC. It shall not be forgotten that this is the first legislative instrument on immigration in the EU, hence its theoretical significance and practical relevance. However, if we analyze its real reflection in each autonomous regulation, in this case the Spanish legislation, under a realistic and pragmatic approach, the objective of harmonization in such delicate matter – due to its traditional ascription to each national legislation subject to state circumstances of all kinds and attached to the tradition of each country and to its particular degree of sensitivity in such a thorny matter – it can be deemed that it is not producing the intended results, at least for now.

Since the mandatory transposition of the Community text on 3 October 2005, infringement proceedings have been initiated against many states for failure to communicate the transposition measures adopted (in the case of Luxembourg, a judgment was issued by the CJEU).

We will then analyze how the LOEx and its Regulation allow us to glimpse a complex post-transposition panorama by means of a wording that has tried to adapt internal regulations to the latest decisions adopted within the EU. Months after the publication of the Directive on reunification, the amendment of the LOEx of 2003 wanted to reflect some of the objectives set from Europe, such as the fight against fraud, the legal instruments to prevent migration chains, the independent obtaining of work and residence authorizations or the limiting circumstances that affect family members eligible for reunification.

The effective transposition of the Directive is also causing various problems, either because its weak binding nature makes countries adapt their legislation with excessive flexibility, or because of its incorrect application, which can affect respect for family life as a fundamental right – a circumstance that requires verification and regular monitoring by the European Commission –.

From the foregoing, we can anticipate some conclusions that will be reinforced in the work now presented. As a matter of fact, we are facing a slippery matter in which two attitudes are clearly opposed to the phenomenon of migration: the essential adoption of measures that have been imposed for decades by ratified Conventions – and that already have their own regulations – exhorting States before the legal obligation to protect the family and respect family life and, on the other

[1] Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (Arts. 16-19).

hand, the particular need of the State to limit and define the entry of foreigners and, of course, of their families, in view of economic, political, sociological or any other kind of reasons.

Specifying these rights, developing them and making them compatible with restrictive policies regarding the obtaining of state authorizations for access to European territory is a complex task whose future analysis is not exempt from interest.

2. *Family reunification in the spanish legal system*

This is about a temporary residence permit granted to the family members of foreigners residing in Spain, by virtue of the right recognized by the regulations that we will analyze in the following lines.

As stated above, the right to family reunification of foreign residents is enshrined in Directive 2003/86/EC of 22 September 2003 on the right to family reunification. In the Spanish legislation, Article 16.2 of the LOEx – *Title I Rights and Freedoms of Foreigners*, *Chapter II Family reunification* – (own translation) is presented as a right linked to family life and family privacy.

Nevertheless, while the right to family life is a fundamental right enshrined in Article 18 of the CE, which regulates family privacy as a dimension attached to personal privacy, the right to family reunification is only a right of legal configuration and therefore subject to the limits that the LOEx and the RLOEx [2] can establish (see the express reference in Art. 17.4 of the LOEx [3]).

Following that, we will analyze the applicable regulations regarding the conditions for exercising the right, the family members eligible for reunification, the legal procedure, the granting and renewal of the residence permit, the autonomous residence in Spain of the reunited family members and their right to family reunification. In addition, we will see how joined family members can access employment in Spain and the case of family reunification of direct ascendants of Spanish citizens. Finally, we will examine in which cases the regulations allow the conversion of situations of *de facto* family reunification into *de jure* family reunification.

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[2] Regulation of Organic Law 4/2000, approved by Royal Decree 557/2011, of 20 April (Art. 52-58).

[3] Foundation in law 11 of STC, no. 236, 7 November 2007. BOE no. 295, 10 de December 2007, pp. 59-83. Available at https://www.boe.es/buscar/doc.php?id=BOE-T-2007-21162 (last access on 6 October 2019).

2.1. *Conditions for the exercise of the right*

Requirements:

- Not to be a citizen of a State of the European Union, the European Economic Area or Switzerland, or a relative of citizens of these countries to whom the regime of citizen of the Union applies.
- Not to be found irregularly in Spanish territory.
- To have no criminal record in Spain and in the previous countries of residence for existing crimes in the Spanish legal system.
- Not to be forbidden to enter Spain and not to be subject to an alert issued for the purposes of refusing entry in the territorial space of countries with which Spain has signed an agreement to this effect.
- To have a health care plan covered by the Social Security or a private health insurance.
- Not to suffer from any of the diseases that may have serious public health repercussions in accordance with the International Health Regulations 2005.
- Not to be, if applicable, within the period of commitment not to return to Spain made by the foreigner when taking part in a voluntary return program.
- To have paid the fee for processing the procedure.
- To have sufficient economic means (Art. 54 RLOEx) to meet the needs of the family, including health care, in the event of these not being covered by the Social Security.

The income contributed by the spouse or partner or another relative in the direct line and first degree residing in Spain and living with the sponsor may be computed (although income from the social assistance system shall not be computable). In the case of family units consisting of two members (sponsor and joined person) a monthly amount of 150% of the IPREM (Spanish acronym for Public Indicator of Income for Multiple Purposes), – which in the year 2019 amounts to 799 euros – is required.

For each additional member, 50% of the IPREM shall be added, which comes to 266 euros in the year 2019.

The RLOEx establishes that by Order of the Minister of the Presidency the amount of the means of living required for this purpose shall be determined, as well as the manner of proving their possession, by taking into account the number of persons who would become dependent on the applicant after the reunification. For this reason, and in order to carry out the calculation, the income of the spouse or partner or another relative in direct line and first degree (parents or children), residing in Spain and living with the sponsor can be included. Income from the social assistance system (unemployment benefit or social assistance, for instance) shall not be computable.

In 2019, Spain shall continue to demand the same amount of money as foreigners who want to join their families, a situation not new since the IPREM has repeated its values since 2010, remaining stable at 532.51 euros per month. The

most important increase was the one registered between 2006 and 2007, which represented an increase of 4.2%.

Having analyzed the aforementioned, it should be pointed out that Art. 54.3 of the RLOEx establishes that the amount of the economic means *may be reduced when the family member eligible for reunification is a minor, when there are exceptional accredited circumstances that advise such reduction based on the principle of the superior interest of the minor and the other legal and regulatory requirements for the granting of the residence permit for family reunification are met* [4] (own translation). This reduction applies exceptionally. Therefore, if sufficient economic means are not proven, the compliance with the rest of the requirements shall be assured in order to increase the probabilities that the reduction of the amount will be applied.

- Adequate housing. How can this requirement be proven? With a report of the social services of the respective municipality (Art.18.1 LOEx and Art. 55.2 of the RLOEx). See Instruction of June 2011, on accreditation of availability of adequate housing in procedures on residence for family reunification [5].

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[4] A number of High Courts have already ruled on this matter. However, the STSJ of Galicia of 21 March 2018, no. 174/2017 is noteworthy to be mentioned. Available at http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8386216&links=%22174%2F2017%22&optimize=20180518&publicinterface=true. (last access on 7 October 2019).

The sentence reads: *In view of this point, and the fact that the application for reunification is for three minor children, 5, 12 and 17 years old respectively, the Chamber understands that in this case the applicant's income must be valued, computing as stated in the judgment of the Court of First Instance the 963.82 euros of salary plus 289.14 euros (the 30% estimated as maintenance), which makes a total of 1252.96 euros, which although it is true, is lower and does not reach the economic means that would correspond for family units of 4 members – 1328 euros –. This circumstance makes it necessary to reduce the income requirement of the family unit on the basis of the principle of the best interest of the child, in accordance with the provisions of Organic Law 1/1996, of 15 January, on the legal protection of minors, as it meets the other legal and regulatory requirements for the granting of residence permits for family reunification.*

It is true that for family units such as that of the plaintiff, income is fixed that is not reached by the appealed for a small amount – not amounting to 100 euros –, but the individuals involved are minors and the Social Services of the City Council of Orense have reported favorably the applicant's roots, being this the only requirement that the applicant does not meet. Therefore, under the protection of the provisions of Art. 54.3 of the RLOEX, in this specific case that is examined, it is possible to reduce the pecuniary amount payable by the precise percentage in order to consider that the amount received by way of salary is sufficient for her maintenance and that of her family and, consequently, it is appropriate to annul the contested decision in the instance on the ground that it is unlawful and to recognize the right of the appellant to reunite her minor children and to obtain authorisation for temporary residence, by family reunification, applied for through administrative channels, since otherwise the right to the social, economic and legal protection of the family laid down in Article 39 of the Constitution would be infringed, as well as Article 3.1 of the United Nations Convention, of 20 November 1989 on the rights of the child and law 1/1996, of 15 January, on the legal protection of minors (own translation).

[5] Complete document in Spanish available at http://blogextranjeriaprogestion.org/wp-content/uploads/2014/10/instruccion-dgi-sgrj-4-20110001.pdf (last access 4 September 2019).

- The sponsor shall have resided in Spain for at least one year and have been granted authorization to reside for at least another year. In order to having ascendants join him or her, the sponsor must hold a long-term or long-term-EU authorization, which implies having been a legal resident in Spain for at least 5 years.

2.2. *Family members eligible for reunification*

If the sponsor fulfills the above requirements, he or she can apply for a residence permit for certain family members, who would be the ones to be joined. Of course, this does not apply to all the family members, but to those mentioned below, i.e. only the family members referred to in Art. 17.1 of the LOEx – almost the same ones cited in Art. 53 of the RLOEx – are eligible for reunification.

It is important to point out that the relative to be joined shall not be in Spain; it is assumed that he or she is in his or her country of origin. As a matter of fact, if the residence permit is granted, this family member shall apply for the corresponding visa at the Spanish consulate in the country of origin, as we will see later.

Precisely, one of the requirements for applying for family reunification is that the person to be joined is not in an irregular situation in Spain [6]. Moreover, according to the sentence cited in the footnote, in practice, the joined relative is recommended not to be in Spain, not even as a tourist, but in his or her country of origin or residence at the time of initiating the family reunification procedure.

The joined relative could be:

1. *Spouse or person with whom the applicant has an affective relationship similar to that of a spouse. The situations of marriage and analogous relationship of affectivity are incompatible.*

For these purposes, an analogous relationship to the conjugal one will be considered under the following circumstances:

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[6] For this purpose, it is worth quoting STSJ of Madrid, no. 95/2017, 15 September 2017, which stated: *In the present case it is an indisputable question that the applicant, wife of the plaintiff, at the beginning of the reunification procedure (application before the corresponding government delegation) was domiciled in national territory without authorization or permission (...) In short, the regulations set out above are clear and forceful with regard to the fact that it is a necessary requirement for access to family reunification, such as the one for which the visa applicant, at the beginning of the file, is not in an irregular situation in Spain. On the basis of the abovementioned established fact, the applicant does not comply with that legal requirement, so that the contested acts, in those respects examined, are fully in accordance with law, which leads to the dismissal of the appeal* (own translation), available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8026547&links=%22974%2F2016%22&optimize=20170522&publicinterface=true (last access 7 October 2019).

– When this is registered in a public register and the registration has not been cancelled, or
– When the validity of an unregistered relationship constituted prior to the start of the sponsor's residence in Spain is proven by any legally admitted means of proof.

The spouse must not be *de facto* or *de jure* separated or have celebrated the marriage in fraud of law. In other words, marriages of convenience shall not be valid.

The most common way employed by the immigration authorities to check whether the marriage is one of convenience is through separate interviews of the spouses, a perfectly valid procedure in accordance with current regulations.

These interviews are of such important nature that they could lead to the denial of the family reunification visa by the corresponding consulate or embassy, even if the authorization has previously been obtained from the immigration authorities in Spain, as decided by the Supreme Court [7].

Reunification of more than one spouse or partner is not possible. In the event the spouse to be joined is a second or subsequent marriage, the dissolution and the situation of the former spouse or partner and their relatives with regard to common housing, pension for the spouse or partner and children must be proven (Art. 53.a) RLOEx).

2. *Children of the sponsor and of the spouse or partner, including those adopted (provided that the adoption produces effects in Spain), who are under eighteen years of age or disabled who objectively cannot provide for their needs due to their state of health.*

In the case of a child of one of the spouses or members of the couple, the latter must exercise sole parental authority or must have been granted custody and be in their charge (Art. 53.c) RLOEx).

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[7] STS, no. 10/2013, 25 April 2014: *It is therefore perfectly compatible with the doctrine cited by the appellant, and certainly with the applicable legislation, that the Consulate rejects the visa application on the basis of facts revealed in the interview with the person concerned. Facts which must relate to the information set out in the provision, including that relating to the "alleged family relationship", where there is sufficient evidence to doubt its veracity. Such is the situation presented here. In the procedure initiated at the Consulate because of Mr. Mariano's visa application, he was summoned to an interview. The interview revealed his ignorance about the personal data and circumstances of the wife, who should know if there was a real personal relationship between them. For the representatives of the Administration, this ignorance constituted sufficient evidence to cast doubt on the reasons given for obtaining the visa. The consular Administration therefore assessed new data, deduced from the investigative activity of the visa file which falls within its exclusive competence, and on which a decision opposed to the previous granting of residence agreed upon by the Government Subdelegation could lawfully be based, as it did* (own translation), available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7035380&links=%2210%2F2013%22&optimize=20140505&publicinterface=true (last access on 7 October 2019).

3. *Minors or children with a disability and unable to provide for their own needs due to their state of health, provided they are legally represented by the sponsor (Art. 53.d) RLOEx).*

In this case, relatives such as siblings, grandchildren, nephews, etc. are being considered, about whom the sponsor acts as guardian, for example, legally appointed.

4. *Ascendants in the first degree of the sponsor – required to be long-term or long-term-EU residents – or of his or her spouse or partner, provided that they are dependent on him or her, are over sixty-five years of age and there are reasons justifying the need to authorize residence in Spain (Art. 53.e) RLOEx).*

In a broad sense, immigration offices require proof that the applicant has neither sufficient assets nor income in his or her country of origin, nor direct relatives (children or partner) who can take care of him or her.

They shall be deemed to be in charge if it can be proved that during the last year the sponsor has transferred funds or incurred expenses from his or her ascendant in an amount of at least 51% of the gross domestic product per capita [8]in annual computation of the country of residence of the latter.

From a more concrete and practical point of view, the main factor that is taken into consideration to accredit that the joined person is dependent on the sponsor, is when the second, *at least during the last year of his residence in Spain, has transferred funds or borne expenses of his relative, which represent at least 51% of the gross domestic product per capita, in annual calculation, of the country of residence of this one, as established, in the matter of indicators on income and economic activity by country and type of indicator, by the National Institute of Statistics* (own translation) [9].

5. Exceptionally, *the ascendant under sixty-five years of age may be joined when humanitarian reasons concur (among other cases, when the ascendant lives with the sponsor in the country of origin, or when he or she is incapable and un-*

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[8] Information on the Gross Domestic Product per capita by country available at https://datos.bancomundial.org/indicator/NY.GDP.PCAP.CD?order (last access on 20 September 2019).

[9] The term 'dependent' is used both in Community family reunification and in general family reunification. Therefore, the notion of being dependent that we will see in the following judgment is applicable to the general regime, even though this was dictated in a case of Community family reunification. This decision stated: *A dependent is a person who is in a situation of dependence on the Union citizen concerned and such dependence must be of such a nature that it requires that person to have recourse to the assistance of the Union citizen to meet his basic needs and therefore what has to be demonstrated is that factual situation, namely a material assistance provided by the Union citizen, necessary for the satisfaction of the basic needs of his family member* (own translation). STSJ of Madrid, no. 974/2016, 10 March 2017, available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8026547&links=%22974%2F2016%22&optimize=20170522&publicinterface=true (last access on 7 October 2019).

der the guardianship of the sponsor or his or her spouse or partner, or when he or she is unable to provide for his or her own needs.

There are also humanitarian reasons if the applications of the spouses in the ascending line are submitted jointly and one of them is over sixty-five years of age.

2.3. *Required documents*

- **Official application form** (EX-02) in duplicate and duly completed and signed by the sponsor.
- **Copy of the sponsor's complete passport, travel document** or valid registration card.
- **Certified copy of the documentation that proves that the applicant has sufficient employment and/or economic resources** to meet the needs of the family. For this purpose, the following might be submitted:
  - In the case of salaried employees:
    - Copy of the employment contract.
    - If applicable, the last income tax return.
  - In the case of self-employed workers:
    - Accreditation of the activity carried out.
    - If applicable, the last personal income tax return.
  - In case of not carrying out any lucrative activity in Spain:
    - Certified cheques, traveller's cheques or payment letters or credit cards, accompanied by a bank certification of the amount available as credit on the aforementioned card or bank certification.
- **Documentation accrediting the availability of adequate housing**. For this purpose, a report issued by the competent body of the Autonomous Community of the sponsor's place of residence must be attached. This report may be issued by the local administration when this has been established by the autonomous community. This requirement may be justified by any means of proof admitted in Law in the event that the autonomous community or the local authority has not issued and notified the report within thirty days from the date of the request. In this case, the documentation provided must refer to: title enabling the occupation of the dwelling, number of rooms, use to which each of the dependencies is destined, number of inhabitants and conditions of habitability and equipment. A copy of the proof of having made the request for a report to the autonomous community or local administration must also be provided.
- **Copy of the complete and valid passport or of the travel document of the joined person**.
- **Copy of the documentation accrediting the family ties or kinship or** existence of the *de facto* union or representation together with:

- In the event of joining the spouse or partner:
  - Affidavit of the applicant not to have another spouse or partner residing with him or her in Spain.
  - If he or she is married in a second or subsequent marriage, a court decision establishing the situation of the previous spouse and their children.
- In the event of joining children:
  - If they are joined by a single parent: documentation accrediting the sole exercise of parental authority, having been granted custody, or proof that the other parent authorizes their residence in Spain.
  - If they are over eighteen and objectively unable to provide for their own needs, supporting documentation must be provided.
  - If they are adoptive children, the decision by which the adoption was agreed.
- In the event of joining represented persons by the sponsor:
  - If the represented are over eighteen years of age and are not objectively able to provide for their own needs, supporting documentation shall be provided.
- In the case of joining ascendants:
  - Documentation proving that the sponsor, during the last year of residence in Spain, has transferred funds or borne the expenses of the ascendant.
  - Documentation accrediting the reasons justifying the need to authorize residence in Spain.
  - If applicable, documentation proving that there are humanitarian reasons justifying the authorisation.

- **Proof of guaranteed health care**. If any of the children to be joined are over 26 years old, private medical insurance shall be needed; the working condition of the sponsoring parent would not be enough due to the fact that at that age they can no longer be included as beneficiaries in the Social Security.

Important information to be considered: when documents from other countries are provided, these shall be translated into Spanish or the co-official language of the territory where the application is submitted. In addition, all foreign public documents shall be previously legalized by the Consular Office of Spain with jurisdiction in the country in which the document has been issued or, where applicable, by the Ministry of Foreign Affairs and Cooperation, except in the case in which the said document bears an apostille stamp by the competent authority of the issuing country in accordance with the Hague Convention of 5 October 1961 or unless the aforementioned document is exempt from legalization by virtue of the International Convention.

2.4. *Procedure*

The procedure for family reunification is enshrined in Art. 18 LOEx and more precisely in Art. 56 RLOEx.

The legitimated subject, the sponsor, shall hand in personally (Art.56.1 RLOEx) and in official form (Art.56.3 RLOEx) the application for temporary residence authorization (Art. 18.1 LOEx and 56.2 RLOEx) in favor of the member(s) of his or her family whom he or she intends to join. This application shall be submitted to the competent body for procedure and decision, i.e. the government delegations in the uniprovincial autonomous communities and the government subdelegations in the provinces [10].

Together with the application, the abovementioned documentation included in Art.56.3 RLOEx shall be attached. The Regulation allows this request to be made when the foreigner holds a residence permit for one year and has requested authorization to reside for at least another year. However, in order to obtain the concession of the reunification, it will be necessary to wait until the holder has been recognized this right to reside for at least another year (Art. 56.1 RLOEx). The sponsor is therefore advised to apply for such renewal prior to the expiry of the initial authorisation (this can be done up to 60 days before).

The processing and decision of the file will be carried out in accordance with the provisions of Art. 56 RLOEx. When the application is accepted for processing, the temporary residence fee for family reunification must be paid within ten working days [11].

The period of decision of the applications will be forty-five days counting from the day after registration in the competent body to process them. Once this period has elapsed without the administration having given any notification, it shall be understood that the application has been rejected due to administrative silence. In the event of a favorable decision, the temporary residence authorization granted shall be suspended in its effectiveness until the issuance of the visa and the effective entry into Spain of the family member eligible for reunification (Art. 58.1 RLOEx).

As procedural peculiarities, when notification of the decision has not been possible, this shall be announced in the Single Edict Board (TEU in Spanish) [12].

If electronic notification has been chosen, or if the person is legally obliged to use the latter, the decision will be notified by publication on the website. If the

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[10] Information on the address, telephone numbers and opening hours of the Immigration Office in the province of residence of the sponsor are available at: http://www.seap.minhap.gob.es/web/servicios/extranjeria/extranjeria_ddgg.html (last access on 6 October 2019).

[11] Sheet 790, Code 052, Epigraph 2.1. Initial authorization for temporary residence. The payment form may be downloaded from the internet site of the Secretary of State for the Civil Service.

[12] https://boe.es/tablon_edictal_unico (last access on 6 October 2019).

decision is not accessed within 10 working days of its publication, it will be deemed to have been notified.

In the case of a positive decision, the joined family member is granted two months from notification date to apply personally for the visa at the diplomatic mission or consular post in whose district he or she resides (in the case of minors, the visa application shall be submitted by his or her duly accredited representative). The rule also provides for the possibility, exceptionally, of acting through a representative or submitting the application at a different diplomatic mission or consular post.

Art. 57.2 of the RLOEx details the necessary documentation to be collected in order to formalize the visa application and contemplates the possibility of requiring the personal appearance of the applicant to conduct an interview for the purpose of a better assessment of the application.

The visa application must be accompanied by the following:

- **Ordinary passport or travel document recognized as valid in Spain** (valid for at least four months).
- **Criminal record certificate** issued by the authorities of the country of origin or of the country or countries in which the applicant has resided during the last five years (in the case of adults of criminal age).
- **Medical certificate**.
- **Original documentation accrediting family ties** and, where appropriate, legal dependency.

The deadline for the decision of the visa file, its notification, the need for personal collection within the period allowed for that purpose (and the consequences of not doing so within that period), shall be as provided in Art. 57 RLOEx.

Thus, it is established that the diplomatic mission or consular post will notify the decision of the visa within a maximum period of two months. After notification, the person concerned shall collect the visa in person within two months from that date (in the case of minors, the visa may be collected by their representative).

Once the visa has been collected, the joined person must enter Spanish territory within the period of validity of the visa, which shall not exceed three months.

After that, the joined person – within one month from his or her entry into Spain –, must apply personally (in the case of minors, the representative can proceed accompanied by the minor) for the Foreigners' Identity Card at the Immigration Office or Police Station of the province where the authorisation has been processed (Art. 58.3 RLOEx) [13].

[13] The instructions where to go, opening hours and to know if an appointment must be made in advance are available at http://www.seap.minhap.gob.es/web/servicios/extranjeria/extranjeria_ddgg.html (last access on 6 October 2019).

The decision to refuse a visa shall always be reasoned and inform the person concerned of the facts and circumstances established which, in accordance with the applicable rules, have led to the decision to refuse it (Art. 56 RLOEx).

The joined person will show **his or her passport or travel document at the time of the fingerprint procedure** in order to prove his or her identity **and shall present the following**:

- **Application for the Foreigners' Identity Card**, in official form (EX-17) [14] o **Proof of payment** of the card fee.
- **Three recent photographs in color**, white background, passport size.
- In the event that the **joined person is a minor, documentation accrediting the representation**.

The validity of the joined person's authorization shall be extended until the same date as the authorization held by the sponsor at the time of entry of the relative into Spain. That is to say, the temporary residence authorization granted to the joined family member shall have an identical validity to that of the sponsor (Art. 18.3 LOEx and Art. 58.3 RLOEx).

2.5. *Renewal of residence permits*

Article 61 of the RLOEx establishes the renewal of the temporary residence authorization granted under this case. The only particular details refer to the omission of the period of three months subsequent to the expiry date of the authorization, common in the rest of the cases of renewal of residences (section 1), and to the obligation to present and process the applications for renewal of the joined relative and that of the sponsor as one – unless there is a justifiable cause – (section 8). This is due to the fact that renewals are not obtained automatically, but the requirements set out in the law shall be met.

Finally, Article 58.3 *in fine* also establishes a singular aspect with respect to the validity of the renewed authorization of persons joined by a holder of permanent residence: their renewed authorization will be of a permanent nature. On this matter, there are those who have interpreted – erroneously, in our opinion, in accordance with what repeated decisions have stated – [15] that a case of access to

[14] Available at http://extranjeros.empleo.gob.es/es/ModelosSolicitudes/Mod_solicitudes2/index.html (last access on 7 October 2019).

[15] STSJ of Castilla-La Mancha, no. 299/2012, 14 April 2014: *When the paragraph says: the subsequent authorization of residence of the regrouped person "will be of a permanent nature", it refers, logically, to the case that this renewal is appropriate because the requirements for the same are met, not just because, having granted the first authorization, it is automatically renewed to the point of becoming a permanent residence authorization* (own translation). Available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7082385

permanent residence that circumvents the generic requirement of having resided continuously in Spain for five years is established which, however, is not contemplated in the cases that excepted this rule.

Based on Art. 61.9 of the RLOEx, the immigration authorities shall reach a decision within a period of three months following the filing date of the application, so that if the Administration does not decide in time, it will be understood that the decision is favorable, i.e. positive administrative silence would operate in this case [16]. From the judgment outlined in the footnote, it can be deduced that within those three months the Administration shall not only decide but also notify the decision. In the case of deciding within the three-month period, but notifying outside that period, the positive administrative silence would also operate and, consequently, the request would be understood as granted.

Finally, the rule raises two important questions:

a) *The maintenance of the right of the joined family members to reside in Spain on a personal basis*. The assumptions and conditions are included in Arts. 16.3 and 19.1 and 2 LOEx and developed in sections 1 to 6 of Art. 59 RLOEx:
   - When the spouse obtains the corresponding work permit.
   - In the event of having resided in Spain for five years without separation.
   - In the event of being a victim of domestic violence.
   - In the event of death of the sponsor.
   - When the marriage is broken (under the condition of a period of residence in common in Spain of at least two years).

   All joined family members, in case of break-up of the marriage or death of the sponsor or victims of domestic violence, shall retain their residence and shall depend for their renewal on the family member with whom they live.

&li nks=%22299%2F2012%22&optimize=20140529&publicinterface=true (last access on 7 October 2019).

[16] STSJ of Valencia, no. 455/2016, 21 March 2018: *In view of this appeal, we must point out that Article 61 of the Immigration Regulation, dedicated to the renewal of residence permits by virtue of family reunification and reproduced in the appealed sentence, establishes in its paragraph 9 that: It shall be understood that the decision is favorable in the event that the Administration does not expressly resolve within three months from the presentation of the application, a precept that we must put in relation to the dates that arise from the administrative file: the application was formulated on July 6, 2015, the decision is dictated on the 5th of October of 2015 but its notification is not attempted until the 19th of October (two attempts) and it is obtained on the 22nd of the same month, therefore, from the 6th of July until the 19th of October more than three months that this precept establishes have passed and, without prejudice to the actions that the Administration may carry out if it considers that the renewal is not in accordance with law, the truth is that the same was obtained by administrative silence and so it must be declared with revocation of the sentence of instance and estimation of the present appeal* (own translation), available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=8419744&li nks=%22455%2F2016%22&optimize=20180613&publicinterface=true (last access on 8 October 2019).

b) *The right to family reunification of the joined persons*. The LOEx establishes in its Art. 17.2 (and so does the RLOEx in its Art. 60) that the family members shall only exercise their right to family reunification when they are holders of a residence permit and independent work and prove compliance with the rest of the legally established requirements. The Regulation states in detail the particular situation of each joined family member and the conditions that, in each case, are demanded of him or her.

2.6. *The access to work for joined family members*

The residence permit for family reunification held by the spouse, partner and children of working age **enables them to work as salaried employees** (with an employment contract) **or as self-employed workers** anywhere in the national territory in any occupation and sector of activity **without the need to process any other administrative procedure**. This is enshrined in Art. 19 of the LOEx after its amendment in 2009 [17].

The authorization of residence for reunification is linked to that of the sponsor, and only allows spouses and children over the age of 16 to reside and work, in accordance with Article 7 of the Workers' Statute; thus, they will be authorized to work without the need to process any other administrative procedure (Article 19.1 LOEx). This means that foreigners in this situation are not obliged to request a change of their Foreigner's Identity Card in order to make this circumstance knowledgeable since when they meet this condition, – although not expressly mentioned therein –, by direct application of current legislation they are already authorized to work without any further procedure.

However, if the worker wants to obtain a card independent of the person who has joined them, he or she must request a modification of the authorization, and prove to have sufficient economic resources. They renewal of their card shall only be requested upon expiration and in conjunction with the sponsor's, unless any other reason to do so. On the other hand, if five years of residence can be proven, the joined person can apply for a long-term residence permit, which allows him or her to work without any limitation.

3. *Family reunification under community law and its transposition into the spanish law*

At its meeting in Tampere on 15 and 16 October 1999, the European Council acknowledged the need to harmonize national legislation on the conditions for

[17] Organic Law 2/2009, of 11 December, amendment of Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration.

admission and residence of third-country nationals, and the importance of ensuring fair treatment of third-country nationals residing legally in the territory of the Member States, together with the interest that a more vigorous integration policy should aim at granting them comparable rights and obligations to citizens of the European Union.

Furthermore, as stated in Recital 2 of Council Directive 2003/86/EC, of 22 September 2003, on the right to family reunification (hereinafter the Directive), "measures on concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law".

Accordingly, the Directive is adopted in order to establish in Community Law common rules for the exercise of the right to family reunification available to third-country nationals legally residing in the territory of the Member States.

The Directive considers 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" (Recital 4). Moreover, it also considers that, in order "to protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria" (Recital 6).

When considering this European standard, it should be borne in mind that:

- The Directive is directly applicable.
- The Directive does not affect the power of Member States to adopt or retain more favorable provisions.
- The Directive contains standstill measures, which are only exceptionally applicable when they are provided for in the legislation of the State wishing to impose them on the date of adoption of the Directive.
- The Directive will apply only to the family reunification of third-country nationals in a Member State of the Union who are not subject to the Community system, and of the refugees whom it regulates in a particular way.

On the basis of the above, there is a clear basic difference between family reunification and the community family card. The temporary residence card of a relative of a European Union citizen differs from family reunification in that the former is granted to certain relatives of a Spanish citizen or of an EU citizen resident in Spain, while family reunification applies to relatives of non-EU foreigners. The regulations, requirements and characteristics of each type of permit are different and should not be confused.

Before the entry into force of Royal Decree 240/2007, of 16 February, on the entry, free circulation and residence in Spain of citizens of the Member States of the European Union and of other States party to the Agreement on the European Economic Area, the direct ascendants of Spanish citizens and those of their spouses were under Community legislation as they were included within its scope

of subjective application (Art. 2 of Royal Decree 178/2003, of 14 February). In accordance with the foregoing, the family reunification of these ascendants was carried out under the conditions and according to the procedure established in this respect in said Community legislation.

The aforementioned Royal Decree 240/2007, of 16 February, in its third final provision, paragraph two, added to the RLOEx an additional provision, the twentieth, which reads: *Regulations applicable to family members of Spanish citizens who are not nationals of a Member State of the European Union or of a State party to the Agreement on the European Economic Area* (own translation). This additional provision has been annulled [18].

According to this, the direct ascendants of Spanish citizens and those of their spouses were excluded from the scope of application of Community legislation unless, at the time of its entry into force, they were already holders of a valid or renewable community resident family member card.

In other words, in accordance with the previous criterion, which has now expired, since the entry into force of Royal Decree 240/2007, of 16 February, the family reunification of direct ascendants of Spanish citizens or their spouses shall be governed by the provisions of the common regulations on immigration (LOEx and RLOEx), so that what a Spaniard had to do to join his direct ascendants was exactly the same as what a foreigner subject to the general aliens regime in Spain had to do to join his or her own. Consequently, when the applicant is a Spanish citizen, the regime of community family reunification shall be applied and not the general one.

Furthermore, the foreigner residing in Spain by family reunification and holder of a temporary residence card of a family member of the Union can raise the complex issue of his or her health care in Spain, because although the government authority has granted him or her a family reunification visa of a community nature, this does not simply mean the automaticity in health care charged to public funds. A very recent ruling of the Supreme Court has just indicated that since the regulations stipulate that the applicant must have sufficient resources and health insurance so that the resident is not a burden for social assistance, the health coverage must be maintained by the sponsor during the time he or she resides in Spain. Therefore, the applicant is not unprotected, but is covered by a third party,

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[18] STSJ of Madrid no. 298/2016, 18 July 2017: *As of the judgment of June 6, 2010, given the terms in which Art. 2 (and annulled the Twentieth Additional Provision of the Regulations on Immigration), Royal Decree 240/07 – independently and outside the Directive – as a provision of domestic law, is also applicable to the reunification of foreign family members of Spaniards (whatever their nationality), whether or not they have made use of their right to free movement and residence within the Common European Space, and specifically its Art. 7.* (own translation), available at www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=8106586&li nks=%22298%2F2016%22&optimize=20170724&publicinterface=true (last access on 7 October 2019).

the Spanish relative, being already unnecessary for the Spanish public health system to cover these needs [19]. This reflects the aforementioned ruling on the right to health care of a Spanish citizen who joined her mother, of Cuban nationality, who was granted the *temporary residence card of a relative* of a European Union citizen, under the provisions of Royal Decree 240/2007.

The judgment puts forward the argument that in order to be able to reside as a joined citizen without a job, one must prove to have sufficient economic means to meet the needs of the family, including health care through a public or private health insurance, contracted in Spain or in another country. Thus, the family of the citizen applying for reunification does not become *a burden for social assistance in Spain during their residence* [20].

4. *Comparing the directive with the spanish law*

Reference will be made only to issues that have not been transposed, to those that have been transposed but in a different way and to those that, although faithfully transposed, are of interest for the conclusions of this work.

The same scheme used to analyze the Spanish law will be followed. Thus, mention will be made to the conditions for the exercise of the right, family members, procedural issues eligible for reunification, the authorization of granted residence, the maintenance of the right of residence on an individual basis and, eventually a reference to the right of access to employment will also be included.

4.1. *Conditions for the exercise of the right*

The few differences between the Directive and Spanish law can be seen in:

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[19] TS, Fourth Chamber, Social Division, Plenary Session, Judgment 364/2019, of 13 May 2019, Appeal 1068/2018. See *Diario La Ley*, no. 9458, Judgment of 17 July 2019, available at http://diari0olaley.laley.es/content/Documento.aspx?params=H4sIAAAAAAAAEAMtMSbH1CjUwMDAztjQ1NjFRK0stKs7Mz7Mty0xPzStJBfEz0ypd8pNDKgtSbdMSc4pT1RKTivNzSktSQ4sybUOKSlMBSjcGXUUAAAA= WKE (last access on 8 October 2019).

[20] NGOs such as Amnesty International or Médecins Sans Frontières have already spoken out against the judgment: *It is further proof that the Royal Decree Law of 2018 does not guarantee universal access to health care, as dozens of protection mechanisms of the United Nations and the Council of Europe are calling for. The Supreme Court has disregarded more than 70 favorable sentences to these people in different Courts of Justice, and have bought the argument that people who come through a reunification procedure have medical insurance and do not need Public Health. Even those who come illegally have that right, it doesn't make sense* (words by the Head of Economic, Social and Cultural Rights at Amnesty International Spain, own translation).

This ruling is neither of the taste of the Foreign Lawyers Association that regrets the resolution of the Supreme Court, which accuses of avoiding applying the Royal Decree of 2018 that takes up the Universal Health.

A. The wording of the requirement to have a dwelling: "accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned" (Art. 7.1 a) of the Directive), as opposed to the more generic and imprecise expression from Art. 55 RLOEx: *adequate to meet the needs of the applicant and the family* (own translation).

B. The requirement to have economic resources, Art. 7.1.c) of the Directive specifies "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members".

For its part, Art. 54 RLOEx speaks of the accreditation of employment and/or sufficient economic resources, without further precision.

On the other hand, Art. 7.2 of the Directive states that "Member States may require third country nationals to comply with integration measures, in accordance with national law"; in the Spanish law there is no such measure and, therefore, it is not currently required as a condition for family reunification.

Under Community law, the Directive "shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence" (Art. 3.1). Moreover, "Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years" (Art. 8 Directive). The Spanish law requires in any case the applicant to hold a renewed residence permit (Art. 38 and Art. 56.1 RLOEx).

Finally, a standstill clause is introduced "where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members" (Art. 8 Directive). This is a requirement that cannot be used by the Spanish Law since it was not included in our legislation before the adoption of the aforementioned Directive.

4.2. *Family members eligible for reunification*

The Directive indicates that "it is for the Member States to decide whether they wish to authorize family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor" (Recital 10 Directive).

With regard to spouses, our legislation requires that there be no separation *de facto* or *de jure* (Art. 53 RLOEx), while the Directive omits such extremes (Art. 4.1 (a); on the other hand, it does establish the possibility – controversial and highly questioned doctrinally speaking – of requiring a minimum age for spouses without exceeding the age of twenty-one in order to avoid forced marriages (Art. 4.5), a circumstance that does not appear in the Spanish legislation.

With regard to polygamous marriages, both regulations express in the same terms the impossibility for a sponsor to join another spouse if he or she already had one living with him or her in the territory of the Member State (Art. 4.4 Directive and Art. 17.1 a) LOEx and Art.53 RLOEx).

In the case of minor children, children of the sponsor of a parent other than the one with whom he or she currently lives, the possibility of limiting his or her family reunification is regulated in Art. 4.1.c) of the Directive in relation to 4.4 *in fine*, an aspect that the Spanish law does not consider.

The Directive also contains two other standstill clauses with regard to minors. One in the last paragraph of Article 4.1.d) "Member States may authorize the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement 2, and another in Article 4.6: "Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15". In both cases, there is no parallelism in the Spanish law.

With respect to the ascendants, Article 2. a) of the Directive determines that the residence of ascendants in direct line may be authorized in the first degree and the Spanish law establishes the same limitation with respect to the degree, – Art.17.1.d) LOEx and Art.53 RLOEx –. Similarly, the Directive states as a requirement for authorizing the residence of these family members to be dependent on them and lack adequate family support in the country of origin – Art. 2.a) –. The Spanish legislation uses the following wording: *when they are dependent, are over sixty-five years of age and there are reasons that justify the need to authorize their residence in Spain* (Art. 17.1 (d) LOEx and Art. 53 RLOEx, own translation).

The Directive covers the possibility of joining unmarried adult children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs because of their state of health – Art. 4.2.b) –. On this point, the Spanish law shows a more restrictive approach, as it limits the possibility to the case of the incapacitated when the applicant is also their legal representative (Art. 17.1 (c) LOEx and Art. 53 RLOEx). The Directive includes the possibility of authorizing the entry and residence of the unmarried couple or registered partner (Art. 4), in the same manner of the Spanish law, which reads: *the person who maintains with the resident foreigner a relationship of affectivity analogous to the conjugal one will be equal to the spouse to all the effects foreseen in this chapter, provided that said relationship is duly accredited and meets the necessary requirements to produce effects in Spain* (Art. 17.4 LOEx, own translation).

4.3. *Procedural questions*

Recital 13 of the Directive refers to the importance of establishing a system of rules of procedure that are efficient, transparent and fair in order to provide an adequate level of legal certainty. Art. 5.1 of the Directive provides for the possibility for the applicant or the family member to submit an application for entry and residence. The Spanish legislation has opted for the first option (Art. 56.1 RLOEx). In the last paragraph of Art. 5.3, the Directive makes it possible for an application for family reunification to be submitted when the family members are already in its territory. This precept provides legal cover for the conversion of *de facto* family reunification into a *de jure* situation, a circumstance not included in the Spanish legislation.

4.4. *Validity of temporary residence permits granted by family reunification*

In its Arts. 13.2 and 13.3, the Directive stipulates that the first permit shall have a minimum duration of one year – which may be renewed – and that the duration of the family members' residence permits shall not exceed the expiry date of the residence permit held by the sponsor.

With identical tenor, as stated in our regulations (Art. 58. 3 RLOEx), the validity of the authorization of the joined person shall be extended until the same date as the authorization held by the sponsor at the time of entry of the relative in Spain.

4.5. *Individual retention of the right of residence of the joined persons*

Recital 15 of the Directive provides that the integration of family members should be encouraged. To this end, the joined persons shall have access to a status independent of the applicant (in particular in the event of the break-up of the marriage). All the cases provided for in Art. 15 of the Directive are covered by the Spanish legislation.

However, the Spanish law does not enshrine a transposition of Art. 17 of the Directive with regard to the possibility that, when refusing an application for family reunification or the renewal of the residence permit obtained in this case, account is taken of the nature and solidity of the person's family ties and the duration of his or her residence in Spain, as well as the existence of family, cultural or social ties with his or her country of origin.

4.6. *Right of access to employment*

Art. 14 of the Directive provides that the members of the sponsor's family shall have the right, in the same way as the sponsor, to take up employment, whether employed or self-employed; it likewise states that Member State may

lay down the conditions to be met by those family members in order to pursue such activity, but may not lay down a period of more than twelve months during which that State may assess the situation on its labor market. Access to work may also be limited for relatives in the ascending line (Art. 59.5 RLOEx) and for joined unmarried adult children (the latter case has not been transposed into Spanish law). The RLOEx (Art. 58.4) establishes that the joined relatives will be able to accede to a residence and work permit without being subject to any term and without the national employment situation being valued for its concession.

5. Administrative practice of family reunification: critical aspects

1. There is an evident and worrying lack of uniformity in the system of attention to citizens in the *submission of applications*: in each Government Delegation and Subdelegation, the offices in charge of receiving applications have different systems for dealing with this submission. In recent years, prior appointments have become more widespread, and provided that there are no difficulties in obtaining them or excessive delays in getting citations, the degree of satisfaction of the interested parties has improved considerably.

2. With regard to the time when *applications are admitted for processing*, there are offices where an attempt is made to make the applicant desist from filing or, simply, the petition is not collected and the corresponding resolution of inadmissibility for processing is not issued in those cases in which the complete documentation or any of the documents that may be considered substantial in the process is not provided at the time of filing.

One of the most worrying points concerns the *documentation of the application*, since there is an enormous variation in the conditions required to prove compliance with each of the requirements (certified or uncertified copies of the applicant's passport, documentation proving the relationship in original or photocopied, certified or not). This situation is aggravated if, in addition, the RLOEx does not specify the documentation with which it must be accredited, for example, the availability of sufficient means of subsistence. The same happens with regard to the accreditation of the availability of adequate housing (sometimes certain titles are required, which shall or shall not meet certain registration requirements) and economic dependency.

This situation can likewise be observed in terms of the *time taken to resolve the case*, which is also noticeable depending on the province in which the case is processed.

4. One of the most precarious and questioned aspects relates to the housing requirement. Discrepancy is found when it comes to assessing the availability of suitable housing (due to the lack of concreteness of the term “have” (whether

ownership/rent/transfer, etc.) as well as in the documentation that justifies that the dwelling meets the requirements set out in the norm in order to be able to exercise the right to family reunification. The discrepancy is here extraordinary:

a) Municipalities that take several months to issue the report. In these cases, the foreigner has been advised that, from the very moment they request the report it is advisable to go to the notary without waiting for a response from the local authority (so the procedure and the period foreseen in the RLOEx – 15 days – is meaningless).
b) Municipalities that charge high fees for issuing the report, of which there is no official model, so each city council makes a different one. Moreover, in some cases it is the social workers who make the report and in others it is an urban planning technician.
   The content also differs, as many reports do not express whether or not the housing is considered sufficient but are limited to enumerate their characteristics.
c) On the other hand, the reports cannot be appealed and, sometimes, in the event of an unfavorable report by the city council, the interested party goes to the notary's office to overcome the obstacle, without there being sufficient coordination between bodies to prevent this type of practice.

5. The same problems, which also cause a *great discrepancy of administrative practice*, are to be found in the assessment of what is understood by the following wording:

a) *"There must be reasons justifying the need"* (own translation) to authorize the residence in Spain of the applicant's relatives in the ascending line.
b) The quality of being dependent. Doubts that seem to persist despite the fact that the RLOEx has clarified the question: when it is proven that at least during the last year of his residence in Spain the sponsor has transferred funds or borne expenses of his or her family in a proportion that allows inferring an effective economic dependence.

6. As far as the *submission of visa applications* is concerned, similar situations arise when family reunification applications are made, so that in some consulates an appointment can even be made by telematically and, in others, long queues have to be made in order to obtain an appointment.

As for the *documentation to be presented*, there are consulates that require documents that are not strictly those that the RLOEx establishes for the presentation in the form of the visa application (although the consulate has the faculty to require any other document, it makes no sense to ask for those referring to the sponsor, which were already incorporated in the application for authorization of residence by virtue of family reunification).

Another questionable aspect is the current practice of consulates consisting of reviewing the assessment made by the Government Delegation or Subdelegation with respect to the existence of reasons justifying the need to authorize the residence in Spain of ascendants.

One of the effects of non-compliance with the deadlines is posed with visa applicants who were minors when the family reunification process began and who, during the long process, have reached the legal age. In many cases, the application is refused for this reason without considering that it is due to a delay in the procedures beyond the control of the interested parties. It is quite common to find *visa refusal decisions insufficiently motivated and lacking a correct individualized assessment of the file*. Occasionally, they are notified on a standard form that contains a brief list of the requirements laid down in the standard indicating those, which in the opinion of the consulate, have not been sufficiently accredited.

6. *Conclusions*

The Spanish legislation on the right to family reunification responds to the purpose of protection of the family and respect for family life enshrined in the instruments of International Law signed by Spain, taking the traditional Spanish family model (spouse, descendants and ascendants) as the first reference to determine the family that can be joined, although it includes other family realities that are manifested today in our society (such as, for example, relations of affectivity analogous to conjugal relations).

We are faced with rules with a strict adherence to the principles of due process of law, both in the terms in which the right is recognized and in the procedure legally established to make that right effective (preferential treatment within the deadlines, requirement to motivate resolutions, access to administrative and judicial remedies). In spite of this situation, a certain imbalance in the procedure to follow shall be acknowledged, a scenario that has been reflected in the previous pages.

In order to respect and broadly guarantee the aforementioned right to family life, it may be inferred from the analysis carried out that the Spanish legislation has duly transposed the applicable Community legislation, adopting broad criteria permitted by the Directive and respecting the advances that had been consolidated in the successive preceding regulations. This has been easily observed both in the Immigration Law and in the Regulation, but also in the array of standstill clauses introduced by the Directive and which, precisely because of their very nature, could not be incorporated into our legal system because they dealt with issues that were already more beneficially regulated in the Spanish law on the date of adoption of the Directive (for example, the impossibility of verifying integration criteria in the case of family reunification of minors over the age of twelve who arrive inde-

pendently of their family; the impossibility of requiring the family reunification of minors to take place after they reach the age of fifteen; or the impossibility of establishing waiting periods between the application and the granting of residence for those who can be reunited, taking into account the State's reception capacity).

The use of the technique of the indeterminate legal concept is a questionable and, of course, improvable aspect. Leaving the interpretation and development and evaluation of the diffuse legal contents to administrative practice in the different provinces causes great differences when joining in one place or another in Spain, which results in undesirable legal insecurity. The profile of the requirements demanded for family reunification should be marked by instructions from the competent bodies, which has so far rarely been done. This can be observed, for instance, in the case of the reunification of ascendants, the requirement that there are sufficient reasons justifying the need to authorize their residence in Spain.

Similarly, the diversity is also manifested in the management of the procedures, in what refers fundamentally to time of processing according to different delegations of government of the national territory, becoming more conspicuous, if possible, in the consulates. And if we are talking about the processing of visas, the lack of legal security and the discrepancies of administrative practice are very evident in the consulates, as it has been seen previously.

As a last negative remark, we would point out the setback suffered by the family reunification of Spanish ascendants, as it ceased to be a case that fell under the protection of Community regulations and was attracted to the sphere of the general regime for foreigners. This modification is being very much questioned due to its scarce justification and for provoking a differentiated treatment between Spaniards who joined their ascendants before the entry into force of the last reform of the Community Regulation and those who wish to do so after that date.

In conclusion and with general character, we can say that the regulation of family reunification in our legal system responds to a basic integrating objective. However, the statistical data repeatedly show the difficulties regarding access to work for joined family members, an aspect that notably limits this integrative nature. It would have been of interest to have information on applications and concessions for family reunification submitted and processed, as well as for joined family members that are actually working, in order to draw a map of the spatial distribution of family reunification in Spain, both at provincial and Autonomous Community level. However, this information is not available.

THE SPANISH IMPLEMENTATION OF THE EUROPEAN CHARTER ON HUMAN RIGHTS WITH REGARD TO FAMILY REUNIFICATION: A CASE-LAW ANALYSIS

1. *Introduction*

The Spanish implementation of the Charter of Fundamental Rights of the European Union (CFREU) [21] and specifically of its Article 7 which, similar to Article 8.1 of the European Convention on Human Rights (ECHR) [22], establishes that "everyone has the right to respect for his or her private and family life", is made effective through Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (hereinafter LOEx), known as the Immigration Act [23] and its implementing Regulation.

The Regulation of LOEx, following its reform by Organic Law 2/2009 and approved by Royal Decree 557/2011 (hereinafter RLOEx [24]) is currently in force in our country.

The European Union provides for a different regime for family reunification, depending on whether the sponsor is a citizen of the European Union or a national

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[21] The CFREU was proclaimed by the European Parliament, the Council of the European Union and the European Commission on 7 December 2000 in Nice and entered into force on 18 December 2000. Revised on 1 December 2009, the current version is in force since 1 January 2010. Doc. 2010/C 83/02, OJ C 83/389, of 3 March 2010.

[22] Adopted in Rome on 4 November 1950, it has undergone several modifications and revisions, the last of which was the implementation of the provisions of Protocol no. 14, in force since 1 June 2010.

[23] This Act has been the subject of numerous reforms since its approval, the most important of which are those operated by Organic Law 14/2003, of 20 November and Organic Law 2/2009, of 11 December.

[24] Royal Decree 557/2011, of 20 April, approving the Regulation of the Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, following its reform by Organic Law 2/2009.

of a third country outside the European Union. In the first case, we would be before the European system of family reunification protected by Directive 2004/38/EC [25] and, in the second case, before the immigration system regulated by Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [26]. Two different procedures are therefore envisaged in which the regime established for European citizens is significantly more beneficial.

The Supreme Court (TS, *Tribunal Supremo* in Spanish) itself has indeed declared in repeated case-law that *the possibility of joining must be applied with less restrictive criteria – although under no circumstance with unconditional character – when the sponsor is a citizen of the European Union, which, moreover, is logical since the situation of the sponsor is qualitatively different depending on whether he is a citizen of the European Union or a legal resident who is a national of a third country* (STS of 20 October 2011, Third Chamber, own translation) [27].

With regard to the first of these cases, i.e. the right to family reunification when the applicant is a Community citizen, Royal Decree 240/2007, of 16 February, on the entry, free movement and residence in Spain of citizens of member countries of the European Union and of other States party to the Agreement on the European Economic Area [28] was approved, which, *inter alia*, transposes Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 into the Spanish law. On this subject, it is necessary to point out that the transposition was not absolute. The implementation of Article 7 of the Directive, relating to the right of long-term residence, was postponed and was carried out through the Fifth Final Provision of Royal Decree-Law 16/2012, of 20 April, on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its benefits [29].

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[25] Directive 2004/38/EC 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.

[26] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. OJ no. L 251/12, 3 October 2003.

[27] In the same vein, STS, 19 October 2015 (appeal no. 1373/2015), 25 February 2016 (appeal no. 2827/2015), 11 July 2016 (appeal no. 1373/2015), 11 July 2016 (appeal no. 2827/2015). 499/2015) and 10 October 2016 (appeal no. 335/2016); as well as judgments of 1 June 2010 (appeal n. 114/2007) and 26 December 2012 (appeal no. 2352/2012). All available at http://www.poder judicial.es/search/indexAN.jsp, (last access on 23 September 2019).

[28] BOE, no. 51, 28 February 2007, pp. 8558-8566. Available at https://www.boe.es/buscar/act.php?id=BOE-A-2007-4184, (last access on 23 September 2019).

[29] Royal Decree 240/2007, of 16 February, on the entry, free movement and residence in Spain of citizens of member countries of the European Union and of other States party to the Agreement on the European Economic Area did not at the time include all the requirements deriving from Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004. That situation caused serious economic damage to Spain, as the Court of Auditors

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification was one of the first decisions taken by the EU following the assumption of competence in this area imposed by the Treaty of Amsterdam, as part of a package of measures aimed at regulating the conditions of entry and residence of non-EU citizens in the EU [30]. Despite its clearly restrictive nature, or perhaps pre-

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pointed out, in particular as regards the impossibility of guaranteeing reimbursement of the costs incurred in providing health and social services to European citizens. In order to remedy this situation, the Fifth Final Provision of Royal Decree-Law 16/2012 of 20 April on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its services transposes into its literal practice Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, including the conditions for the exercise of the right of residence for a period exceeding three months. The aim was to avoid the serious economic damage caused to Spain by European citizens who travelled to our country and made use of the Spanish public services (especially health services), given the impossibility of guaranteeing reimbursement of the expenses incurred in providing health and social services to these European citizens.

[30] Prior to the Treaty of Amsterdam, a number of resolutions had already been adopted with the aim of gradually harmonizing the various laws of the Member States on immigration and family reunification. However, the Community policy on family reunification, in the strict sense, does not begin until the adoption of the Treaty of Amsterdam and the introduction in its Articles of a new title called "Visas, Asylum, Immigration and other policies related to the free movement of persons", aimed at unifying state legislation in this area. See APARICIO CHOFRÉ, L., "La aplicación de la directiva comunitaria sobre el derecho a la reagrupación familiar, cinco años después", *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, no. 57, pp. 143-162.

With respect to the Community legislation prior to the approval of Directive 2003/86/EC, the following instruments shall be cited:

In the category dedicated to the fight against illegal immigration, we highlight:

- Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas.
- Council Regulation (EC) No 574/1999 of 12 March 1999 determining the Non-EU Member Countries whose nationals must be in possession of visas when crossing the external borders of the Member States.
- Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.
- Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.
- Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence.
- Council Regulation (EC) No 1030/2002 of 13 June 2002 (amended by Regulation 380/2008 of 18 April 2008) laying down a uniform format for residence permits for third-country nationals.
- Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air.
- Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data.
- Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

cisely because of it, it marked a decisive milestone in the matter by becoming the European Union's first unified legal instrument in the field of legal immigration and family reunification.

There is no doubt that the main ideas underlying the text are, on the one hand, the maximum limitation of the number of family members eligible for reunification and, on the one hand, the great discretion given to the Member States with regard to their transposition into national law, which has led to the obligatory modification of many of the national provisions on the subject.

In Spain, the legal regime for family reunification of foreign nationals of third-countries citizens is regulated in Articles 16 to 19 of LOEx, as well as in Articles 52 to 61 of Royal Decree 557/2011, of 20 April, which approved the RLOEx.

In addition, various instructions from the Directorate General of Immigration that have a special impact on the subject at hand shall be considered. In particular, we refer to the one relating to the family reunification of minors and persons with disabilities over whom the applicant has legal representation (DGI/SGRJ/01/2008), which clarifies the situation of the fostering of foreign minors by Spanish citizens or foreign residents based on the document known as "*kafala*" (DGI/SGRJ/06/2007); the one that indicates the accreditation of the provision of adequate housing in the administrative procedures of family

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- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

In the group that regulates the specific rights of foreigners residing in the European Union, the following stand out:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.
- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.
- Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.
- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

All Council Directives available at https://eur-lex.europa.eu/homepage.html?locale=en, (last access on 24 September 2019).

reunification (DGI/SGRJ/04/2011), the one relative to the constancy of the previous governmental report in the files of authorization of residence and in particular the one of the Art. 53.1(i) RLOEx (DGI/SGRJ/09/2008); and, finally, that relating to the submission of foreign documents in proceedings concerning immigrants (DGI/SGRJ/06/2008) [31].

2. *The case-law of the Constitutional Court*

Since the first Organic Law on Foreigners was passed in Spain in 1985, doubts have been raised regarding the compliance of some of its precepts with the Spanish Constitution (hereinafter CE), especially with regard to the regulation of the fundamental rights of immigrants [32], which seem to have their origin in the interpretation of Article 13.1 of the EC of 1978 (which establishes in paragraph 1 that foreigners in Spain "*shall enjoy the public freedoms guaranteed by the present Part, under the terms to be laid down by treaties and the law*" [33].

These suspicions of unconstitutionality did not cease with the approval of the current LOEx, suspicions that were channeled through up to eight appeals before the Constitutional Court (TC, *Tribunal Constitucional,* in Spanish). The situation is complicated by the peculiar Spanish division of competences, in which state competences are added to those assumed by the different autonomous communities and local administrations. As a consequence, the current legal status of non-EU foreigners in Spain is configured around several legal bodies: the CE itself, the European legislation, state legislation on the matter, and very particularly, the regulations arising from the autonomous communities, all among which important differences are detected that lead to conflicts of competence between the State and the autonomous communities.

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[31] See VARGAS GÓMEZ-URRUTIA, M., "Una lectura crítica de los vínculos familiares a la luz de la Directiva 2003/86/CE y de las normas españolas de extranjería", *Cuadernos de Derecho Transnacional* (octubre 2018), vol. 10, no. 2, pp. 732-751.

[32] In fact, LO 7/1985, of July 1, was declared unconstitutional in several of its precepts by STC 115/1987, of July 7, available at http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/847, (last access on 3 October 2019).

[33] From STC 11/1983, of 21 February, in which the Constitutional Court ruled for the first time on an appeal for a petition for constitutional protection (*recurso de amparo*, in Spanish) filed by a foreign citizen, to the judgments handed down at the end of 2007, which ruled on eight appeals of unconstitutionality against LO 8/2000, which modified several precepts of LO 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, the Constitutional Court has been developing case-law aimed at recognizing a wide range of fundamental rights in favor of foreigners. See, M.ª del C. VIDAL FUEYO, *Constitución y Extranjería*, Madrid, Centro de Estudios Políticos y Constitucionales, 2004, p. 326; and S. GARCÍA VÁZQUEZ, *El Estatuto Jurídico-Constitucional del extranjero en España*, Valencia, Tirant monografías, 2007, p. 445.

It is therefore essential to define the scope of competence of the legislator in this matter, and, in this sense, the interpretation of the Constitutional Court is unavoidable [34].

The case-law of the Constitutional Court is evidently based on the fact that Article 13.1 of the CE configures the entire legal-constitutional regime of the fundamental rights of foreigners in Spain, starting from a broad interpretation of the expression "*public freedoms*", elaborating the famous tripartite theory that is synthesized in the following formula:

There are rights that correspond equally to Spanish citizens and foreigners and whose regulation must be equal for both – all those directly linked to the dignity of the person would be part of this group –; there are rights that do not belong in any way to foreigners (those recognized in Art. 23 of the CE, with the exception contained in Art. 13.2). There are others that will or will not belong to foreigners according to the provisions of treaties and laws, being then admissible the difference of treatment with the Spanish citizens as to its exercise. (STC 107/1984, FJ 4, own translation).

So, how does the tripartite theory fit in with the issue we are now dealing with, i.e. the right to family reunification? It seems that the recognition of the right to family reunification, as a subjective right of the immigrant who has obtained a residence permit, is consistent with the principles and values that inspire our democratic regime and with the social and legal protection of the family contained in Article 39.1 CE. Therefore, it would be incumbent on the legislator the obligation to promote the exercise of the right to family reunification, in order to facilitate the integration of immigrants and the defense of the model of social and democratic State of Law enshrined in the EC.

However, connecting the right to family reunification with the content of the fundamental right to privacy enshrined in Article 18.1 CE is even more complicated. There is no doubt that foreigners, regardless of their administrative situation, enjoy the right to family life and family privacy under the same conditions as Spanish citizens, but the faculties granted to them by this right refer exclusively to the protection "*of an area of their own and reserved from the action and knowledge of others*" (STC 231/1988, FJ 3, own translation). In other words, the law is protecting areas of privacy against possible illegitimate intrusions by third parties outside the family, but under no circumstance does it enable their owners to demand that the public authorities guarantee them a life in common with their closest relatives.

In this sense, the decision of the Constitutional Court STC 236/2007 clarified in its F.J. 11 that although the ECtHR has not expressly deduced the right to fami-

[34] VIDAL FUEYO, M.C., "La jurisprudencia del Tribunal Constitucional en materia de Derecho Fundamentales de los Extranjeros a la luz de la STC 236/2007", *Revista Española de Derecho Constitucional*, no. 85 (January-April 2009), pp. 353-379.

ly privacy (Art. 8.1 ECHR) a right to family reunification, it has considered that such a connection is possible in cases worthy of special consideration, such as those cases in which "*family life is not possible anywhere else, due to legal or factual impediment*" (own translation), (Decision of the ECtHR Sen case, 21 December 2001; *Boultif case*, 2 August 2001), but these are very specific cases of reunification connected with special situations of asylum or refuge, not with a supposed legal infraction [35].

A different situation arises in the regulation of the conditions and requirements for family reunification by regulatory means, even if the content or limits of the right to privacy are not affected (Art. 18.1 CE). In accordance with the provisions of Article 13.1 CE, which establishes a reservation of law in relation to the rules regulating the exercise of the rights recognized throughout Title I "Fundamental Rights and Duties", the right to family reunification must be regulated by law.

On the other hand, it is obvious that this right is connected to Article 19 CE, relating to entry and establishment, and to the defense of the family by Article 39 CE, which, as a guiding principle of social and economic policy, will require legislative development (Article 53.3 CE), which together with the international treaties that include the right to family reunification, the case-law of the European Court of Human Rights on the matter and Council Directive 2004/86/EC, of 22 September 2003, harmonizing the system of family reunification of non-EU nationals residing in a Member State, we must consider that we are dealing with a matter that must necessarily be regulated by law.

3. The case-law of the Supreme Court

When approaching the present study, we have found an enormous number of resolutions issued by the Supreme Court in matters of family reunification, specifically by its Third Chamber, the Contentious-Administrative Chamber, as this jurisdiction is competent to hear matters related to the foreigners.

The enormous activity carried out by the Third Chamber of the Supreme Court accounts, on the one hand, for the enormous judicialization of matters related to immigration and foreigners, as a consequence of the large number of administrative procedures generated by these matters.

The difficulties encountered by Spain are well known in the European Union, as a result of massive immigration attracted by the special geographical situation of our country just a few miles from North Africa. It is obvious that the administrative procedures of expulsion of non-EU foreigners in an illegal situation generate an enormous number of judicial procedures in the area of contentious-administrative jurisdiction, which we are now concerned with.

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[35] VIDAL FUEYO, M.C., "La jurisprudencia del Tribunal Constitucional …", cit.

But these are not the only proceedings on which the Supreme Court has been compelled to rule repeatedly. Moreover, the issue we are dealing with now, family reunification, has generated no little case-law; and if the volume of decisions of the Supreme Court is huge, the volume of decisions of the Lower Courts is much greater, a fact that can be checked by checking the Superior Courts of Justice and the Provincial Courts of Contentious-Administrative Matters.

Accordingly, we have chosen to produce this report by focusing on the most recent case-law, and only that coming from the Supreme Court.

Similarly, we have grouped the decisions of the Third Chamber of the Supreme Court into two large groups, in the sense expressed in the introduction to this paper. We will firstly analyze the latest judgments handed down when the applicant is a Spanish citizen, or a citizen of another EU Member State; and, secondly, the most recent case-law relating to cases in which the applicant is a non-EU foreign citizen.

In both groups, we will list the most significant resolutions in relation to the thorniest issues brought before the Supreme Court.

3.1. *The case-law of the Supreme Court when the sponsor is a citizen of the EU*

One of the main issues raised in Spanish domestic law in relation to the right to family reunification relates to the application of Directive 2004/38/EC, with regard to Article 8.1 of the ECHR, and specifically to the interpretation of Article 7 of the Directive; in the sense of whether the requirements laid down by that legal provision are also applicable to cases in which a Spanish citizen intends to reunite non-EU family members.

The Contentious Chamber of the Supreme Court, in a recent resolution of 7 June 2019 [36], pronounces in relation to this thorny question, that is, whether Article 7 of Royal Decree 240/2007, of 16 February, (in the current wording, introduced by the Fifth Final Provision of Royal Decree Law 16/12, of 20 April, on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its benefits) could be applicable to the reunification of non-EU family members of Spanish citizens residing in Spain. This controversial question, on which there is consolidated case-law [37], has been positively

[36] STS no. 786/2019, de 07/06/2019 (Third Chamber), Roj: STS 1872/2019, ECLI: ES:TS:2019:1872, Available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[37] All in all, judgments of the Third Chamber of the Supreme Court 1295/2017, of 18 July, delivered in appeal 298/2016 which is set out in the contested appeal; and subsequent judgments of 11 June 2018 (ECR 1709/17), 3 July 2018 (ECR 4181/17), 30 October 2018 (ECR 3047/17) and 6 November 2018 (ECR 5468/17). Also cited are STS no. 365/16 of 7 September (appeal 908/15) of the Second Section of the Bilbao Chamber, as well as those of 1 and 21 July 2015; STS no. 324/15 of 13 December of the La Rioja Chamber (appeal 143/15); STS no. 509/15 of 9 September of the TS

resolved, since the Supreme Court considers that the aforementioned Royal Decree 240/07, independently of and outside the Directive and as a provision of domestic law, is also applicable to the reunification of foreign family members, whatever their nationality, of Spanish citizens, whether or not they have made use of their right to freedom of movement and residence within the European Common Area, and specifically Article 7 thereof [38].

In the words of the Supreme Court, this is how the very important STS of 1 June 2010, which partially amends Article 2 of Royal Decree 240/2007 by deleting the expression '*other Member State*' from the aforementioned Article 2.1, must be interpreted, thus broadening the subjective scope of application of the aforementioned Royal Decree – which no longer coincides with Directive 2004/38 EC –. This modification implies the inclusion of the family members who are related in the Article, whatever their nationality, to the "*citizen of the European Union or of another State party when they accompany him or join him*" (own translation). The intention behind this resolution is clear, as it obeys the purpose of equating in Spain – for the purposes of reunification – foreign family members independent of their nationality who accompany or join either European citizens or Spanish citizens, both residents (European citizen and Spaniard) in Spain.

Thus, the Court affirms that "*it is true that Spanish citizens may not be limited – except in the cases provided for by law – to their fundamental right to move and reside freely in Spanish territory (Article 19 CE), but this does not prevent them from being subject to the same requirements or conditions when they seek to reunite foreign family members, in this case the same as the rest of European citizens*" (own translation).

Regarding the effect of this interpretation on the right to family privacy, the STS of 7 June 2019 concludes that "*limitations on the family reunification of 'foreigners' by Spanish citizens residing in Spain (such as those imposed on the reunification of family members by foreigners legally residing in Spain under the Aliens legislation) do not negatively affect the fundamental right to family privacy,*

Chamber of the Balearic Islands (appeal 30/15), All available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[38] The aforementioned STS of 1 June 2010 (Third Chamber), Roj: STS 4259/2010 – ECLI: ES:TS:2010:4259, stated that *Royal Decree 240/2007, of 16 February, will be applicable, whatever their nationality, and in the terms provided by it, to relatives of a Spanish citizen, when they accompany him/her or join him /her* (own translation). In this way, the expression "another Member State" is deleted, and *equipped the relatives of Spanish European citizens to the relatives of non-Spanish European citizens, who are within the subjective scope of Article 2 of Royal Decree 240/2007, must, obviously, and for the same reasons stated there, the content of said system, contained in Final Provision Three 2 of Royal Decree 240/2007, of 16 February (at that time Additional Provision Twentieth of Royal Decree 2393/2004, of 30 December), will disappear, thus annulling Additional Provision Twentieth of the Immigration Regulation* (own translation), available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

recognized in Art. 18.1 CE, having declared STC no. 186/13, in line with no. 236/07, that our Constitution does not recognize a 'right to family life' in the same terms as the case-law of the European Court of Human Rights has interpreted Art. 8.1 ECHR , and even less a fundamental right to family reunification, since none of these rights forms part of the content of the right to family privacy guaranteed by Art. 18.1 CE" (own translation). In similar terms, the subsequent STS of 10 June 2019 is pronounced [39].

Once this question has been resolved, it is worth asking whether the conditions for the exercise of the right to family reunification are resolved peacefully by the TC.

Therefore, in order to determine whether a relative of a EU – or Spanish – citizen is dependent on the latter, the host Member State must assess whether, in the light of his or her economic and social circumstances, he or she is or is not in a position to provide for the basic needs. On the other hand, the need for material support must be in the state of origin or provenance of the family member at the time he or she applies to establish himself or herself with the Community national, as established in the settled case-law of the CJEU and of the TS itself. Thus, the Supreme Court, in its Judgment of 8 May 2017, defines the concept of "*dependent person*" clearly defining it as "a person who is in a situation of dependency on the Union citizen in question and such dependency must be of such a nature that it requires that person to have recourse to the assistance of the Union citizen to satisfy his basic needs and therefore what has to be demonstrated is that factual situation, namely material assistance provided by the Union citizen, necessary for the satisfaction of the basic needs of his family member" [40] (own translation).

In short, it must be reliably demonstrated that the sponsor, in an effective and real way and not merely formally, is an integral part of the family of the applicant and therefore the latter must keep him or her in everything necessary to live with dignity. How should this be accredited? By referring to the Court of Justice of the European Union's uniform interpretation of this indeterminate legal concept.

With regard to this aspect, the CJEU, in its judgment of 9 January 2007 (Case C-1/05. *Yunying Jia v Migrationsverket*) interpreting the requirement "*dependant*", already contained in Directive 73/148 – now repealed by Directive 2004/38/E – stated that in order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and so-

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[39] STS no. 789/2019, 10 June 2019 (Third Chamber), Roj: STS 1871/2019 – ECLI: ES:TS:2019:1871, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[40] STS no. 778/2017, 8 May 2017, (Third Chamber), (appeal no. 1712/2016), Roj: STS 1685/2017 – ECLI: ES:TS:2017:1685, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

cial conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national[41].

In any event, the mere undertaking by the Community citizen or his or her spouse to assume responsibility for the members of the family in question does not prove that there is a real situation of dependence on them, as it is consistently held in the case-law of the Supreme Court.

These are judgments of the Third Chamber of the Supreme Court of 10 June 2013 (appeal no. 3869/2012), 24 July 2014 (appeal no. 62/2014) and 10 October 2016 (appeal no. 335/2016), among others. It is therefore essential to prove economic dependence, as well as the reasons justifying the need for reunification. This is without prejudice to the fact that, as demanded by the Supreme Court itself, it is necessary to carry out an individualized analysis, based on non-restrictive criteria, of the social and economic situation of the applicant and his or her relatives [42].

3.2. *The case-law of the Supreme Court of Spain when the applicant is not a citizen of the EU*

One of the most controversial issues has been the assessment of the sufficiency of economic means for the authorization of residence by family group.

In a recent judgment of 17 June 2016, the Third Chamber of the Supreme Court ruled on this question, which presents an unquestionable cassational interest for the formation of case-law. The question raised consists of determining wheth-

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[41] The abovementioned judgment of the CJEU of 9 January 2007 (Case C-1/05. Yunying Jia v. Migrationsverket) interpreting "the status of 'dependent' family member is the result of a factual situation characterized by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or by his spouse (see, in relation to Article 10 of Regulation No 1612/68 and Article 1 of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), Lebon, paragraph 22, and Case C-200/02 Zhu and Chen [2004] ECR I-9925, paragraph 43, respectively.", available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0001, (last access on 3 October 2019).

"The Court has also held that the status of dependent family member does not presuppose the existence of a right to maintenance, otherwise that status would depend on national legislation, which varies from one State to another (Lebon, paragraph 21). According to the Court, there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly" (Lebon, paragraphs 22 and 23).

[42] The above-cited STS (Third Chamber) 8 May 2017 (appeal no. 1712/2016), 20 October 2011 (appeal no. 1470/2009) and 26 December 2012 (appeal no.2352/2012), available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

er, in the granting of temporary residence permits for exceptional reasons of social roots, when the exemption from the employment contract is requested, in order to accredit the sufficiency of economic means, it is possible to resort to the analogical application of Article 54 of the RLOEx [43], referring to family reunification or, on the contrary, it is possible to make a discretionary assessment of that sufficiency in the light of the specific circumstances of each case.

The Third Chamber of the TC understands that the regulatory treatment given to applications for residence permits for family reunification is different from applications for temporary residence permits for reasons of social roots supported by family ties. There are, therefore, important differences between the application for a residence permit for family reunification, whereby a resident foreigner may join in Spain his or her family members referred to in Article 53 of RLOEx who are outside the national territory, and the application for a temporary residence permit for reasons of social roots derived from family ties, which already contemplates a continuous stay in Spain for a minimum period of three years by the person applying for that temporary residence.

The Supreme Court resolves this question by understanding that, in authorizations for temporary residence for exceptional reasons of social roots based on family ties, in order to accredit the sufficiency of economic means, when the ex-

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[43] Article 54 of Royal Decree 557/2011, of 20 April, approving the Regulations of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, as amended by Organic Law 2/2009, establishes the following parameters:

1. *The foreigner who requests authorization of residence for the regrouping of his relatives must prove at the time of submitting the application that he or she has sufficient economic means to meet the needs of the family, including health care, and also taking into account the number of family members who already live with him or her in Spain at his or her expense, in the following amounts:*
   a) *In the case of family units that include, computing the applicant and when the person reunited arrives in Spain, two members: an amount representing 150% of the IPREM per month shall be required.*
   b) *In the case of family units that include more than two persons on arrival in Spain: an amount that represents 50% of the IPREM (Spanish acronym for Public Indicator of Income for Multiple Purposes) monthly for each additional member.*
2. *Authorizations will not be granted if there is no prospect of maintaining economic means during the year following the date of submission of the application. This income maintenance forecast for that year must be made taking into account the evolution of the applicant's means in the six months prior to the date of submission of the application.*
3. *The requirement for this amount may be reduced where the reuniting family member is a minor and where exceptional circumstances exist.*
   Likewise, the amount may be reduced in relation to the reunification of other family members for humanitarian reasons.
4. *Income from the social assistance system shall not be computable for these purposes, but income contributed by the spouse or partner of the foreign sponsor, as well as by another family member in the first degree direct line, who is a resident in Spain and who lives with the latter* (own translation).

emption from the employment contract is requested, it is not possible to resort to the analogical application of Article 54 on family reunification, being appropriate, on the contrary, a discretionary assessment of sufficiency in view of the specific circumstances of the case [44].

A different issue is the renewal of residence authorizations by family reunification and the scope, for the purposes of its refusal, of the assessment (or absence of assessment) of other circumstances such as those established in Article 17 of Directive 2003/86/EC, identifying Articles 61.3.b as legal rules that should in principle be interpreted 61.3.b.2 and 54.1 of Royal Decree 557/2011, of 20 April, in relation to Articles 7, 16 and 17 of Directive 2003/86/EC, the Third Chamber of the TC pronounces in cassation, by means of a judgment dated 18 June 2018, ruling that the requirement of accreditation of sufficient economic means on the part of the sponsor is unavoidable, even taking into account "*the mandate of weighting of the various concurrent circumstances resulting from the European legislation referred to above*" [45] (own translation). The provisions of Article 61 are thus observed.3 of Royal Decree 557/2011 (ROLEx) which, for the purpose of renewing a residence permit for family reunification, requires the sponsor to have – among other requirements – sufficient employment and/or economic resources to meet the needs of the family, including health care if not covered by the Social Security, in an amount that represents 100% of IPREM (Spanish acronym for Public Indicator of Income for Multiple Purposes) on a monthly basis, this amount may be reduced when the family member is a minor, in accordance with article 54.3 of Royal Decree 557/2011.

Another of the requirements demanded by the Royal Decree is that the applicant must have no criminal background. The issue was raised before the Third Chamber of the TC by means of an appeal in cassation against the judgment handed down by the Administrative Chamber of the National Court in Spain (AN, *Nacional,* in Spanish) on 21 March 2012. The TS decided to submit a preliminary question to the CJEU in the following terms:

> *"Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependent of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004 (C-200/02), and of 8 March 2011, (C-34/09), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?".*

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[44] STS no. 832/2019, (Third Chamber), (appeal no. 1023/2018), Roj: STS 1992/2019 – ECLI: ES:TS:2019:1992, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[45] STS no. 1030/2018, 18 June 2018, (appeal no. 308/2016), Roj: STS 2526/2018 – ECLI: ES:TS:2018:2526.

The CJEU ruled that *"Article 21 TFEU and Directive 2004/38/EC 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependent and resides with him in the host Member State.".*

"Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union" [46].

Finally, we refer to another issue that has generated no small amount of case-law: the subject of marriages of convenience. In this sense, and in accordance with Article 17 of LOEx, foreign residents can join in Spain their spouses who are not separated *de facto* or *de jure*, provided that the marriage was not celebrated in fraud of law or, in other words, that it is a marriage of convenience or simulated marriage, for migratory purposes and to their children and those of the spouse, including adopted children, provided that they are under eighteen years of age or persons with disabilities who are objectively unable to provide for their own needs due to their state of health [47].

4. *Conclusions*

In view of the above, we can conclude that the implementation in Spain of the European legislation on family reunification and, specifically, of the provisions contained in Article 7 of the CFREU and Article 8.1 of the ECHR has been done correctly, but in a rather restrictive way, especially in some aspects, such as those related to the regulation of the fundamental rights of immigrants, which could ini-

[46] STS no. 15/2017, 10 January 2017, (Third Chamber), (appeal no. 961/2013), Roj: STS 9/2017 – ECLI: ES:TS:2017:9, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

[47] STS, 14 May 2016, (Third Chamber), (appeal no. 2080/2015), Roj: STS 1058/2016 – ECLI: ES:TS:2016:1058, available at http://www.poderjudicial.es/search/indexAN.jsp, (last access on 3 October 2019).

tially be opposed to the provisions of Article 13.1 of the Spanish Constitution, which guarantees foreigners the same rights as Spaniards.

These suspicions of unconstitutionality required the intervention of the Constitutional Court itself and the consequent intervention of some precepts of the LO-Ex.

However, this constitutionally recognized equality between Spanish citizens and foreigners does not extend to the right to family privacy, referred to in Article 18.1 CE, in the sense that public authorities must guarantee foreigners a life in common with their relatives in Spain. The Constitutional Court has stated that this constitutional precept only refers to the prohibition of illegitimate interference by third parties in the family environment.

In the same sense, as could not be otherwise, the TS has been requiring strict compliance with the requirements established by the Spanish internal regulations to facilitate family reunification, especially the economic requirements, when the applicant is Spanish or a community citizen, without references to the right to family privacy can prevail over the administrative provisions.

Sufficiency of economic means is also one of the requirements that the TS has most often had to resolve when the applicant is a national of a non-EU country. In most cases, the TS has aligned itself with the most rigorous positions. The TS is more comprehensive when there are minors involved. Thus, the requirement that the applicant has no criminal record when the refusal of the family reunification permit obliges the minor children to leave the territory of the European Union has been ignored.

However, as inferred from the European Directives to which we have referred to at the beginning of this report, and as acknowledged by the TS itself: "*the possibility of reunification must be applied with less restrictive criteria when the applicant is a citizen of the European Union*" (own translation), the truth is that the Spanish jurisprudential interpretation is not very flexible in the matter of foreigners, and even less in the subject we are dealing with. It is true that some lower courts are more permeable, but that is, unfortunately, not the general trend.

Certainly, the criteria have hardened in recent decades – without any kind of hesitation – due to the massive immigration flow from the coasts of North Africa, a very serious current problem in Spain. The very complicated situation deriving from this uncontrolled immigration could shed some light on the restrictive jurisprudential interpretation of our TS.

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THE FUNDAMENTAL RIGHT TO FAMILY REUNIFICATION IN THE CONTEXT OF MIGRATION POLICIES THROUGH A MULTILEVEL PERSPECTIVE

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1. *Introduction: family reunification as a cornerstone in international and national policies on migration increasingly challenged in recent times by massive migration to Europe and Italy in particular*

Family reunification is one of the fundamental elements of international and national policies concerning the protection of migrants' and refugees' rights, as family reunification is not only a necessity for migrants for making family life possible, but it is crucial for the migrants' welfare and development as well as for their integration in the host countries [1].

Family reunification represents a safe and legal channel for migrants and beneficiaries of international protection to reunite with their separated family members and live a normal family life, as recently recalled by UNHCR [2].

Family reunification refers, in fact, to the situation where family members join another member of the family who is already living and working in another country in a regular situation, re-forming in the host State a family previously existing elsewhere.

Traditionally considered as a way of legally gaining access to States, it continues to be one of the main driving causes for migration within Europe. Since the 1980s, family reunification has become a major cause for legal immigration in a considerable number of countries, and particularly in Europe.

As shown by statistical data [3], movements for family reasons represent a significant part of the migration flows in the European area. Hence, residence

[1] Council of Europe, Special Representative of the Secretary General on Migration and Refugees, *Thematic Report on migrant and refugee children*, 10 March 2017.

[2] UN High Commissioner for Refugees (UNHCR), *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, January 2018, 2nd edition, available at: http://www.refworld.org/docid/5a9029f04.html.

permits for family reasons have been the type most frequently issued within the European Union.

This is even more true for Italy where recent surveys of the presence of Third-Country Nationals (TCNs) carried out by the Italian National Institute of Statistics (ISTAT) show that family reunification is still the most significant ground for entry into the country in percentage terms, hugely advancing the permits issued for work.

The latest data available, referred to 2017, report that new inflows of non-EU foreigners were 262,770 (+16% new permits over the previous year). Permits issued for family purposes were 43.2%, while new permits issued for work only accounted for 4.6%, thus consolidating a trend already seen in the last years [4].

In the last few decades, Italy – traditionally an emigration country – has thus gradually turned also into an immigration country. As mentioned, Italy is indeed in the process of stabilising the foreign presence, the majority of which appears interested in staying.

As of 1 January 2020, foreign citizens legally residing in Italy amounted to 5 millions and 382 thousands, with 3.7 million of non-EU citizens (Third Country Nationals) 60% of them having an EU residence permit for long-term residents. Among the migrants arrived in 2012, for instance, the 53,4% was still present in Italy in 2017. A slightly less percentage concerns those migrants with political

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[3] See Eurostat, *Statistic Explained* (available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics).

[4] ISTAT, *Non-EU Citizens: presence, new inflows and acquisition of citizenship*, Report 14 November 2018 (available at: https://www.istat.it/it/files//2018/11/EN_Non-EU-citizens_2018.pdf).

Since 2011 the general trend of the legal reason for acquiring the permit to stay has been changing. In fact, residence permits for working reasons represented almost the 50 per cent of the total permits released, while they have been decreasing consistently every year, reaching the lowest level in 2016 with 12.873 working permits released, meaning a total of 346.267 less than 2010.

On the contrary, resident permits for asylum or humanitarian reasons have significantly increased. In 2014, of a total of 248,323 residence permits granted, 40.8% were for family reasons and 19.3% were for asylum/humanitarian. reasons. In 2015, of a total of 238,936 residence permits granted, 44.8% were for family reasons and 28.2% were for asylum/humanitarian reasons. In 2016, migrants with their permit recognised for this type of reason were 77.927, approximately seven times what they were in 2010.

Nonetheless, the main channel to obtain the permit of residence seems to be constantly represented by family reunification which consistently represents between 40% and 45% of permits granted between 2011 and 2016. In fact, despite some annual differences, since 2008 the total never decreased below the 100.000 units, exceeding more than a half the permits granted for asylum and humanitarian reasons. These data seem to confirm an overall shift in the nature of the permits granted, which confirms the impact of the economic crisis and humanitarian emergencies on migration flows. See T. CAPONIO, T. CAPPIALI, *Italian Migration Policy in Times of Multiple Crises: Social and Political Implications, in South European Society and Politics*, 2018, 115-132; P. PANNIA, S. D'AMATO, V. FEDERICO, *Italy – Country Report*, Working Papers Global Migration: Consequences and Responses Paper 2018/07, May 2018.

asylum permits (51,5%), while the 65,8% of the migrants recognised for family reunification remained.

The ever-growing significance of this phenomenon has progressively led legislatures of the countries of employment of migrants, and the European Union as well, to recognize – in the presence of specific circumstances – the legal possibility of family reunification for members of the families left behind.

In recent years, following the sharp increase of refugee and migrant population since 2013, family reunification has become a sensitive area for the effective protection of fundamental rights in contemporary constitutionalism, dramatically calling into question in particular the urgent need to protect migrant children and their families experiencing family separation.

Some families have become separated during journeys to or within Europe. In some cases, only certain members travelled to Europe from countries of origin or countries of transit to seek protection, economic or educational opportunities. Unaccompanied foreign minors – a problem of the utmost relevance in Italy – have been separated from family members for years and have lost contact with their family. In some instances, family members are scattered across states in Europe, while some are in countries of transit or origin.

It is to be recalled, infact, that the question of family unity in situations of largescale influx has been considered as reflecting "minimum basic human standards" requiring that "family unity should be respected" and that "all possible assistance should be given for the tracing of relatives", as agreed by the Member States of UNHCR's Executive Committee [5].

The present essay aims at discussing the protection afforded to the non-nationals and, specifically, to the right to family unity and family reunification in the Italian constitutional order taking into consideration the international and European obligations (stemming particulary by the European Convention of Human Rights and the EU Charter of Fundamental Rights), so to eventually highlight the judicial treatment of situations where national law potentially infringes both national fundamental rights and the ones protected by the ECHR and the EU Charter of Fundamental Rights.

To this respect the structure of the article is as follows.

First, it will move from a preliminary undersanding of family reunification seen in its multidimensional perspective both as a fundamental right directly or indirectly protected in the national Constitution and in the "other" Charters that ensure human rights at various levels in the European landscape – the ECHR and the EU Charter of Fundamental Rights, but also in its "legislative dimension" as

[5] UNHCR, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, No. 100 (LV), 8 October 2004, available at: http://www.refworld.org/docid/41751fd82.html, para. (d) referring to the importance of "maintaining family unity wherever possible".

provided by the EU legislator (in the context of the EU Family Reunification Directive) whose intervention of minimum harmonization calls into question a wide margin of appreciation left to every single EU Member State.

In order to build a frame on family reunification, European and national standards relevant to its protection are considered, as interpreted in the practice of the Italian Constitutional Court and of the European Courts – the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) within the Council of Europe – an approach which cannot be missed nowadays in the European continent grown as a "space of constitutional interdependence" (as it will be recalled in the final remarks).

Such preliminary overview is not only devoted to shape an understanding of the different bodies of law and, implicitly, of different safeguards which may be applicable simultaneously for the purpose of family reunification and restoring family links, but it also aspires to trace the influences among legal systems leading to a changed attitude over time showed by the Italian courts, both ordinary courts and the Italian Constitutional Court, moving from a "constitutional patriotism" towards an incremental openness to the European environment on matters regarding "family" and "family life".

In the second part, the essay reflects upon the scope of application granted to the right to family reunification for third country nationals within the Italian legal order, in relation to the definition of the family members entitled to reunification, the requirements conditioning such right, the procedure set forth at legislative level and the rights granted to family members once reunited, with a specific attention to family reunification of children and refugees/beneficiaries of subsidiary protection.

The final remarks are devoted to a more general reflection aiming at clarifying how in the Italian legal order the issues raised by the overlapping of national, European and international legal sources and judicial decisions – to some a true "labyrinth" for the interpreter[6] – ought to be dealt with in order to generate fruitful mutual influences among the different systems of fundamental rights protection following a recent case law inaugurated by the Italian Constitutional Court.

2. *The right to family reunification for migrants as a "prysm in 3D": between "multiple dimension", "variable geometry" and "constitutional variety"*

Traditionally, immigration law is a discipline in which the State has the sovereign right to control the entry and residence of foreign nationals in its territory.

[6] See V. MANES, *Il giudice nel labirinto. Profili delle intersezioni tra diritto penale e fonti sovranazionali*, 2012.

However, this sovereign right to control immigration has been progressively conditioned not only by international and European human rights law, where family reunification is linked to the general right to respect for family life covering a wide range of topics, but also through the recognition to third country nationals of fundamental rights protected at both national and supranational levels.

The dense intertwining among the Constitution and the Charters that ensure human rights at various levels – the Italian Constitution, the EU Charter of Fundamental Rights and the European Convention of Human Rights (furthermore ECHR) and even other international conventions establishing specific bills of rights, (such as the New York Convention on the Rights of the Child) is prominently illustrated in the case of family reunification.

Contrary to other legal systems lacking a constitutional protection for such right, family reunification has been recognized as a fundamental right protected in the Italian Constitution (sharing this feature with the Constitutions of France, Federal Republic of Germany, Estonia, and Latvia), granted – as accomplished by the Italian Constitutional Court – not only to Italian citizens bust also to foreigners, as a dimension of the right to family unity and the protection afforded to children within the family (see below para. 3.3).

Still, it is worth recalling that the protection afforded to the right to family reunification into the Italian legal order has in particular been alimented by the dialogue between the ECtHR, the CJEU and the national Courts, as the provisions on family reunification are subject to the limitations imposed by the ECHR and Union law on national restrictions on family reunification rights of migrants and beneficiaries of international protection.

Following a right to family life and family unity, enshrined in several international legal instruments, (such as the Universal Declaration of Human Rights, Article 16, the UN Convention on the Rights of the Child – CRC, Articles 9 and 10 [7]), at a regional level both the European Convention on Human Rights provides for the protection of family life in Article 8 and, specifically, the European Convention on Migrant Workers of 1977 (though applying only to migrants coming from member states of the Council of Europe which are party to the Convention) deals with family reunification in Article 12 [8].

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[7] Article 9 of the CRC sets out that "a child shall not be separated from his or her parents against their will, except when … such separation is necessary for the best interests of the child".

[8] The European Convention on Migrant Workers (which only applies to migrants coming from member states of the Council of Europe which are party to the Convention) specifically deals with family reunification in its article 12, which reads in its paragraph 1: "The spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker, are authorized on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party".

As known, the European Convention on Human Rights does not contain a right to family reunification as such, but through an extensive interpretation of Article 8 of the Convention [9] the right to respect for family life has been interpreted by the European Court of Human Rights (ECtHR) as including family reunification under the "wide umbrella" provided by art. 8 [10].

In this perspectice, the ECtHR has recognised a right to family reunification relevant, in principle, in two different situations, namely not only when a family member wishes to join for the purpose of family reunification another member of the family abroad, but also when a member of the family is expelled or threatened with expulsion, usually decided as a sanction resulting after a criminal proceeding, from the country where he/she and the family live [11].

The very same dimension as a fundamental right for family reunification rests within the European Union Law, where the Charter of Fundamental Rights of the European Union (EUCFR), in its Article 7 reproduces Art. 8 ECHR (setting out that everyone has the right to respect for his or her private and family life, home and communications) and in Art. 9 protects the right to marry and to found a family, together with the *expressis verbis* codification, in Article 24, of the best interests of the child.

However, this 'entitlement' is subject, under the Convention, to some important conditions; thus, the migrant worker should have "available for the family housing considered as normal for national workers in the region where the migrant worker is employed" (art.12 (1)), and the receiving country may render the authorization of family reunification conditional upon a waiting period which shall not exceed twelve months. Furthermore, any State may make the family reunion "further conditional upon the migrant worker having steady resources sufficient to meet the needs of his family" (art. 12(2)) and even temporarily derogate from the obligation of family reunification "for one or more parts of its territory" (art. 12 (3)).

[9] V. ZENO ZENCOVICH, *Art. 8, Diritto al rispetto della vita privata e familiare*, in S. BARTOLE, B. CONFORTI, G. RAIMONDI, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001, 307-317; C. RUSSO, art. 8 §1, in L.-E. PETTITI, E. DECAUX, P-H. IMBERT, *La Convention Européenne des droits de l'homme, Commentaire article par article*, Parigi, 1995, 305-321; V. COUSSIRAT-COUSTERE, art. 8 § 2, ivi, 323-354; F.G. JACOBS, R.C.A. WHITE, *The European Convention on Human Rights*, Oxford, 2006, IV ed., 241- 298; VAN DIJK, G.J.H. VAN HOOF (éd), *Theory and practise of the European Convention on Human Rights*, The Hague, 1998; C. PARAVANI, "art. 8 Diritto al rispetto della vita privata e familiare", in C. DEFILIPPI, D. BOSI, R. HARVEY, *La Convenzione Europea dei diritti dell'uomo e delle libertà fondamentali*, Napoli, 2004, 291-380.

[10] See R. FRIEDERY, "Family Reunification in the Framework of the Council of Europe", in R. FREDERY, L. MANCA, R. ROSKOPF (eds.), *Family Reunification: International, European and National Perspectives*, Berlin, 2018, p. 29 ff.

[11] ECtHR, *Gül v. Switzerland*, Application No. 23218/94, Judgement of 19 February 1996; ECTHR, *Boultif v. Switzerland*, Application No. 54273/00, Judgement of 20 December 2001; ECtHR, *Sen v. Netherlands*, Application No. 31465/96, (21.12.2001), paras. 40-41; ECtHR, *Jakupovic v. Austria*, Application No. 36757/97, Judgement of 6 February 2003 on the distinction between admission and expulsion.

While apparently based on similar parameters of the European Convention [12], family reunification within the European Union legal system shares a "peculiar nuance" as it has been enriched also with a "legislative dimension" as part of a "common immigration policy" [13] Member states have conferred to the Union as part and parcel of the establishment of "an area of freedom, security and justice" (art. 3, para. 2, TEU).

This very notable distinction among the Conventional system and the EU legal order raises a first problematic aspect one needs to be aware of.

While in the European Convention system the right to family reunification stems from the extremely general character of the right to the protection of the family without any explicit limitation to a condition of regular residence on the European territory, within the EU legal system family reunification in its fundamental right dimension is confined to the legal limits posed by the EU legislator for crucial aspects such as the circle of persons considered to represent one's family – something which impact directly on the scope of application for family reunification – or the type of States' obligations relating to family reunification concerning the substantive requirements (such as requiring certain financial conditions to be met) or procedural requirements (such as time limits for making applications).

This implies, in the first instance, that in the EU legal order family reunification is strictly linked with requisites like those of citizenship and residence, thus confining the relevant right only to migrants regularly residing on the European territory [14].

Moreover, in the EU legal order the development of such "common immigration policy" has not led to a general legal framework as, on the contrary, Third Country Nationals' fundamental rights are highly "fragmented" in several different EU legal acts and thus they can only be detached after having reconstrued several different sources of EU law tackling specific aspects with different substantive requirements (such as, for instance, family reunification, long-term resi-

[12] In so far as this is the case, the EU Charter of fundamental rights must be interpreted in line with the corresponding provision and the case law of the ECTHR, as made clear by Art. 52, 3 Nevertheless, Article 52(3) shall not prevent Union law providing more extensive protection.

[13] Art. 79, para. 1, of TFEU confers to the Union the task to "develop a common immigration policy aimed at ensuring, at all stages, the effi cient management of migration fl ows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings".

Among the measures to be adopted in this context Art. 79, para. 2, lett. *a*, attributes to "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure" the competence to adopt measures concerning "the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification".

[14] See R. FRIEDERY, F. MARCELLI, *The Right to Family Reunification in European Union Law and the CJEU Jurisprudence*, in R. FRIEDERY et al. (*op. cit.*), p. 49 ff.

dency, acces to work, international protection, return) and addressing specific categories of beneficiaries [15].

It is thus not possibile in the EU legal system to identify the overall system of rights and guarantees for Third Country Nationals, but the interpreter is required to first recontruct the relevant legal regime only after having identified the specific category applicable in the single case at stake.

A further complexity rests with the fact that, even after successfully completed all these "hermeneutic efforts", the applicable provisions might in any case greatly differ among EU Member States as the piece of legislation – which may also be seen as "giving effect" to the relevant EU Charter's rights mentioned above, i.e. the Family Reunification Directive – provides both for limitations on its scope of application together with a huge margin of appreciation left to national legislators when transposing the EU provisions into their domestic legal systems.

It is worth recalling that the Family Reunification Directive (2003/86/EC) was the first instrument of EU law in which the Charter was referred to, despite that the Charter, at the time of the adoption of the Directive did not yet have binding force [16].

On one side, the positive innovation stemming from the EU legal order has been the adoption in 2003 of common European immigration rules to regulate the conditions to exercise the right to family reunification of third-country nationals at EU level through a Directive which is the the only instrument in international law that grants a clearly-defined subjective right to family reunification to applicants who comply with the conditions of entry and residence for non-EU family members joining a non-EU citizen already legally residing in a Member State defined as well in the Directive.

What is to be stressed, in fact, is that the Family Reunification Directive imposes a precise "positive obligation" on Member States requiring them, in cases determined by the same Directive, to authorise family reunification of certain members of the sponsor's family – those componing the "nuclear family" – and leaving them no leeway in this [17].

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[15] For this important perspective see B. NASCIMBENE, *Considerazioni conclusive. Le incertezze delle politiche europee di immigrazione e asilo*, in S. AMADEO, F. SPITALERI (eds.), *Le garanzie fondamentali dell'immigrato in Europa*, 2015, p. 398.

[16] In preamble 2 of the Directive it is stated that measures concerning family reunification should be adopted in conformity with the right to respect for private and family life as laid down in the ECHR and in the Charter.

[17] The Family Reunification Directive provides an exhaustive list of conditions which Member States are allowed to impose on the sponsor or the spouse and if these conditions are met, Member States are left no discretion: they have to admit the members of the nuclear family of the sponsor. Member States are left with a certain margin of appreciation to verify whether the requirements are met, but this should not lead to undermining the objective of the Directive, which is that family reunification should be promoted. See CJEU Case C-540/03, *European Parliament v. Council*, 27 June 2006, § 54, 59, 61-62, and CJEU Case C-578/08, *Chakroun*, 4 March 2010, §43 and 47.

On the other side, being one of the first instruments of the newly-acquired EU competence in the field of migration and asylum, the negotiation of the Family Reunification Directive took place in a highly politicised climate at the time when the EU Treaty provided for a legislative procedure in which the role of the European Parliament was limited to consultation and unanimity was required among Member States.

This resulted in difficult negotiations within the Council, with national governments far more interested on agreeing on a low level of harmosisazion and providing for restrictive requirements in order to tackle abuse and better manage the large inflow of migrants, rather than being sentitive to the migrants' rights: something which can be easily detected when comparing the initial proposal by the European Commission in 1999 and the final text adopetd by the Council in 2003 [18], which even led the European Parliament to challenge before the CJEU those provisions of the Directive allowing national legislators to introduce limits to reunification of children, deemed contrary to the right to family reunification (at that time protected obly as a general principle of EU law, based on several sources among them art. 8 ECHR) and the principle of non discrimination on grounds of age [19].

This "dark side" of the Family Reunification Directive [20] (applicable to all Member States except Denmark, Ireland, and the UK) explains the limitations as to its scope of application, regarding only cases when both the sponsor and their family member to be reunited are third-country nationals.

On the contrary, foreign family members of EU citizens are excluded from the Directive [21] (these may however be covered by Directive 2004/38/EC14, if they are family members of EU citizens who move to or reside in a Member State other than that of which they are a national, while family reunification of EU citizens residing in the Member State of their nationality is not subject to Union law and remains a national competence).

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[18] For a summary of the differences among the Commission's proposal in 1999 (COM(1999)638 final) and the text finally adopted by the Council in 2003, see B. MASSON, *L'harmonisation des conditions du regroupement familial: la Cour fait la leçon sur le titre IV CE*, in *Revue Trimestrelle de Droit Européen*, 2006, n. 4, p. 678.

[19] CJEU, *Parliament v. Council*, C-540/03. The European Parliament contested the possibility to limit the reunification of children aged over 12 years (Art. 4[1] last indent), the possibility to request that the applications concerning family reunifi cation of minor children have to be submitted before the age of 15 (Art. 4[6]) and the limits foreseen by Art. 8 concerning the previous stay of the sponsor and the "waiting period" before the issue of the residence permit, all deemed to be non-compliant with the right to respect for family life and the principle of non-discrimination enshrined in Articles 8 and 14 ECHR .

[20] Council of the EU, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification* (Family Reunification Directive), OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, 3 October 2003

[21] In accordance with Article 3(3) of the Family Reunification Directive.

But the most evident esemplification of this "dark side" of the Family Reunification Directive rests within its numerous optional provisions (the "may"-clauses), which not only were criticised after adoption by NGOs and academics, but were also considered by the European Commission in 2008 in its first report on the implementation of the Directive [22] as leaving the Member States too much discretion when applying some of its optional provisions (in particular as regards the possible waiting period, the income requirement and the possible integration measures) and moved the European Commission in 2014 to publish a Communication containing guidance on the interpretation of the Family Reunification Directive in order to refrain Member States from applying practices undermining the objective of the Directive, which the Commission recalled "*is to promote family reunification*" [23].

From a *multidimensional right* (apt to describe the differences among the protection provided by the ECHR and the EU), family reunification for Third Country Nationals in the European landscape can be further pictured as a more complex "*prysm in 3D*", when considering the relationships between the EU and the Members States legal orders which call into question both vertical and horizontal perspectives of its protection.

A notable connotation for the fundamental right to family reunification rests, in fact, within its "*variable geometry*" [24], being a fundamental right conditioned – along a set of common EU rules defining a very low level harmonization – to the specific legal conditions for family reunification provided by national legislators, entitled with broad discretionary powers to determine in their relevant implementing measures further conditions for the exercise of the substantive right to family reunification, within the limits provided by the Directive as interpreted by the Court of Justice of the European Union.

What is all the more important to stress here is that these further legal conditions Member States are entitled to decide not only address procedurals requirements [25], but they can also touch upon the very essence of this right, namely the identification of the beneficiaries eligible for reunification (as the Directive traces a distinction among mandatory provisions for the nuclear family – i.e. the spouse and children, including adopted children of either the sponsor or the spouse – and

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[22] COM(2008)610 final of 8 October 2008.

[23] Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014)210 final.

[24] See F. ANGELINI, *Il diritto al ricongiungimento familiare*, cit., p. 161.

[25] The main issues raised concern: the refusal to issue visas or permits, proof of identity or family ties as ground for rejection, long processing times by administrations, disproportionate charges for issuing permits, the notion of stable and regular resources, access to employment for family members, incorrectly applied waiting periods, and the proportionality of pre-integration conditions.

other optional eligible persons [26]) and the definition of requirements for exercising the right (as Member States may require for the foreign migrant some pre-departure or post-departure integration measures to family reunification, as for instance, pre-departure language integration tests [27]).

The great extent afforded to the Member States'discretion largely explains the existence, among certain commonalities, of quite significant differences between EU Member State's policies and practices on family reunification [28].

Indeed, the "variable geometry" and fragmentation affecting provisions on the right to family reunification actually characterizes the very same EU instruments of EU legal migration legislation, whith provisions on family reunification for Third country nationals scattered among a main act – the cited Family Reunification Directive – and other more "sectoral" acts, also addressing more targeted beneficiaries.

Among these latter sectoral acts of EU legal migration legislation, some provide for more favourable rules for family reunification if compared to the Family

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[26] With mandatory provisions, the Directive requires (subject to the other conditions of the Directive) Member States to authorize the entry and residence of the "nuclear" or "core" family, which means the sponsor's spouse and minor children of the sponsor or spouse.

However, even for this category, the Directive allows certain restrictions.

As for the spouse, under Article 4(5) Member States can fix a minimum age (21 years is the maximum threshold under the Directive) irrespective of whether this corresponds to the age of majority in the given Member States. The reason behind this provision was a worry that the rules on family reunification could be abused for forced marriages.

For minor children, two further restrictions are allowed by the Directive, both in the form of a stand-still clause derogation. The first one (Article 4(1) last indent) asking children over 12 years arriving independently of the rest of their families to prove that they meet integration conditions.[11] has only been used by one Member State. The second possible restriction (Article 4(6)) states that children older than 15 may be required to enter a Member State on grounds other than family reunification – has not been used by any Member State.

As the Directive only obliges Member States to ensure family reunification for the core/nuclear family, Member States are free to decide whether to include other family members in their national legislation (Article 4(3), such as, for instance, parents of the sponsor and/or his/her spouse, registered partners, same-sex marriages or samee-sex registrered partners.

[27] See on these S. CARRERA, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden, 2009; V. PIERGIGLI, *Integrazione linguistica e immigrazione. Approcci e tendenze nel diritto comparato europeo*, in *Federalismi.it*, n. 22, 2013. According to the CJEU, the required knowledge such national provisions impose as pre-departure language tests should promote integration and not undermine the Directive, with fees not be disproportionate. If the spouse fails the test, (Member) States have to take into account the background of the spouse (education, age etc.) and the efforts undertaken, in order to prevent that the test becomes an obstacle for exercising the right to family reunification (CJEU C-153/13, *K. and A*., 9 July 2015, paragraphs 56-59), for comments see M. JESSE, *The unlawfulness of existing pre-departure integration conditions applied in family reunification scenarios. Urgent need to change national laws in the European Union*, in *International Journal of Migration and Border Studies*, 2016, pp. 274-288.

[28] For an overview, see EMN Synthetis Report, *Family Reunification of TCNS in the EU plus Norway: National Practices*, 2017.

Reunification Directive – as in the case of the Blue Card Directive (2009/50/EC)[29] and the Long-Term Residents Directive (Directive 2003/109/EC)[30] – while others are silent on family reunification (as in the case of the Reception Conditions Directive 2013/33/EU[31]).

It happens also that other legislative instruments only indirectly may contribute to family unity while regulating other profiles. It is in fact precisely the case of asylum seekers who are living in different EU Member States, who may benefit from the application of the EU "Dublin III" Regulation[32], which does not grant an individual the right to family reunification, but sets out the criteria to determine which Member State of the EU is responsible for handling an application for international protection and asylum: in this case family members who are all *already* in the European Union but in different Member States – and have all applied for asylum (have official asylum-seeker status) or have been granted international protection (refugee status or subsidiary protection) – may reunite in the State which is determined as being responsible for examining the applications for international protection and asylum, along criteria defined in order of priority[33].

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[29] The Blue Card Directive (2009/50/EC) provides a more favourable regime compared to the Family Reunification Directive in four important aspects (see Art. 15): it does not require reasonable prospects of obtaining permanent residence rights or having a minimum period of legal residence; no pre-departure integration requirements may be applied; the time limit given for processing and granting permits for family members is shorter, limited to six months in the Blue Card Directive, whereas the Family Reunification Directive imposes a time-limit of nine months; while Article 14(2) of the Family Reunification Directive allows Member States to restrict access to the labour market for family members during the first year of residence, Blue Card Directive grants them immediate access.

[30] Article 16 of Long-Term Residents Directive (Directive 2003/109/EC) allows family members who lived with a holder of a LTR-permit to accompany him/her while settling in a second EU Member State, if they apply within three months after entrance in the second Member State. Although this right is restricted to members of the nuclear family, Recital 20 of the Long-Term Residents Directive encourages Member States to take into account the situation of 'disabled adult children and of first-degree relatives in the direct ascending line who are dependent on them'. Article 16(5) of the Long-Term Residents Directive refers to the Family Reunification Directive for the admission of family members who did not live with the sponsor in the first Member State. Regarding their access to the labour market, education or vocational training of the family members, the provisions of the Family Reunification Directive are applicable.

[31] The Reception Conditions Directive 2013/33/EU does not even mention family reunification, but it only specifies in Article 12 that Member States "shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned", where the family members concerned are the spouse, unmarried partner and minor children, or parents or another adult responsible for an unmarried minor.

[32] Dublin Regulation (EU) No.604/2013.

[33] In order of priority of the Dublin criteria, the State responsible is the one (a) where a family member of an unaccompanied child is legally present; (b) where resides a family member who is a beneficiary of international protection; (c) where resides a family member whose asylum application is pending.The other criteria do not relate to the family links, but to the state that issued residence

Still, prominent for our discourse is underlying that, under the EU Dublin Regulation (applying only in the "Dublin countries", thus excluding Turkey, FYROM, Albania, Montenegro, Serbia or Bosnia), family reunification takes actually a different dimension if compared with the Family Reunification Directive.

Not only, infact, family reunification is shaped along more restrictive criteria as for the persons to be reunited (reunifications regarding only "immediate family members", qualified as such the spouse or the life-partner and minor children under age 18 and not married, without any further extension to other family members), but it is also to be accounted more as an "interest" the State is required to take into account when deciding the requests of asylum or international protection, rather than a fundamental right of the asylum seeker.

In fact, the persons concerned must express their desire to join the family member in the other Member State in writing before the "Dublin criteria" are applicable, while at the same time it is up to the concerned Member State to make a take-charge or a take-back request in application of the criteria mentioned above and individuals who are subjected to either a take-charge or take-back request from another Member State have the right to an effective remedy only against the transfer to that Member State (in case of adoption of a take-charge decision), while they do not have any legal remedy to seek such a transfer against a take-back decision [34].

Eventually, moving from the EU level to the national legal order, the prysm reflected by the fundamental right to family reunification in the different EU Member States legal orders needs to take into accont, in the first place, the "*constitutional variety*" [35] of constitutional provisions governing, respectively, the European Convention on Human Rights (hereinafter ECHR) and EU norms' impact on national systems among the different Member States in the European Union, leading to variable ways in which to conceive the relationship between the national and European constitutional levels.

Recent studies [36] have widely aknowledged the diversity of national approaches reflected by the constitutional provisions providing for the effects of the ECHR

documents or a visa, or the state through which the asylum applicant has entered or has resided in (See Regulation No. 604/2013, articles 8, 9, 10).

[34] More in depth see C. FAVILLI, *L'Unione che protegge e l'Unione che respinge. Progressi, contraddizioni e paradossi del sistema europeo di asilo*, in *Questione Giustizia*, 2018, vol. 2, p. 37.

[35] G. MARTINICO, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, in *The European Journal of International Law,* 2012, pp. 401-424; O. POLLICINO, *Toward a convergence between the EU and ECHR legal systems?*, in G. REPETTO (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law An Italian Perspective*, Cambridge, 2013, pp. 99-118.

[36] See G. MARTINICO and O. POLLICINO (eds), T*he National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective,* 2010; H. KELLER and A. STONE SWEET (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems,* 2009; G. REPETTO

ad EU norms on the domestic legal orders, leading to differences in the domestic authority of the European Convention and EU laws.

While some Constitutions assign a particular status to EU law, distinguishing it from public international law – as in the case of the Italian Constitution [37] – thus leading to different effects between EU obligations and international ones (among them the ECHR) in the domestic legal system [38], other Constitutions recognize the special status of international human rights treaties for the interpretive guidance on the constitutional provisions on fundamental rights (as in the case of the Spanish and Portoguese Constitutions [39], or the Bulgarian Constitution [40]), while some other Constitutions do not distinguish between public international law as ECHR and EU law (as in France and the Netherlands [41]).

(ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law An Italian Perspective*, Cambridge, 2013.

[37] According to Article 117 *'[l]egislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations'.*

[38] C. PINELLI, *I limiti generali alla potesta legislativa statale e regionale e i rapporti con l'ordinamento comunitario*, in *Foro it.*, 2001, p. 194. The difference was later on confirmed by the Italian Constitutional Court in 2007 by upholding the para-constitutional nature of EU law and underlining the sub-constitutional character of the ECHR.

[39] In Spain and Portugal (respectively, with Article 10 of the Spanish Constitution and Article 16 of the Portuguese Constitution). The most important confirmation of human rights treaties' special ranking in Spain is Article 10.2,33 acknowledging that they provide interpretive guidance in the application of human rights-related constitutional clauses (even if the Constitutional Court specified that this does not imply that human rights treaties have constitutional status). As for Portugal, the fundamental provision is Article 16 of the Constitution, which recognizes that international human rights treaties have a role which is complementary to the Constitution. This provision accords an interpretative role to the Universal Declaration of Human Rights, seemingly excluding other conventions like the ECHR. In 1982, an attempt to insert a reference to the ECHR into the Constitution failed, but the Portuguese Constitutional Court often used the ECHR as an important auxiliary hermeneutic tool for interpreting the Constitution, leaving the matter unresolved.

[40] The Bulgarian Constitution, in its Article 5, recognizes a general precedence of international law (including the ECHR and EU law) over national law, and also provides for the duty to interpret national law in a manner which is consistent with these regimes, including the case law of their respective courts. In 1998, the Bulgarian Constitutional Court ruled that: "The Convention constitutes a set of European common values which is of a significant importance for the legal systems of the Member States and consequently the interpretation of the constitutional provisions relating to the protection of human rights has to be made to the extent possible in accordance with the corresponding clauses of the Convention" (See Bulgarian Constitutional Court Decision no. 2, of 18 Feb. 1998: Official journal no. 22, 24 Feb. 1998. A similar provision is Article 20(1) of the Romanian Constitution: '[c]onstitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to'.

[41] BETLEM and NOLLKAEMPER, *Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, in *European Journal of International Law*, 2003, p. 569.

This "variety" is particular true for the ECHR, due not only to the different national constitutional provisions, providing a different status afforded to the Convention's provisions within the State's law of the Members of the Council of Europe [42]. In this case, in fact, also the national system of human rights protection and the institutional role played by domestic courts in each Member State play a prominent part together with some peculiar features of the ECHR itself, as for instance the rules regulating the principle of subsidiarity (through which the States' Courts are eminent actors in ensuring the national safeguard of human rights) [43], the margin of appreciation [44] (which allows national authorities, including judges, a certain measure of discretion with respect to the construction and fulfilment of the obligations arising from the ECHR [45]). together with the emergence of an European legal tendency, the so-called "consensus approach" [46] in matters raising moral or ethical issues, like those related to marriage and family.

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[42] L. MONTANARI, *I diritti dell'uomo nell'area europea fra fonti internazionali e fonti interne* (2002) H. KELLER and A. STONE SWEET (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2009). See also I. CAMERON, *The Court and the Member States: procedural Aspects*, in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, Cambridge, 2013, pp. 25-61.

[43] The Strasbourg Court has constantly confirmed that the machinery of protection established by the Convention is subsidiary to national systems of human rights protection. See ECTHR, *De Souza Ribeiro v. France*, December 13, 2012, para. 77; ECTHR, *Kudła v. Poland*, October 26, 2000, para. 152; ECTHR (Grand Chamber*), Selmouni v. France*, July 28, 1999, para. 74; ECTRR, *Handyside v. UK*, December 7, 1976, para. 48.

[44] F. DONATI, P. MILAZZO, *La dottrina del margine di apprezzamento nella giurisprudenza della Corte Europea dei Diritti dell'Uomo*, in P. FALZEA, A. SPADARO, L. VENTURA (a cura di), *La Corte costituzionale e le Corti d'Europa*, Torino, 2003, 65 ss; P. TANZARELLA, *Il margine di apprezzamento*, in M. CARTABIA (a cura di), *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Bologna, 2007, 149; M. ADENAS, E. BJORGE, *National Implementation of ECHR Rights*, in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, pp. 181-262.

[45] ECtHR, *X, Y and Z v. UK*, April 22, 1997, para. 44; ECTHR, *Frette v. France*, February 26, 2002, para. 41; ECtHR (Grand Chamber), *Christine Goodwin v. UK*, July 11, 2002, para. 85; ECtHR, *A v. UK*, February 19, 2009, para. 154.

[46] E. BRIBOSIA, I. ROVIRE, L. VAN den EYNDE, *Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience'*, in *Berkeley Journal of International Law*, 2014, pp. 2-43, in part. pp. 18-25. On the "consensus approach" in relation to the national margin of appreciation doctrine see, among others, J. GERARDS, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 *European Law Journal*, 2011, pp. 80-120; G. LETSAS, *Two Concepts of the Margin of Appreciation*, 26 *Oxford Journal of Legal Studies*, 2006, pp. 705-732; E. Brems, *Human Rights: Universality And Diversity*, Nijhoff, The Hague, 2001, pp. 411-419. D. TEGA, *I diritti in crisi*, Milano, 2012.

Though the "constitutional variety" of the international and European clauses in domestic Constitutions can actually be further shaped by a dynamic judicial interpretation by domestic constitutional courts [47], when looking at the law in action of the respective national judges one could detect some commonalities in their relevant case-law with clear signs of approximation in the treatment of EU and ECHR laws (mostly for the use of consistent interpretation both towards the ECHR and EU law). Still, the same legal doctrine recognizes that "quite often the constitutional discipline results in an important, if not decisive, obstacle to complete convergence" [48].

To this respect, it is worth noting that the different domestic authority given to the ECHR and to EU provisions or the EU Charter has in any case implications as for the "judicial protocol" which regulates in every domestic order conflict situations involving internal law and, respectively, ECHR or EU law with regard to the area of fundamental rights (raising the question for the common judge whether to refer the question to the costitutional court or to disapply internal law in constrast with the external legal sources or to lodge a preliminary reference with the Court of Justice).

As indeed the well-known "Taricco Saga" between the Italian Constitutional Court and the Court of Justice has shown [49], for the outcome of the judicial solution to the case is crucial more than ever not the Court (whether national or European) having the last word on the case, but on the contrary the one that speaks first as it "often plays a crucial role in framing the constitutional questions that other courts and, more in general, other institutions, will be called to answer" [50].

Against this background, reflecting on the "fragmented" fundamental right to family reunification inevitably requires a closer look to the "law in action" in both

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[47] See G. MARTINICO, *Is the European Convention Going to Be 'Supreme'?*, cit., pp. providing with useful examples of convergence towards the two regimes in relation not only to consistent interpretation, but also for disapplication of national law conflicting with European provisions and emergence of a counter-limits doctrine. See also O. POLLICINO, *Toward a convergence between the EU and ECHR legal systems?*, cit., stressing the "constantly growing bifurcation between a static reading of the relevant 'European' and 'international' clauses present in the constitutions, and their dynamic judicial interpretation by constitutional courts" (p. 109)

[48] G. MARTINICO, *Is the European Convention Going to Be 'Supreme'?,* cit., p. 423.

[49] Within this saga, which saw both the Court of Jusstice and the Italian Consitutional Court intervening twice on the same case, the most important fact was the referral order no. 24/2017 the Italian Constitutional Court referred a preliminary ruling to the Court of Justice, challenging the assessment of the Court of Justice concerning the alleged duty of domestic judges to retroactively disregard criminal rules by invoking its power to safeguard the inviolable content and scope of constitutional guarantees in criminal matters as a limit to the effect of EU rules. See A. BERNARDI and C. CUPELLI (eds.), *Il caso Taricco e il dialogo tra le Corti. L'ordinanza 24/2017 della Corte costituzionale*, 2017.; G. PICCIRILLI, *The "Taricco Saga": The Italian Constitutional Court continues its European journey*, in *EuConst*, 2018, p. 814.

[50] Quoting N. LUPO, *The Advantage of Having the "First Word" in the Composite European Constitution*, in *Italian Journal of Public Law*, 2018, p. 188.

the domestic and European levels as – quoting a judge of the Italian Constitutional Court [51], precisely after the *Taricco* Saga [52] it has been definitely accomplished "there is no exclusive primacy in the interplay between national and European levels" as, on the contrary, "we are living in times of 'constitutional duplicity' and the specific task of each constitutional judge is to contribute to the dialogue among legal culture and legal charters".

Still, as it will be addressed in the final remarks of this essay, in order to preserve legal pluralism in Europe [53] and afford open loyal constitutional conversations leading to fruitful mutual influences among the different three legal orders, the growing definition of "judicial protocols" (for defining which judicial actor such questions of compatibility has to be addressed to) are of the utmost importance and need to be carefully used by common courts and, even before them, have to be considered by legal practitioners.

3. *The fundamental right to family reunification for foreign citizens in the Italian constitutional landscape*

Reflecting on the right to family reunification and the rights granted to family members reunited within the Italian legal system deserves a preliminary analysis of the guarantees provided at constitutional level to foreign citizens and to asylum seekers, in order to highlight the prominent role the Italian Constitutional Court has progressively played in raising the standards of protection, family reunification for foreign citizens receiving protection at constitutional level well before the adoption of the EU Family Reunification Directive.

3.1. *The background – part I: fundamental rights and progressive equality of treatment for foreign citizens in the Italian legal order*

Until the 1970s Italy was primarily a country of emigration. This is reflected in the Italian Constitution of 1948, aknowledging mainly the freedom to emigrate

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[51] Italian Constitutional Court's Judge Giuliano Amato in *Constitutional Adjudication within a European Composite Constitution. A view from the bench (interviews to Judges Giuliano Amato, Marta Cartabia, Daria de Pretis, Silvana Sciarra*), in *Italian Journal of Public Law*, 2018, p. 495.

[52] ECJ 8 September 2015, Case C-105/14, *Ivo Taricco et al*., ECLI:EU:C:2015:555, Italian Constitutional Court referral order n. 24/2017, ECJ 5 December 2017, Case C-42/17, *M.A.S., M.B*., ECLI:EU:C:2017:936, Italian Constitutional Court, decision n. 115/2018.

[53] For an overview on "constiturional plurarism" see R. Bifulco, *Europe and Constitutional Pluralism: Prospects and Limitations*, in P. Faraguna, C. Fasone, G. Piccirilli (eds.), *Constitutional Adjudication in Europe between Unity and Pluralism*, Napoli, 2018, p. 167 ff.

for the Italian citizens [54] and with a few and generic provisions devoted to the right of asylum and the legal status of foreigners [55].

According to the second paragraph of Art. 10 of the Italian Constitution, the legal status of foreigners is governed "by the law in accordance with international rules and treaties", which implies the possibility for the legislature to limit the entrance and settlement of foreigners. Prevailing academic opinion, and the case-law of the Constitutional Court as well, exclude the possibility that the Constitution establishes in any of its articles an actual right, on the part of foreigners, to enter national territory.

The Italian Constitutional Court recognised, in its judgement no. 62/1994, that:

> "a foreigner's lack of connections with the national community, and therefore of a juridical constitutional link with the Italian State, leads to the denial of any automatic freedom of entry into Italian territory, since a foreigner can only enter and stay in the country upon certain authorisations (which can be revoked at any time) and, generally speaking, for a limited period of time" [56].

As known, while the situation regarding citizens of EU Member States (or those with equivalent status) is similar to that of Italian citizens – by virtue of Article 18 of the EU Treaty, given constitutional effectiveness by Article 11 of the Italian Constitution –, for citizens from outside the EU it is necessary to distinguish between holders of a residence permit (or card), issued on the basis of the Consolidated Text of the Immigration Laws [57] (who are free to reside in the national territory and to come and go without the need for a re-entry visa), and those non European citizens who are in Italy illegally, who consequently enjoy no such freedom.

With the constitutional reform of 2001, the legal status of foreigners, immigration and asylum appeared among the subjects listed by art. 117 Const. subject to the exclusive legislative competence of the State, while other policy area affecting the management of migration and the legal status of foreigners – such as housing,

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[54] The Italian Constitution.proclaims that "every citizen is free to leave the territory of the Republic and return to it except for obligations defined by law" (art. 16(2)) and "it recognizes the freedom to emigrate, except for legal limitations for the common good, and protects Italian labour abroad" (art. 35(4)).

[55] In particular, Art. 10 states that "(2) The legal status of foreigners shall be regulated by law in compliance with international provisions and treaties" [and] (3) foreigners who are, in their own country, denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution, are entitled to the right to asylum under those conditions provided by law".

[56] See Italian Constitutional Court, judgements no. 104/1969; 144/1970; 244/1974; 503/1987.

[57] Legislative Decree no. 286/1998, 'Consolidated Act of rules on immigration and norms regarding the condition of the foreigner' (G.U. 18 Aug. 1998, no. 191, Ordinary Supplement).

healthcare, education – are assigned to the concurrent or residual general legislative competence of the Regions.

Thus, although the Italian Constitution provides only few rules directly addressing asylum, migration and the legal status of foreigners, other pivotal constitutional provisions complement enhancing the national standards of foreigners' rights.

Among these, it is worth to mention: Art. 117 Const., giving EU law and international treaties signed by Italy (among these the ECHR) which have acquired constitutional relevance, though entrusted with a different domestic authority [58]; the "personalist principle" of Art. 2 Const. [59], according to which "the Republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity", and the principle of equality of Art. 3 that forbids unfair discrimination and entrenches substantial equality [60]

In fact, international conventions and jurisprudence (especially the ECHR, ratified and made executive by Italy with law no. 848/1955) with the right to private and family life and the principle of non-discrimination proclaimed by art. 8 and 14 ECHR – as well as the "personalist principle" and the principle of equality (enshrined in Articles 2 and 3 of the Italian Constitution) have been frequently invoked by the Italian Constitutional Court to secure and extend the fundamental rights of foreigners [61].

The Constitutional Court has ruled that, despite Art. 3 of the Constitution makes reference to citizens only, when the respect of fundamental rights is at

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[58] Art. 117 (1) Const. states: "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*".

[59] A. RUGGERI, *Il principio personalista e le sue proiezioni*, in *Federalismi.it*, 2013, n. 17; A. VEDASCHI, *Il principio personalista*, in L. MEZZETTI (ed.), *Principi costituzionali*, Torino, 2011, p. 274 ff.

[60] ("(1) All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions. (2) It is the duty of the Republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country").

[61] For further comments see C. CORSI, *Peripezie di un cammino verso l'integrazione giuridica degli stranieri. Alcuni elementi sintomatici*, in *Osservatorio AIC*, n. 1/2018; P. CARROZZA, *Diritti degli stranieri e politiche regionali e locali*, in C. PANZERA, A. RAUTIC. SALAZAR, A. SPADARO (eds), *Metamorfosi della cittadinanza e diritti degli stranieri*, Napoli, 2016, pp. 57- 142; M. CARTABIA, *Gli 'immigrati' nella giurisprudenza costituzionale: titolari di diritti e protagonisti della solidarietà*, in C. PANZERA, A. RAUTI, C. SALAZAR, and A. SPADARO (eds), *Quattro lezioni sugli stranieri*, Napoli, 2016, pp. 3-34; C. CORSI, *Stranieri, diritti sociali e principio di eguaglianza nella giurisprudenza della Corte Costituzionale*, in *Federalismi.it*, n. 3/2014; F. BIONDI DAL MONTE, *Dai diritti sociali alla cittadinanza. La condizione giuridica dello straniero tra ordinamento italiano e prospettive sovranazionali*, Torino, 2013.

stake, the principle of equality applies also to foreigners. Still the different legal status of foreigners [62] may justify a different legal treatment with regard to security, public health, public order, international treaties and national policy on migration [63], but not with regard to the protection of inviolable rights since they belong "*to individuals not as members of a political community but as human beings as such*" [64].

With a settled position, the Constitutional Court recalls that Parliament is granted broad discretion in regulating foreign nationals' entry into and stay within the country, in consideration of the variety of interests affected by these rules; however, it must also be stressed that the Court has regularly reasserted that this legislative discretion is not absolute, and must strike a reasonable and proportionate balance between all rights and interests at issue, above all when the provisions on immigration are liable to impinge upon fundamental rights which the Constitution protects on an equal footing for nationals and non-nationals [65].

In particular, in several decisions the Constitutional Court affirmed that limiting the access to social benefits aimed to satisfy human basic needs only to foreigners with an EC residence permit for long-residents entails an "unreasonable discrimination" between Italian citizens and foreigners regularly residing in Italy [66].

Following the same reasoning, a Constitutional Court's settled case-law maintained foreigners' entitlement to social rights, such as the right to health and healthcare services [67] and to "essential social benefits", such as invalidity benefits for mobility, blindness and deafness, public housing, regardless of the length of their residence. In particular, the Court clarified that specific social benefits that constitute "a remedy to satisfy the primary needs for the protection of the human person", have to be considered "fundamental rights because they represent a guarantee for the person's survival" [68].

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[62] The Court's reasoning is more complex than a simple equalization between citizens and foreigner. It ascertained the difference between citizens and foreigners: whiles citizens have an "original" relation with the State, foreigners have a non-original and often temporary relation with the State.

[63] Italian Constitutional Court, decision no. 104/1969; decision no. 62/1994.

[64] Italian Constitutional Court, decisions no. 105/2001, no. 249/2010. On the application of the principle of equality to third country citizens see recently A. GIORGIS, E. GROSSO, M. LOSANA (eds.), *Diritti uguali per tutti? Gli stranieri e la garanzia dell'uguaglianza formale*, Milano, 2017.

[65] Italian Constitutional Court, judgments no. 202/2013, no. 172 of 2012, no. 245 of 2011, nos. 299 and 249 of 2010, no. 148 of 2008, no. 206 of 2006 and no. 78 of 2005.

[66] See, amongst the others, the decision of the Italian Constitutional Court no. 187/2010, in which the Court also makes explicit reference to the decisions of the European Court of Human Rights, *Gaygusuz v. Austria* 16.9.96 and *Niedzwieck v. Germania* 25.10.05.

[67] Italian Constitutional Court, decision no. 269/2010.

[68] Italian Constitutional Court, decisions no. 187/2010; no. 329/2011; no. 40/2013, no. 22/2015; and no. 230/2015.

The Italian Constitutional Court in recent years has progressively developed a solid case law on those legislations at Regional level introducing a reference to a previous extended period of residence in the Region in order to gain access to fundamental social rights [69], leading to several declarations of unconstitutionality for violation of the principles of equality and reasonableness laid down in Article 3 of the Constitution [70], thus isolating those few contrary precedents initially expressing a different approach [71].

Again recently, with judgement n. 44 of 2020, considering a referral order concerning regional legislation purporting to impose a requirement of five years' prior residence or gainful activity in the Region as a mandatory prerequisite for establishing eligibility for residential housing, the Italian Constitutional Court held that this prerequisite was unreasonable, having regard to the rationale for providing social housing, and in fact that its consequences were at odds with the function of public housing (i.e. providing a home to people who do not have one). The Court therefore ruled the legislation unconstitutional insofar as it imposed this requirement, specifyng that while the aspect of stability may be one of the aspects to be assessed when drawing up the ranking list of beneficiaries, considering the social function of public housing, it is unreasonable to exclude even the neediest persons *ex ante* from the allocation of housing solely on the grounds that they cannot provide sufficient guarantees of stability. The Court, thus, considered the provision of a previous extended period of residence as a general *sine qua non* for eligibility for the service to be unconstitutional as it establishes an unreasonable difference in treatment to the detriment of those Italian or foreign nationals who

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[69] B. PEZZINI, *Una questione che interroga l'eguaglianza*, in *Lo statuto costituzionale del non cittadino*, Atti del XXIV Convegno annuale AIC, Napoli, Jovene, 2010; F. CORVAJA, *Cittadinanza e residenza qualificata nell'accesso al welfare regionale*, in *Le Regioni*, 2011, p. 1271; C. CORSI, *Stranieri, diritti sociali e principio di eguaglianza nella giurisprudenza della Corte costituzionale*, in *Federalismi*, 2014; C. CORSI, *L'accesso degli stranieri ai diritti sociali*, in *Cittadinanze amministrative*, a cura di A. BARTOLINI e A. PIOGGIA, vol. VIII, in *A 150 anni dall'unificazione amministrativa italiana*, Firenze, 2016, 133 ss.; F. BIONDI DAL MONTE, *Dai diritti sociali alla cittadinanza*, Torino, 2013; E. GROSSO, A. GIORGIS, M. LOSANA, *Diritti uguali per tutti?*, Milano, 2017; D. TEGA, *Le politiche xenofobe continuano a essere incostituzionali*, in *Diritti regionali*, 2.2018. C. CORSI, *Peripezie di un cammino verso l'integrazione giuridica degli stranieri. Alcuni elementi sintomatici*, in *Rivista AIC*, 2018, 16.

[70] Italian Constitutional Court, judgments no. 40/2011; 2/2013; 133/2013; 172/2013; 168/2014; 106/2018; 166/2018; 107/2018; 44/2020.

[71] A different approach the Italian Constitutional Court showed in judgement no. 222/2013 commented by L. PRINCIPATO, *L'integrazione sociale, fine o* condicio sine qua non *dei diritti costituzionali?*, in *Giur. cost.,* 2013, p. 3294 ff. arguing for a "variable geometry" motivation adopted by the Court. On the divergent anwers given by the Italian Constitutional Court to the question how much equality is to be granted to third country nationals in enjoying social fundamental rights see recently F. CORVAJA, *Straniero e prestazioni di assistenza sociale: la Corte fa un passo indietro ed uno di lato*, in *Dir. Imm. Citt.,* 2019, p. 244 ss.

do not fulfil that prerequisite, as well as the principle of substantive equality laid down by Article 3(2) of the Constitution [72].

The same reasoning, based also on the anti-discrimination principle, allowed the Italian Constitutional Court to extend some guarantees and social rights to undocumented migrants. The recognition of "hard core" fundamental principles and inviolable rights, regardless of citizenship and legal status, made the Constitutional Court to rule that expulsions cannot be enforced if the undocumented migrant is under an essential therapeutic treatment [73].

Moreover, a similar reasoning underpins the foreigner's rights to legal defence, even in case of undocumented foreigners. Here the Constitutional Court clarified that the effective exercise of the right of defence "*implies that the recipient of a provision of restriction of the self-determination freedom, be enabled to understand its content and meaning*". Consequently, "*under the hypothesis of ignorance without fault of the expulsion order – in particular for non-compliance with the obligation of translation of the legal act – the deadline for proposing an appeal should not be considered*" [74].

The Constitutional Court has thus played a fundamental role in promoting the legal entitlements of foreigners and in preventing standards downgrading.

However, besides the Court, a crucial role in shaping the national legislation on immigration and asylum and in extending foreigners' rights has also been played by ordinary judges [75], whose jurisdiction has been recently boosted [76].

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[72] For comments see C. CORSI, *Illegittimità costituzionale del requisito della residenza protratta per i servizi abitativi*, in *Questione Giustizia*, 2020.

[73] Italian Constitutional Court, decision no. 252/2001.

[74] Italian Constitutional Court, decision no.

[75] See M. CARTABIA, *Gli 'immigrati' nella giurisprudenza costituzionale: titolari di diritti e protagonisti della solidarietà*, in C. PANZERA, A. RAUTI, C. SALAZAR and A. SPADARO (eds), *Quattro lezioni sugli stranieri*, Napoli, 2016, pp. 3-34; M. BENVENUTI, *Dieci anni di giurisprudenza costituzionale in materia di immigrazione e di diritto di asilo e condizione giuridica dei cittadini di Stati non appartenenti all'Unione Europea*, in *Questione giustizia*, 2014, pp. 80-105.

[76] The Law-Decree no. 13/2017 (so called "Minniti Decree", from the name of the Ministry for Home Affairs at that time), converted into Law, with amendments, no. 46/2017, introduced specialised court sections within the ordinary jurisdiction, competent for examining a specific area pertaining to asylum law and immigration law (see Art. 1 Law Decree no. 13/2017 as converted by Law no. 46/2017). According to art. 2(1) of the same Decree, judges are appointed on the basis of specific skills to be acquired through professional experience and training. However, amongst this area of competence, the "Minniti Decree" does not make reference to important subject matters, such as the revision of expulsion orders and the revision of decisions to refuse entry (For comments see G. SAVIO, *Le nuove disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale: una (contro)riforma annunciata*, in *Diritto Immigrazione Cittadinanza,* no. 3/2017).

3.2. *The background – part II: the constitutional right of asylum in the Italian legal order and the prominent role of the "humanitarian residence permit" as a "flexible instrument" for allowing entry into and stay within the country*

With specific reference to the right of asylum, Article 10, para. 3, of the Italian Constitution states "*An alien who is denied, in his or her own country, the effective exercise of the democratic liberties guaranteed by the Italian Constitution shall have the right of asylum in the territory of the Italian Republic, in accordance with the conditions established by law*".

The broad definition of the right of asylum emerging from this disposition can only be understood in the light of Italian history, registering many exiles during the fascist period. The provision also marked a clear distance from the historical configuration of asylum as the tendentially unconditional right of the State to grant or not that protection, rather than as an individual right relevant to the person invoking protection [77].

Moreover, it is to be stressed the specific constitutional importance attached to the right of asylum emerging from the "place" of its regulation [78].

Not only Art. 10 Const. is placed among the first twelve "Fundamental Principles", but it is also connected, on one hand, with the more general commitment to promote, in an international field, a system that ensures peace and justice between nations (Art. 11 Const.) and, on the other hand, to the need to recognize and guarantee the fundamental rights of the individual towards not only the citizen but of the person as such, affirmed by Art. 2 Const [79].

Still, Art. 10 Const. received a problematic and late implementation in the Italian legal order and has never been fully satisfactory [80].

The ratification by Italy in 1954 of the Geneva Convention Relating to the Status of Refugees could not be regarded as a full implementation of the Italian constitutional provision, as the definition of a refugee in the Geneva Convention is much more restrictive compared to the scope of Article 10 of the Italian Constitu-

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[77] See L. BUSCEMA, *The hard research of a "safe place*", in *Rivista AIC*, no. 4/2018, p. 35.

[78] M. BENVENUTI, *Asilo (diritto di), II) Diritto costituzionale* (ad vocem), in *Enc. Giur*., III, Roma, 2007, 1 sqq.; C. ESPOSITO, *Asilo (diritto di), Diritto costituzionale*" (ad vocem), in *Enc. Dir*., III, Milano, 1958, 222 sqq.

[79] On the relation between arts 2 and 10(2) Const., see A. BARBERA, *"Principi fondamentali: art. 2*", in G. BRANCA (ed.) *Commentario della Costituzione*, Bologna-Roma, 1975; P. BARILE*, Il soggetto privato nella Costituzione italiana*, Padova, 1953, p. 51; V. ONIDA, *Relazione*, in AA.VV., *I diritti fondamentali oggi*, Padova, 1995, p. 75; A. Pace, *Problematiche delle libertà costituzionali, Lezioni, I Parte generale*, Padova, 1990, p. 146: E. GROSSO, "*Straniero (status costituzionale dello)*", in *Digesto discipline pubblicistiche*, XV, Torino, 1999, p. 164.

[80] Recently on this see M. BENVENUTI, *La forma dell'acqua*, in *Questione giustizia*, 2018, vol. II, p. 18 ss.

tion [81]. Moreover, contrary to other legal traditions [82], for many years Italy lacked a legislative framework defining the procedures for recognising the refugee status in Italy [83].

Since the end of the 1990s Italian judges have started recognising to foreigners (and also stateless persons), who find themselves in a situation such as the one described in Article 10 Const., a perfect subjective constitutional right to obtain asylum even in the absence of a law that specified the conditions for exercising and enjoying that right, retaining that the constitutional provision defined the specific circumstances with sufficient clarity and precision, thereby giving rise to a right to asylum for foreign nationals in such circumstances, which could be ascertained by the courts themselves. Such recognition certainly did not imply affording all of the protections tied to refugee status, but the foreigner was allowed in any case to remain in Italy.

The difficulties encountered in the implementation of the right of asylum recognised by Art. 10 Const. lasted until a specific discipline at EU level was enacted.

As for the European Union, the right to asylum as the "right to a safe place" began to become the goal of a common policy following the entry into force of the Treaty of Amsterdam in 1999, which introduced the title "visas, asylum, immigration and other policies related to free movement of persons" into the Treaty on European Union [84].

So the first EC directives on this subject matter were approved and transposed in the Italian legal order [85]. In particular, legislative decree no. 251/2007, imple-

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[81] See C. CORSI, *The twist and turns of asylum laws in Italy*, EUI blogs, February 28, 2019.

[82] In particular on the important German legal tradition on the right to asylum see G. MANGIONE, *Il diritto di asilo nell'ordinamento costituzionale tedesco,* Milano, 1999.

[83] The first legislative provisions concerning the procedures were laid down only with the so-called "Martelli law" of 1990, then amended in 2002 by the "Bossi-Fini" immigration law.

[84] See B. NASCIMBENE, *Asilo e statuto di rifugiato*, in AA.VV., *Lo statuto costituzionale del non cittadino*. Atti del XXIV Convegno annuale dell'Associazione italiana dei costituzionalisti, Napoli, 2010, 304 sqq.; C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford, 2015; S. PEERS, V. MORENO-LAX, M. GARLICK, E. GUILD, *EU Immigration Law (Text and Commentary*), II ed., vol. 3, Leiden-Boston, 2015.

[85] See Directive 2004/83/EC "on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted" was transposed in Italy by Legislative Decree no. 251/2007, and Directive 2005/85/EC "on minimum standards on procedures in Member States for granting and withdrawing refugee status" was transposed by Legislative Decree no. 25/2008. See P. BONETTI, *Il diritto di asilo in Italia dopo l'attuazione della direttiva comunitaria sulle qualifiche e sugli status di rifugiato e di protezione temporanea*, in *Diritto, immigrazione e cittadinanza*, n. 1, 2008, 93 sqq.; D.U. GALETTA, *Il diritto di asilo in Italia e nell'Unione europea oggi: fra impegno a sviluppare una politica comune europea, tendenza all'"esternalizzazione" e politiche nazionali di gestione della c.d. "emergenza immigrazione"*, in *Riv. it. dir. pubbl. comunit.*, 2010, 06, 1450 sqq.;

menting directive 2004/83, introduced the "subsidiary protection status" next to the "refugee status" in the Italian legal system.

With the subsequent legislative decree no. 25/2008 it was established that in cases in which the application for "international protection" was rejected, but there were serious concerns of a humanitarian nature, the competent authorities would pass on the relevant documentation to the police commissioner, who could grant a "residence permit on humanitarian grounds".

This 'humanitarian' residence permit was regulated by the "Consolidated Act on immigration" (Legislative Decree no. 286/1998), which lays down general provisions concerning the legal status of aliens, without, however, addressing the subject of asylum. Article 5, paragraph 6 of the Consolidated Act gave the police commissioner the option of issuing a residence permit if there were serious reasons, in particular humanitarian concerns or reasons deriving from constitutional or international obligations of the Italian State. As this legislative clause was designed to safeguard the legal status of alien, it was necessarily broad in scope. So it was that the Italian legislative framework governing asylum came to include a "humanitarian protection regime" alongside the "international protection regime" (embracing refugee protection and subsidiary protection).

Therefore, although Article 10 of the Constitution had never been implemented through a specific law, the courts maintained that Article 10 had been fully implemented and was governed through a pluralistic system of protection (refugee protection, subsidiary protection and humanitarian protection) and that there was no longer any margin allowed for the judiciary regarding the direct application of Article 10(3). Accordingly, the three protection measures were judged to represent a full implementation of the constitutional right of asylum; hence the impossibility of asylum requests other than in the cases provided for in State legislation.

The Supreme Court emphasized that humanitarian protection constituted "one of the forms of implementation of constitutional asylum, precisely by virtue of its open nature and the fact that the conditions for its recognition are not wholly precisely definable, consistently with the broad scope of the right of asylum contained in the constitutional provision, which expressly refers to denial of the exercise of democratic liberties" [86].

The Supreme Court further underscored that humanitarian protection, though not precisely defined by EU provisions and left to the discretion of the States, is nonetheless referred to in Directive 115/2008/EC "on common standards and procedures in Member States for returning illegally staying third-country nationals",

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G. Scaccia, D. De Lungo, *Il diritto di asilo*, in F. Rimoli (ed.), *Immigrazione e integrazione*, Napoli, 2014, 605 sqq; F. Scuto, *La gestione dell'"emergenza" tra interventi dell'Unione europea e ordinamento nazionale: l'impatto sulle fonti del diritto dell'immigrazione,* in F. Cortese, G. Pelacani (eds.), *Il diritto in migrazione*, Napoli, 2017, 373 sqq.

[86] Italian Court of Cassation, judgment no. 4455/2018.

which provides that "Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory".

It is worth here to anticipate that Italian migration policies, including the right to asylum, have been subject, in the recent period, to a highly sensitive debate.

Following a "securitarian approach", the former center-right Government adopted Decree-law no. 113/2018 (the so-called "Security Decree") providing the abolition of the residence permit previously granted on grounds of humanitarian protection, together with a restriction of the reception system to recognized refugees, thus excluding asylum seekers still awaiting a decision.

The huge critics raised by legal scholars, together with the "rebellion" by several local and regional governments and the decisions by several ordinary judges to raise constitutional questions on those provisions, not only resulted in partial declarations of unconstitutionality decided by the Italian Constitutional Court, but also moved the new center-left Government to repeal those discriminating provisions through a new Decree-Law no. 130 of 21 October 2020, aiming at reversing many of the worst policies imposed by the previous reform while also reintroducing respect for constitutional and international obligations.

3.3. *The right to family reunification for third country nationals under the Italian Constitution: between family unity and "issues of affection"*

Family reunification for third country nationals is certainly a sensitive issue in contemporary world, being essentially a pre-requisite for full and effective integration of foreign nationals into the State at a social and economic level [87].

A first important remark, when comparing the right to family reunification in the Italian legal order with other legal traditions, is that the notion of "right to family reunification" stems already from the Italian Constitution and it is thus not solely connected with the transposition of the European directive adopted in 2003.

Accordingly, the recognition of a fundamental right to family reunification is not strictly related to the transposition of the EU directive because it was the object of a consecration through the prior intervention of the constitutional jurisdiction.

Thus, even if at legislative level, the reference text regulating family reunification in Italy is Legislative Decree No. 286/1998 ("*Consolidated Act on Immigration and the condition of third country nationals*") [88], concerning the provisions

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[87] See A. Crescenzi, *Family reunification and the Italian case*, in R. Friedery, L. Manca, R. Rosskopf (eds.), *Family Reunification: International, European and National Perspectives*, Berlin, 2016, p. 135.

[88] Legislative Decree 25 July 1998, No. 286 on "Consolidated Act of Provisions concerning immigration and the condition of third country nationals", published on the Gazzetta Ufficiale No. 191 of 18 August 1998.

regulating immigration and the status of foreign nationals – namely Title IV, devoted to family unity and the protection of minors (Articles 28, 29, 29 *bis* and 30), transposing the said EC Directive (see below para. 4.1) – , it is important to move from a review of the Italian constitutional provisions, revealing a particularly rich legal tradition on family matters together with the relevant Italian Constitutional Court's case law referring to it.

Indeed, the Italian Constitution is one of the constitutional texts that most provides for specific provisions regarding the family [89], reflecting a more general strategy the Constituents pursued (together with social rights for workers and the reform of school institutions) for the transformation of the Italian society [90] (in this perspective it is miningful that Article 29 Constitution, devoted to the family, opens Title II of the First Part of the Constitution, entitled to "Ethical and social rights and duties") and clearly showing the public relevance assigned to the principles regarding the family [91].

The Constitution establishes that "the Republic recognises and guarantees the rights of the family as a natural society", adding that "Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family" (Art. 29 Const.) and "favours through economic incentives and other measures the formation of the family and the fulfillment of related tasks, with special regard to large families (Art. 31 Const.).

Moreover, Article 30 Const. disciplines the duties of parents and entrusts the legislature to ensure that "children born outside of marriage are guaranteed full legal and social protection, consistent with the rights of the members of the legitimate family" and to set "the rules and limits for paternity research".

Against this landscape, with Article 29 the Constituents wanted to clearly affirm the autonomy of the family in front of the State, as to mark a sharp discontinuity of the new Constitution with the former fascist era policies in the field of family law clearly not aimed at providing protection for the family, but on the contrary wishing to put the family itself under the State control with the protection of the different members of the family not devoted to protect their individual rights but to provide them with rights as members of a community considered vital for the State [92]. The democratic Constitution thus refused not only a "totalitari-

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[89] For a comparative analysis see S. CECCANTI, *Costituzioni, famiglie, convivenze in Europa*, in *Federalismi.it*, 2006, 6 aprile 2006.

[90] M. BESSONE, *Art. 29*, in G. BRANCA (ed.), *Commentario della Costituzione*, *Rapporti etico-sociali (artt. 29-34)*, Bologna-Roma, 1976, p. 3; C. GRASSETTI, *I principi costituzionali relativi al diritto di famiglia*, in *Commentario Calamandrei-Levi*, I, Firenze, 19650, p. 286.

[91] P. BARILE, *Eguaglianza dei coniugi e unità della famiglia* (1955), in *Scritti di diritto costituzionale*, Padova, 1967, p. 175.

[92] E. LAMARQUE, voice *Famiglia (dir. cost.)*, in S. CASSESE (ed.), *Dizionario di diritto pubblico*, Milano, 2006, 2418. See also below para. no. 6.1.1. and scholars cited in footnotes nos. 191, 192, 193.

an notion" of the family, but also rejected the patriarchal gerarchic family characteristic of the Roman-German legal tradition which had been used as a justification for provisions clearly infringing the right to marry [93].

As it has been precisely noted [94], also considering the Constitutional Court's case-law and its use of contitutional parameters in decisions regarding family law matters [95], from Articles 29 and 30 one could say that in the Italian Constitution protection is certainly afforded in two scenarios: one, deriving from marriage, regarding mainly "horizontal relationships" among the spouses, and the other one giving protection to the "vertical relationships" among parents and their children, irrespective whether taking place in a legitimate family or in a *de facto* family as both are guaranteed [96].

In this context, in the Italian Constitutional Court' case law the right to family reunitication has been inscripted as a dimension of the fundamental right to family unity protected by Articles 29 and 30 of the Italian Constitution as constitutional provisions that protect the family and, within the family, minor children [97].

The principle of unity of the family, textually recognised in Article 29 Const., though poorly used in its initial dimension as limit to the principle of equality of the spouses [98], with the important reform of Italian family law in the mid Seventies has turned into an autonomous principle (the family unity being considered as physical unity) to be preserved also through positive obligations from the State, thus gaining a role very much similar to the one played by the right to family life protected under Art. 8 ECHR [99].

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[93] M. GATTUSO, *La Costituzione e il matrimonio fra omosessuali*, in *Il Mulino*, 3/2007, 455.

[94] M. MANETTI, *Famiglia e Costituzione: le nuove sfide del pluralismo delle morali*, in *Rivista AIC* del 2/7/2010; E. LAMARQUE, *Gli articoli costituzionali sulla famiglia: travolti da un insolito (e inesorabile) destino*, in *La «società naturale» e i suoi "nemici"*, cit., p. 193.

[95] See Italian Constitutional Court, judgement n. 86/2009.

[96] See B. PEZZINI, *Dentro il mestiere di vivere: uguali in natura o uguali in diritto?,* in R. BIN, G. BRUNELLI, A. GUAZZAROTTI, P. VERONESI, A. PUGIOTTO (eds.), *La «società naturale» e i suoi "nemici". Sul paradigma eterosessuale del matrimonio*, Torino, 2010, 11-12, affirming «da un lato, l'uguaglianza dei sessi procede nella parificazione di padre e madre nel ruolo genitoriale, dall'altro, l'art. 30 relativizza l'art. 29 e la sua definizione di famiglia (legittima), precludendo qualsiasi interpretazione che costruisca un nesso rigido tra filiazione, famiglia e matrimonio»; e, ancora, la differenza tra famiglia legittima e famiglia di fatto «riguarda essenzialmente relazioni orizzontali tra i coniugi; mentre famiglia legittima e famiglia di fatto restano equiparabili in maniera molto netta nell'ambito delle relazioni verticali, cioè delle relazioni dei genitori con i figli». See also E. LAMARQUE, *Gli articoli costituzionali sulla famiglia: travolti da un insolito (e inesorabile) destino*, in *La «società naturale» e i suoi "nemici"*, cit., p. 193.

[97] Italian Constitutional Court, judgement n. 28/1995, conclusions on points of law n. 4.

[98] The Constitutional Court affirmed that as an excpetion to the principle of moral and legal equality of the spouses, it had to be subject to a strict interpretation (judgement n. 64/1961).

[99] See F. BIONDI, *Famiglia e matrimonio. Quale modello*, in F. GIUFFRÈ, I.NICOTRA (eds.), *La famiglia davanti ai suoi giudici*, Napoli, 2014, p. 3 ff.

Based on this legal reasoning, the right to family reunification has been recognised as a fundamental right of the person which has to be guaranteed in principle also to a foreign national: the duty and right of parents to support, raise and educate their children, and thus to keep them together, and the right of parents and minor children to maintain a family life together within the unity of the family are in principle guaranteed also for foreign citizens [100].

Being undisputed the fundamental right essence of family reunification, actually following a diachronic evaluation, two "movements" can be detected in the Italian Constitutional Court's case law recognizing a fundamental right to family reunification for migrants [101].

In a first phase, the Italian Constitutional Court's case law showed a tendency towards greater guarantees for the freedom of movement for non-European 'foreigners', with constitutional rulings which appreciated the necessity to make an exception to general limitations with the aim of allowing foreigners to exercise inviolable rights [102].

A clear illustration of such "extensive" approach is judgement no. 28/1995, adopted at a time where no comprehensive legislation on immigration was in place in Italy, but only a piece of legislation that tried to give a first regulation to specific aspects of the migration phenomenon maily related to to the labour market.

In this decision, as noted, the Italian Constitutional Court acknowledged the fundamental right of family unity, as anchored in the Italian Constitution and other international instruments, giving a particular relevance to the family life and cohabitation for exercising the rights and duties towards the children provided by the Italian Constitution, which the Court considered granted also to Third Country Nationals.

To this respect, the Court conceived the right to family reunification as a proper fundamental right protected at constitutional level, which could only be limited or balanced against other constitutional values equally protected at the same con-

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[100] Ibid.

[101] For this perspective see G. BASCHERINI, *Immigrazione e diritti fondamentali*, Napoli, 2007, p. 310 ff; P. BONETTI, *Diritto all'unità familiare e tutela dei minori*, in B. NASCIMBENE (ed.), *Diritto degli stranieri*, Padova, 2004, p. 863 ff.; M. MANETTI, *Il ricongiungimento familiare nel diritto italiano*, in R. PISILLO MAZZESCHI, P. PUSTORIO, A. VIVIANI (eds.), *Diritti umani degli immigrati*, p. 39 ff. F. BIONDI, *L'unità familiare nella giurisprudenza della Corte costituzionale e delle Corti europee (in tema di ricongiungimento familiare e di espulsione degli stranieri extracomunitari*, in N. ZANON (ed.), *Le Corti dell'integrazione europea e la Corte costituzionale italiana*. *Avvicinamenti, dialoghi, dissonanze*, Napoli, 2006, pp. 63-98.

[102] See P. GIANGASPERO, *Limiti al ricongiungimento familiare e diritti fondamentali degli immigrati*, in *Famiglia e Diritto*, 2005; F. ANGELINI, *Il diritto al ricongiungimento familiare*, in F. ANGELINI, M. BENVENUTI, A. SCHILLACI (a cura di), *Le nuove frontiere del diritto dell'immigrazione: Integrazione, diritti, sicurezza*, Napoli, 2011, p. 166 ss.

stitutional level, qualifying the piece of legislation under scrutiny as a law giving effect to a fundamental right and as such to be protected in an extensive manner not only – as provided by the law – for a migrant worker but also to a foreign domestic worker to reunite with her minor child from a previous marriage.

In the same extensive approach, judgement no. 203/1997 then ruled in favour of a non-European parent the right to reside in the country in order to rejoin his or her youngest child, legally residing in Italy with another parent not linked to the former by marriage: 'the guarantee of cohabitation for the family unit is rooted in the constitutional regulations that ensure the safeguarding of the family, and in particular, of underage children". The judgement recognised the right to family reunification as entrusted to each member of the family and not only to the householder.

In a second phase, after the EU and national legislators had enacted specific provisions limiting such right, the Constitutional Court took a different stance: on one side, it recognised that the principle of family unity could be invoked autonomously as requiring a positive obligation of the State to allow the reunification of family members, but on the other side it delimited such right in a rather narrow way by recognizing it exclusively to the legitimate nuclear family created through marriage as composed by the spouses and, if present, by their children (judgement no. 224/2005).

In this perspective, the Constitutional Court left the legislator to decide in its discretion the extent of the notion of "family", as well as – in cases of reunification or expulsion of third country nationals – the balancing among the family reunitification of the foreign citizen and the competing opposite interest of the State to control the entry into its territory.

According to this well-settled case law, family reunification has been given a double essence as the Constitutional Court has drawn a distinction between an inviolable "*constitutional right to family unity*", protecting family links among the spouses and among parents and their children, and on the contrary an "*interest in issues of affection*" for all other family links [103].

In the latter case, no constitutional values are there to be balanced, but on the contrary "margins of discretion open up for the legislator to balance those issues of affection against other important issues" [104]. As a further clarification, the Constitutional Court stated that family solidarity does not imply cohabitation, which on the contrary has to be guaranteed, as a pre-condition for the family unity, only to the members of the nuclear family.

Such a distinction clearly paves the way for defining whether positive obligations upon the State are to be considered. In this perspective, under Art. 29 Const.

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[103] G. SIRIANNI, *"Diritto alla unità familiare" e "interesse agli affetti" dei cittadini extracomunitari secondo la Consulta* (6/4/2006), in www.costituzionalismo.it.

[104] Italian Constitutional Court, judgement no. 224/2005.

the Court recognized a positive obligation for the State to allow the family reunification of the spouse and, under Art. 30 Const. – with a specific protection for the "best interests of the child" – among the parent and the natural child and among an unmarried couple with their children [105], whereas it considered not unreasonable the exclusion of reunification with ascendants [106] and adult children [107] beyond the cases provided by the legislator (for the legislative provisions on family reunification see below, paragraphs 4.1. and 7).

For the Constitutional Court, in reunification cases involving adult children, the legislator could balance issues of affection against other important issues. In particular, the Court stated that it is reasonable only to allow reunification with adult children where there is a situation of need resulting from a permanent inability to provide for their own needs on account of their state of health. According to the Court one cannot equate the situation of an adult child to that of dependent parents since, in the case of the former, it can be assumed that any situation of economic dependence is related to outside circumstances and hence can be resolved except in cases where there is an illness that permanently affects the ability to work.

For the Italian Constitutional Court, in any case, family bonds in the Italian territory of third country nationals are to be considered though a *careful individual assessment* at the occasion of the issue or renew or revocation of the residence permit for a foreign national who has exercised the right of family reunion or for a reunited family member.

In its judgement no. 202/2013, concerning national provisions that provided for the automatic refusal to issue or renew or revocation of the residence permit of an individual convicted of certain serious criminal offences, the Court considered that whilst the legislation allowed for exceptions in cases in which the right to family reunion had been exercised, these did not apply in situations in which the person concerned was entitled to exercise such a right, but had not done so. The Court struck down the legislation as unconstitutional, violating in the first instance Articles 2, 3, 29, 30 and 31 of the Italian Constitution insofar as it did not extend the enhanced protection provided for thereunder to all cases in which the foreign national has family ties in the country. But the Court declared uncostitutional that legislation also with refence to Article 8 ECHR, as applied by the European Court of Human Rights, as an interposed rule in these proceedings with reference to Article 117(1) of the Constitution, expressly applying the "concreteness" of the tests tipycally supplied by the ECtHR in its case-law into a contitutional adjudication system designed, to the contrary, as an abstract model deal-

[105] Italian Constitutional Court, judgement no. 203/1997.

[106] Italian Constitutional Court, orders no. 224/2005, 464/2005.

[107] Italian Constitutional Court, orders no. 187/2004, 224/2005, 464/ 2005, 162/ 2006, 368/2006.

ing with norms, rather than facts,[108] (the Court expressly quoted a ECtHR's judgment actually referred to Italy, case *Cherif and others v. Italy* of 7 April 2009).

The "rationale" for this decision, then, rested not only on the national constitutional parameters, but also on the case-law of the European Court of Human Righst on art. 8 ECHR (see below para. 5.1.). The Constitutional Court actually stated:

> "This level of attention to the specific circumstances of the foreign national and his family, guaranteed by Article 8 ECHR as applied by the European Court of Human Rights, is an expression of a level of protection for family relations which is equivalent, insofar as is relevant in the case under examination, to the protection granted to the family under Italian constitutional law. Consequently, the contested provision must be ruled unconstitutional also on this basis, due to the violation of Article 8 ECHR, in accordance with constitutional case law which assigns this Court the task, when carrying out its unique role, of making a 'systemic and unitary' assessment of fundamental rights such as to ensure the "fullest extent of the guarantees" available for all relevant rights and principles under constitutional and supranational law, considered overall, which are at all times inter-related with one another"[109].

This important decision from the Italian Constitutional Court thus conferred in family reunification matters what in the Italian legal dotrine has been termed an "*ad hoc* balancing delegated to courts"[110] (but actually in this case also to the immigration national administrative authories), leaving enough discretion to the judge in balancing the competing interests in each case at stake.

In this decision it is also important to aknowledge what the Constitutional Court coined as its "unique role" of making a "systemic and unitary" assessment of fundamental rights such as to ensure the "fullest extent of the guarantees" available for all relevant rights and principles under constitutional and suprana-

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[108] As clearly pointed out by A. GUAZZAROTTI, *Strasbourg Jurisprudence as an Input for "Cultural Evolution" in Italian Judicial Practice*, in G. REPETTO, *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective*, Cambridge-Antwerp-Portland, 2013, p. 55, "constitutional adjudication in Italy is mostly a matter of 'norms' and not of 'facts', in accordance with an abstract model. The Italian Constitutional Court has to compare the meaning of a statute law against the meaning of one or more articles of the Constitution, even if the potential conflict between the two sources of law must arise from a concrete matter of application (preliminary questions by ordinary courts). Contrary to this model of adjudication is the practice of the ECtHR, which is increasingly eroding the Constitutional Court's mission as to the protection of human rights at the internal level. The way Strasbourg decides its cases is, mostly, a matter of facts, and the attention the ECtHR gives to the factual dimension of the cases has a seminal influence over the final judgment".

[109] Italian Constitutional Court judgement no. 202/2013, Conclusions on points of law no. 5.

[110] R. BIN, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale*, Milano, 1992, pp. 91 and 127.

tional law which in the last years (since 2015 especially) the Court has actually tried to reinforce regarding the judicial treatment of situations where national law potentially infringes both national fundamental rights, protected by the Italian Constitution, and the ECHR or the EU's Charter of Fundamental Righs, inviting national judges to activate in both cases constitutional review first (as it twill be made clear in the final remarks).

To conclude on the right to family reunification within the contitutional system of protection, it is also important to highlight that the Italian Supreme Court (*Corte di Cassazione*) – the Italian judge of last resort, which is supposed to ensure a uniformity of the interpretation of the law among all Italian courts by virtue of its precedents [111] – with several decisions, also stressed that the right to family reunification is recognised only to Third-Country National legally residing in the Italian territory [112], thus being not sufficient the existence of a family nucleus. Such case-law has been recently confirmed also in relation to expulsion of foreigners, illegally present in the Country: the Court denied a right to remain in Italy in order to exercise a right to family reunification with another foreigner illegally residing without a residence permit [113].

Such a rigid stance, typical of the Italian legal sytem, as to the requirement of a legal presence in the territory for the foreign nationals and, in general, as to the conditions set forth at legislative level to allow their entry and stay (for family reunification permits, see below paragraphs 4.1, 6, 8) has recently been criticized, after the breakout of Coronavirus pandemia that brought to the forefront the problem of the huge number of illegal migrants and the quest for their "regularization". In this perspective it has thus been addressed – precisely moving from the rationale set forth in the previously mentioned 2013 Constitutional Court decision. – the proposal to introduce into the Italian legal system a general provision allowing for a permanent system of regularization based on a specific assessment of their situation and assessment of inexistence of security reasons, as provided in the French legal system [114].

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[111] Royal Decree of 30 January 1941 n. 12 (article 65).

[112] Italian Court of Cassation, First Section, judgements no. 12226/2003; First Section, no. 12223/2003; First Section, no.25026/2005.

[113] Italian Court of Cassation, First Section, no. 22206/2004.

[114] See for the critics an the proposal see P. BONETTI, *Gli effetti giuridici della pandemia del Coronavirus sulla condizione degli stranieri*, in *Federalismi.it*, 20 May 2020.

4. *Contextualising the protection afforded to the right to family reunification within the Italian legislative provisions on immigration and asylum: the progressive restrictive trend*

The restrictive approach progressively taken by the Italian Constitutional Court in adjudicating cases involving the right to family reunification has been clearly connected with a self-restraint orientation towards the legislative discretion of the Italian legislator progressively shaping this subject matter through law.

Family reunification has been poorly regulated for a long time in Italy [115], being Italy mainly a country of emigration until the 70's, the Italian legislature did not intervene until the mid-80's to regulate this subject-matter, thus leaving into force a pre-constitutional legislation, the "Public Security Consolidated Law" (decree no. 773/1931), which looked at foreigners' entry and stay essentially in terms of public order protection [116].

The progressive relevance of the phenomenon of migration paved the way for significant normative changes. The first true comprehensive attempt to regulate the migration phenomenon came in 1998, when the Legislative Decree No. 286/1998 – the Italian "*Consolidated Act of Provisions concerning immigration and the conditions of third country nationals*" (hereafter, the Consolidated Act on Immigration) – was issued. It provided a fundamental set of principles on immigration and on foreigners' legal status and a framework of regulations which are still binding.

The Consolidated Act was characterized by a two-tracks strategy [117], clearly shown by an "integration approach" towards legally resident migrants coexisting with a tough fight against irregular immigration.

On the one hand, in fact, the Consolidated Act established migrants' rights and duties, equalizing them to Italian citizens for what it concerns civil rights and judicial protection (arts. 1-4). The Law also recognized foreigner children's rights and migrant's right to family unity (arts. 28-33).

For the first time even social rights (such as the right to health, education and social integration) received a proper coherent regulation (arts. 34-46).

Rules on migrants' employment and migrant workers' rights were also provided. In particular, a new measure was introduced: a system of "sponsorship", guaranteed by an Italian citizen or by a legally resident foreigner, which allowed migrants to enter the country 'to search for a job', without being previously hired (art. 23).

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[115] See A. CRESCENZI, *Family Reunification and the Italian Case*, cit., p. 136.

[116] See B. NASCIMBENE, *Diritto degli stranieri*, Padova, 2004, p. 4.

[117] See P. PANNIA, S. D'AMATO, V. FEDERICO, *Italy – Country Report*, Working Papers Global Migration: Consequences and Responses Paper 2018/07, May 2018, p. 31.

On the other hand, the Consolidated Act provided an organic regulation of conditions of entry (through the "programmatic document" and the establishment of yearly entry quotas) and stay. The Act entrenched the principle of non-refoulement (art. 19), but it also provided more stringent controls at the borders (art. 9), and a broader recurs to pushback and deportation (arts. 8-13). Temporary detention centres (the so called "Centri di permanenza e assistenza") were established for migrants waiting to be deported (art. 14).

4.1. *The specific provisions regarding the right to family reunification in the "Consolidated Act on Immigration" transposing the Family Reunification Directive 2003/86/EC*

In the Consolidated Act on Immigration, mentioned above, specific provisions regulate the right to family reunification, still binding even if partially amended by following legislation.

Art. 28, recognizes the right to maintain or obtain family unity for Third-Country Nationals holding a residence card or permit of a year or longer with current validity (or for which an application for renewal has been submitted within the statutory time limits) issued for the purpose of employed or self-employed work or on the grounds of asylum, or for education, religious, or family reasons.

As will be discussed in more detail below (para. 9), Art. 29 of the Consolidated Act defines the procedures to apply for family reunification – with a specific more favourable regulation in Art. 29-bis for refugees' family reunification – and Art. 30 regulates residence permits for family reasons.

Specific provisions are devoted for the reunification of children (see below, para. 7.1).

The Consolidated Act was subsequently partially amended by several laws reflecting a clear restrictive trend.

In 2002, law no. 189/2002 [118] (the so called "Bossi-Fini" law) lowered entry quota and strongly linked third nationals' regular entry and residence to employment, establishing a cumbersome procedure for obtaining a regular visa for work reasons [119], alongside more restrictive provisions on expulsion and detention.

As for reunion of family members, the 2012 law provided a restriction among the family members eligible for reunion due to economic reasons, in order to pre-

[118] Law 30th July 2002, No. 189 on "*Changes in Regulations on the Matter of Immigration and Asylum*", published in the *Official Gazette* no. n. 199 of 26 August 2002.

[119] Law no. 189/2002 replaced the previous system of sponsorship with a complicated mechanism where migrants willing to enter the country for work reasons had to demonstrate there was an employer in Italy already committed to hire them.

vent a huge impact on the national security system as reunited family members are ensured in Italy full access to social and health assistance [120].

Thus, for dependent adult children the reunion became admissible if they are unable to support their indispensable necessities of life because of their health conditions entailing total disability.

As for elderly people, the law denied the possibility to apply for reunification with relatives within the third degree if unfit for working. Reunification with dependent parents became possible only if they have no other children in the country of origin or provenance, or if they are over 65 and the other children cannot support them because of serious and documented health reasons [121].

In 2007, the Family Reunification Directive 2003/86/EC on the right to family reunification was transposed into the Italian legal order by Legislative Decree no. 5/2007, and this led to the insertion in the Consolidated Act on Immigration of specific provisions (Art. 29-bis) devoted to refugees' family reunification, entrusting aliens with an already recognised refugee status to apply for family reunification with the same categories of family members and with the same procedures provided for Third-Country Nationals legally residing within national territory.

Meanwhile, as far as asylum is concerned, a number of normative provisions were approved in order to comply with the EU obligations and the construction of a "Common European Asylum System" [122].

In 2008-2009 a profound revision of the legislation regarding immigration was provided by the so called "Security Package" (*Pacchetto Sicurezza*) enacted through laws no. 125/2008 and no. 94/2009, reflecting a prominent security approach to migration using criminal law to fight against illegal entry and residence (called "clandestinity"), [123] with provisions that were partially declared unconstitutional by the Constitutional Court later on [124].

As regards family reunification under the "Security Package", with legislative decree no. 160/2008 a revision of legislation implementing Directive 2003/86/EC brought about further restrictions – inserted into the Consolidated Act on Immi-

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[120] See A. Crescenzi, *Family Reunification and the Italian Case*, cit., p. 137.

[121] See law no. 189/2002, Art. 23.

[122] With legislative decrees no. 85/2003; no. 140/2005; no. 251/2007; No. 25/2008, respectively transposed the EU Directives on "temporary protection", "reception conditions", "qualification", "asylum procedures").

[123] The "Security Package" introduced the "aggravating circumstance of clandestinity" (under which the punishment for a crime committed by an undocumented foreigner could be increased up to one third compared with the same crime committed by an Italian citizen or a regularly resident foreigner), and the crimes of "clandestinity" and of refusal to comply with a removal order issued for illegal entry, together with a broad harshening of detention and expulsion measures.

[124] The Italian Constitutional Court declared the aggravating circumstance of clandestinity unconstitutional (decision no. 249/2010), while dismissed the question of constitutionality of the crime of clandestinity (decision no. 250/2010).

gration, Art. 29 – regarding the exclusion of a minor spouse, and in the case of legal separation, limited the reunification with adult children to the single case in which they are unable to support their indispensable necessities of life because of their objective health conditions entailing total disability [125].

Eventually, in 2014 legislative decree no. 18/2014 transposed the two EU Qualification Directives thus extending to beneficiaries of subsidiary protection status the right to family reunification under the same conditions provided for refugees by the Consolidated Act, consequently removing for beneficiaries of subsidiary protection the need to meet the requirements generally provided (related to income, health insurance, and accommodation requirements, see below para. 8) when applying for family reunification.

5. *"Elsewhere, in the meanwhile …": the protection afforded at the supranational level by the European Courts to the right to family reunification for foreign nationals and its growing influence in the Italian legal order*

Protection for the right to family reunification for foreign citizens in the Italian legal order, already provided at constitutional level, along with its progressive regulation at legislative level, has been hugely alimented by the dialogue between the ECtHR, the CJEU and the national Courts, each of them participating in the development of the European system of human rights protection.

Both the European Court of Human Rights and the Court of Justice of the European Union have interpreted the relevant provisions for family reunification enshrined in the numerous international and regional human rights treaties and in Eu law (both EU primary and secondary law provisions and the EU Charter), thus providing the national courts with important principles to be considered in cases regarding family reunification, not only as regarding the notion of "family" and "family life", but also for the definition of specific obligations for the State.

The relevant influence such case-law has sparkled in the Italian legal order eventually led to a new understanding of family relationships, as accomplished by new legislative provisions enacted (see below paras. nos.6.1. and 6.2.) .

Clearly, the reasons why the European Courts's case-law has come to the forefront in cases dealing with fundamental rights adjudication rests within the Italian constitutional reform of 2001, according to which the national and regional legislatures are required to abide by the EU law and the international obligations (Article 117, para. 1, of the Constitution), and to the domestic authority assigned to the ECHR and EU law by the Italian Constitutional Court, which has undergone a substantial modification though a new case-law inaugurated in 2015 (for the

[125] See Article 29, para. 1, letters a), c), d) of the Consolidated Act on Immigration, inserted though legislative decree no. 160/2008.

ECHR) and in 2017 (for the EU Charter of Fundamental Rights), as in the final remarks will be discussed.

In the following paragraphs a closer examination of the case-law regarding family reunification of both the ECtHR and the CJEU will be provided, so to highlight their important "transformative" impact for the Italian legal order.

5.1. *The extended protection for the right to family reunification in the European Court of Human Rights' case-law: recognizing family bonds in a wider perspective*

Although not explicitly mentioned in the text of the ECHR, the European Court of Human Rights (ECtHR) has held that, in decisions concerning immigration, States must respect the right to family life within the meaning of Article 8 of the Convention, with a right to family reunification flowing from the right to respect family life in Art. 8 ECHR [126] though, as it will be further pointed out, contrary to the EU Family Reunification Directive there is not an absolute obligation to admit the foreigner to enter and reside in the State territory, thus in principle leaving States more discretion in policies, as well as in individual decisions.

In cases involving immigration, the Strasbourg Court's starting point is the right of the State to control the entry of aliens into its territory and their residence there, though the Court has progressively refined its approach considerably restricting the States' prerogatives [127], not only through a wide notion of family but also by imposing positive obligations on the States as regards family reunification. It has in fact aknowledged that where family life as well as immigration are concerned, "the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest" [128].

Thus, while the State's margin of appreciation in the exercise of this right is generally quite wide, it has nonetheless been circumscribed by a range of factors progressively enucleated in the Court's case-law.

The argumentation traditionally followed by the ECtHR in its jurisprudence on Art. 8 ECHR is articulated into a two-steps analysis. In the first instance, the Court verifies whether actually a family life exists and deserves protection. In the

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[126] EChHR, *Gül v. Switzerland*, Application No. 23218/94, Judgement of 19 February 1996; ECtHR, *Boultif v. Switzerland*, Application No. 54273/00, Judgement of 20 December 2001; ECtHR, *Sen v. Netherlands*, Application No. 31465/96, (21.12.2001), paras. 40-41; ECtHR, *Jakupovic v. Austria*, Application No. 36757/97, Judgement of 6 February 2003 about the clear distinction between admission and expulsion.

[127] G. BASCHERINI, *Immigrants' family life in the rulings of the European supranational courts*, in G. Repetto (ed.), *The Constitutional Relevance of the ECHR in Domestic and* European *Law. An Italian Perspective*, Intersentia, 2013, p. 191 ff.

[128] ECtHR Grand Chamber, 3 October 2014, *Jeunesse v. The Netherlands*, Application no. 12738/10.

second instance it verifies whether the contested measure infringes upon the right to family life and in such event the Court follows a clear path: the State's prerogative to control entry must be balanced against the requirements of Article 8(2) ECHR that any interference with the right to family life must be "in accordance with the law", in the interests of one or more legitimate aims, and "necessary in a democratic society" for achieving them, that is to say "justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued" [129].

Before going into deep, it should also be recalled, in the first instance, that the Strasbourg Court's case-law is of paramount importance both for the EU and national legal orders.

In fact, this jurisprudence has influenced heavily both the content of the EU Family Reunification Directive as well as its interpretation by the Court of Justice of the European Union as rights enshrined in ECHR represent also fundamental principles of Union law [130].

On the other side, it is worth highligting that Art. 8 ECHR provides for extensive protection in the domestic legal order beyond EU law, as it can be invoked also by a third contry national (sponsor) exluded from the scope of Family Reunification but falling within the scope of national law [131].

a) *The wide notion of "family" and "family life" under Art. 8 ECHR*

To this respect, the ECtHR case-law interpreting the notion of "family life" of Art. 8 ECHR tends to take a broad conception of "family", informed by the principle of non-discrimination of Art. 14 ECHR [132], emphasising that family life is rooted in real connections, not only in formal legal relationships.

Actually the Strasbourg Court has never offered an exaustive definition of both "family" and "family life" and, on the contrary, through its case law it has provided clarification only on a case-by-case basis like an "*abbecedaire*" [133].

Thus it is no surprise that for the ECtHR a "family life" within the meaning of Article 8 ECHR exists well beyond the traditional nuclear family united upon

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[129] ECtHR, 18 February 1991, *Moustaquim v. Belgium*, Application no. 12313/86.

[130] Art. 6, para. 3, Treaty on European Union.

[131] See Article 1 ECHR enabling all persons falling within the jurisdiction of a Treaty Party, to invoke the Convention.

[132] See C. COSTELLO, *The human rights of migrants and refugees in European law*, OUP, 2015, Chapter 4; H. STALFORD, *Concepts of family under EU law: lessons from the ECHR*, in *International Journal of Law, Policy and the Family*, 2012, Vol. 16, Issue 3, pp. 410-434. F. BIONDI, *L'unità familiare nella giurisprudenza della Corte costituzionale e delle Corti europee (in tema di ricongiungimento familiare ed espulsione degli stranieri extracomunitari)*, in N. ZANON (ed.), *Le Corti dell'integrazione europea e la Corte costituzionale italiana*, Napoli, 2006, pp. 63-98.

[133] F. SUDRE, *La «construction» par le juge europeén du droit au respect de la vie privée*, in Id. (dir), *Le droit au respect de la vie privée au sens de la Convention européenne des droits de l'homme*, Bruxelles, 2005, pp. 11-33, at p. 12.

marriage, not only in the case of relationships between married couples but also between non-married (stable) partners [134], also envolving informal and religious marriages [135]. As regards parents and their children, family ties are created from the moment of a child's birth and only cease to exist under "exceptional circumstances" [136].

The nuclear family certainly is accorded a special protection, as for the the admission of spouses of foreigners with legal residence the Court determined that for married couples "where the existence of a family tie has been established, the State must in principle act in a manner calculated to enable that tie to be developed and take measures that will enable the family to be reunited" [137].

The Court has provided protection also to "extended family" members – such as adult children [138], nephews and nieces [139], family members in the ascending line [140] – but (departing from its wide protection) requiring that they fall within the concept of "family life" provided that additional factors of dependence, other than normal emotional ties, are shown to exist [141], in practice requiring to meet a high threshold both , namely that care for the family member in the host state must be the only option [142] and provided that the are close personal ties

In any case, this attention to recognize protection to family bonds in a wide perspective is all the more important if seen against the background of several national immigration and asylum laws which often take a restrictive approach to defining family members, excluding adult children or family members who are not spouses (for the Italian legislation see below para. 6).

When specifically dealing with respect to family reunification, the ECtHR has a quite consistent jurisprudence with precise requirements. These include, in particular, effective and strong links between the family members concerned and the host country, actual existence of "family life", impossibility to reunite the family elsewhere.

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[134] ECtHR, *Al-Nashif v. Bulgaria*, Application No. 50963/99 (20 June 2002), paragraph 112, with further references.

[135] ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Application Nos. 9214/80, 9473/81 and 9474/81 (28 May 1985), paragraph 63.

[136] ECtHR, *Gül v. Switzerland*, Application No. 23218/94 (19 February 1996) paragraph 32, with further references. On the Court's definition of family life, see B. RAINEY, E. WICKS and C. OVEY, *The European Convention on Human Rights*, Oxford, 2014, pp. 335-338.

[137] ECtHR, *Mehemi v. France (No. 2),* Application no. 53470/99, ECTHR, 10 April 2003.

[138] ECtHR, *A.W. Khan v. the United Kingdom*, No. 47486/06, 12 January 2010, paragraph 32.

[139] ECtHR, *Javeed v.the Netherlands (dec.)*, No. 47390/99, 3 July 2001.

[140] ECtHR*A.W. Khan v. the United Kingdom*, No. 47486/06, 12 January 2010, paragraph 32.

[141] ECtHR, *Senchishak v. Finland*, Application No. 5049/12 (18 November 2014), paragraph 55 with further references.

[142] ECtHR, *Senchishak v. Finland*, cit., paragraph 57.

In reconciling States' migration control prerogatives with the right to respect for family life, the Court's approach has distinguished two types of situations where to apply Article 8 ECHR and which the Court seems to consider with a slightly different orientation.

The first situation concerns family members wanting to join for the purpose of family reunification another member of the family abroad, usually the breadwinner. The second scenario applies when a member of the family is expelled or threatened with expulsion (often as a result of sanctions resulting from criminal proceedings) from the country where he/she and the family live.

Looking at the Strasbourg Court's case-law, it can be observed that the scope of States' negative obligations not to divide families in the expulsion context are more developed than that of their positive obligations to admit family members so that individuals are enabled to enjoy their right to family life and family unity [143].

While, in fact, in cases referring to admission and entry, the Court considers that it must be ascertained whether the State is under a positive obligation to allow for residence [144], in cases instead involving settled migrants whose residence is revoked or not renewed, the Court assumes an interference with the right to family life and checks whether there is a justification for the interference following the test of Article 8(2) of the Convention [145].

b) *The latest approach in ECtHR's case law based on the cuncurrent aplication of Art. 8 and Art. 14 ECHR (Principle of non discrimination): the case of same-sex partnerships-relationships.*

In recent years a main trend in the Strasbourg Court's case law has tried to tackle discriminations in family reunification, expressly addressing that restrictions on family reunification should not be discriminatory, both on grounds of sex and more recently on grounds of ethnic origin [146].

Particularly important for the Italian legal order (see below paras. 6.1. and 6.2) is that ECtHR's case law that put an emphasis on the ties within the family irrespective of the marital status, the sexual orientation or gender identity.

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[143] See F. NICHOLSON, *The "Essential Rights" to Family Unity of Refugees and Others in need of International Protection in the context of Family Reunification*, Research paper, United Nations High Commissioner for Refugees, 2018.

[144] ECtHR, *Gül v. Switzerland*, 19 February 1996, *Reports* 1996-I.

[145] ECtHR, See *Boultif v. Switzerland*, No. 57273/00, ECHR 2001-IX, paragraph 39.

[146] ECtHR, *Biao v. Denmark*, the Grand Chamber found a violation of Article 14 of the Convention in the difference in treatment between certain categories of Danish nationals regarding family reunification, allowing only those who had been Danish nationals for 28 years to enjoy the right. Danish rules were found to amount to indirect discrimination on grounds of ethnicity, as "[n]o difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society".

In 2010 the ECtHR, in *Schalk and Kopf*, clearly affirmed for the first time that a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of "family life" for the purpose of the right to respect for private and family life as enshrined in article 8 ECHR [147], in the same way as the relationship of a heterosexual couple (thus departing from the previous case law which considered same-sex relationshios under "private life").

The Strasbourg Court observed that a rapid evolution of social attitudes towards same-sex couples has taken place in many European countries, as proven by the fact that a considerable number of them have afforded legal recognition to same-sex couples. For this reason, the Court considered it artificial to uphold its previous case law according to which same-sex couples only fell under the notion of 'private life', and not also under the notion of 'family life' within the meaning of article 8 ECHR.

The Strasbourg Court stressed that the notion of family is no longer confined to the traditional marriage-based relationship and may include other *de facto* families, regardless of whether the relationship is established by different-sex or same-sex couples. In the same judgment, the ECtHR also interpreted the right to marry enshrined in article 12 ECHR in the light of article 9 of the EU Charter of Fundamental Rights: the Court stressed that the latter provision has deliberately dropped the reference to 'men and women' made by article 12 ECHR and does not contain any obstacle to recognising same-sex relationships in the context of marriage. Marriage should no longer be considered to be limited, in all circumstance, to opposite-sex partners.

With this interpretation the Strasbourg Court challenged the traditional concept of marriage. However, the ECtHR also affirmed that neither article 12 ECHR nor article 14 ECHR taken in conjunction with article 8 ECHR imposes an obligation on the Contracting States to grant same-sex couples access to marriage. In fact, marriage has deep-rooted social and cultural connotations which may differ largely from one society to another and it is up to each country to decide whether or not to allow same-sex marriage.

Whilst the Strasbourg Court reiterated in its subsequent case law that there is no obligation to grant access to marriage to same-sex couples, it also considered that the interest of a same-sex couple in having the option of entering into a form

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[147] ECtHR, 24 June 2010, *Schalk and Kopf v Austria*, App no 30141/04, paras. 93-94. With regard to the debate on the family life of same-sex couples and their right to marry according to the case law of the European Court of Human Rights, see: S. NINATTI, *Ai confini dell'dentità costituzionale. Dinamiche familiari e integrazione europea*, Torino, 2012; Ian Curry Sumner, Same-sex relationships *in Europe: Trends Towards Tolerance?*, in *Amsterdam Law Forum*, 2011, p. 56 ff; P. JOHNSON, *Homosexuality and the European Court of Human Rights*, 2013, p. 93 ff and p. 146 ff; Pietro PUSTORINO, *Same-Sex Couples Before the ECTHR: The Right to Marriage*, in D. GALLO, L. PALADINI, P. PUSTORINO (eds), *Same-Sex Couples before National, Supranational and International Jurisdiction*, 2014, p. 399.

of civil union or registered partnership had be protected. Thus, in *Oliari and others* [148] the Court ruled that a State, like Italy, that did not provide a legal framework allowing same-sex couples to have their relationship recognised and protected under domestic law, failed to comply with the positive obligation to ensure respect for such couples' private and family life.

These two judgements have been particularly relevant in the family reunification context when in 2016 the Court decided two important cases, again addressing a violation upon Italy.

In *Pajić v. Croatia* the ECtHR found a violation of Article 14 taken in conjunction with Article 8 ECHR in the case of a lesbian couple from Croatia and Bosnia and Herzegovina, whose request for a residence permit for family reunification in Croatia had been denied, as the Aliens Act excluded persons living in a same-sex relationship from the possibility of obtaining family reunification, considering also not relevant the fact they were not cohabiting [149].

Along the same line, the Court decided, in *Taddeucci et McCall c. Italie* [150], the case of a couple made up by an Italian and a New Zealand national (Mr. Taddeucci and Mr. McCall respectively) who considered the refusal by the Italian authorities to issue a residence permit for family reasons to Mr. McCall – on the grounds that he did not qualify as a "family member" under Italian immigration law – constituted a discrimination on the grounds of sexual orientation.

At domestic level, the Italian Supreme Court had actually held such an exclusion compatible with Arts. 8 and 14 ECHR [151] as it considered that these provisions did not impose the inclusion of non-married couples (registered or not) within the legal definition of family members provided by Italian rules on family reunification. In its view, Italian law did not discriminate specifically against same-sex couples because in its margin of appreciation in the field of migration law it excluded any type of non-marital union from the possibility to obtain residence permits on the grounds of family life.

On the contrary, the ECtHR found a violation of Article 14 in conjunction with Article 8 ECHR on the grounds that the couple had been treated on the same less favourable basis as unmarried heterosexual couples, when it was impossible for them to get married in Italy.

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[148] ECtHR, 21 July 2015, *Oliari and Others v. Italy*, Application no. For comments see S. RAGONE, V. VOLPE, *An Emerging Right to a "Gay" Family Life? The Case Oliari v. Italy in a Comparative Perspective*, in *Germ. Law Journ*., 2016, pp. 451-485.

[149] ECtHR, 23 February 2016, *Pajić v. Croatia,* Application No. 68453/13, paragraph 64, citing P.B. and J.S. v. Austria, Application No. 18984/02 (22 July 2010) paras. 27-30; and Schalk and Kopf v. Austria, Application No. 30141/04 (24 June 2010) paras. 91-94.

[150] ECtHR, *Taddeucci et McCall c. Italie*, 2016.

[151] Italian Supreme Court, judgment no. 6441/2009.

Thus the Strasbourg Court maintained that treating same-sex couples differently to opposite-sex couples, for the purposes of granting residence permits for family reasons, violated the applicants' right to freedom from discrimination based on sexual orientation in the enjoyment of their rights under Article 8 of the Convention, recognizing a violation of Article 14 taken in conjunction with Article 8 of the Convention.

c) *ECtHR case-law on State's obligations regarding family reunification*

Apart from the notion of "family" to be adopted, as said, the ECtHR is often required to verify whther there are positive obligations for the State to recognize family reunification.

Compared to its case-law concerning expulsion, where the Strabourg Court provided protection against expulsion for long-settled migrants (as it will be seen further on), the recognition of a specific right to family reunification seems to be in a sort of limbo between States' duty to recognize and respect the human rights of all individuals within their territory vis-à-vis States' right to freely determine – within certain limits – their immigration laws and border control policies.

The Strasbourg Court, in its case law referring to art. 8 ECHR, has affirmed that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there [152]. Moreover, the Convention does not guarantee the right of a foreign national to enter or to reside in a particular country of his choice [153].

Thus, there is no obligation for the domestic authorities to allow a third country national to settle in their country: the corollary of a State's right to control immigration is the duty of aliens to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence [154], and refusing admission does not normally require positive justification.

Where immigration is concerned, Article 8 ECHR, taken alone, cannot be considered to impose on a State a general obligation to respect a married couple's

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[152] ECtHR, *Abdulaziz, Cabales and Balkandali vs. United Kingdom*, cases no. 15/1983/71/107-109, § 67-68, where the Court argued that: "the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest" and "where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory" and that "it may well be that Salah Ahmut would prefer to maintain and intensify his family links with Souffiane in the Netherlands. However … Article 8 does not guarantee a right to choose the most suitable place to develop family life".

[153] ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, No. 50435/99, ECHR 2006-I, paragraph 39.

[154] ECtHR, *Ahmut and. Ahmut vs. the Netherlands*, case no. 21702/93, 17 May 1995, § 67(a).

choice of country for their matrimonial residence or to authorise family reunification on its territory [155]. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest [156].

In general, for the Strasbourg Court, migrants must demonstrate that family life cannot be enjoyed "elsewhere" in order to show that the refusal of family reunification will violate Article 8 of the Convention.

While the first judgments defined an extremely high standard for family reunification, requiring applicants to prove that reunification was the only way to restablish or establish family life [157], the standard has been subsequently lowered asking applicants to show that reunion is the "most adequate" way to family life [158].

Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion [159].

Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious [160]. Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances [161].

For the Strabourg Court, the family reunification process must also be adequately transparent and processed without undue delays and held that there had been of violation of Art. 8 in 2014 with two judgments of the Court in *Tanda-*

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[155] ECtHR, *Jeunesse v. the Netherlands* [GC], § 107; *Biao v. Denmark* [GC], § 117.

[156] ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, §§ 67-68; *Gül v. Switzerland*, § 38; *Ahmut v. the Netherlands*, § 63; *Sen v. the Netherlands*; *Osman v. Denmark*, § 54; *Berisha v. Switzerland*, § 60.

[157] ECtHR, *Gül v. Switzerland*, cit.

[158] ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, Application No. 60665/00 (1 December 2005); *Jeunesse v. the Netherlands*, Application No. 12738/10 (3 October 2014).

[159] ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, § 38; *Ajayi and Others v. the United Kingdom* (dec.); *Solomon v. the Netherlands (dec.).*

[160] ECtHR, *Sarumi v. the United Kingdom* (dec.); Shebashov v. Latvia (dec.).

[161] ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, § 68; Mitchell v. the United Kingdom (dec.); *Ajayi and Others v. the United Kingdom* (dec.); Rodrigues da Silva and Hoogkamer v. the Netherlands; Biao v. Denmark [GC], § 138).

Muzinga v. France and *Mugenzi v. France*, with both applicants recognised refugees in France asking for the reunification of their children staying in third countries who gained reunification only after several years marked by insurmountable difficulties [162].

The case law has developed over time to become more protective of human rights, in particular when the rights of children are at issue [163] as well as in the case of refugees.

The case of reunification of children is certainly the one relying on the most settled case-law, where prominently stands the "best interests of the child" principle, leading recurrently the Court to stress that where family reunification involves children, the national authorities must give precedence to the best interests of the child in the review of proportionality of the interference with family life [164].

In the case of refugees the Court has been sensitive to their particular situation and has strengthened the protection of their right to family reunification, departing from the standards required for non-refugees both for not applying the "elsewhere" approach, as in the case of refugees there are "insurmountable obstacles" to establishing family life in the country of origin, and by not considering whether parents had voluntarily left children in their country of origin as a factor potentially weighing against family reunification. The Court, on the contrary, considering that refugees are by definition forced to flee, acknowledges that they are often also compelled by circumstances to leave family members behind.

d) *ECtHR jurisprudence concerning expulsion and the right to family life and the best interest of the child*

As said, the Strasbourg Court seems generally more inclined to protect the unity of a family group whose members are already living and working in a foreign country, when deportation and/or expulsion of one of the members – usually as a supplementary sanction resulting from a criminal activity – potentially threaten the unity of the family.

In these cases, the Court looks at the proportionality of the measure, the level of family ties and, most recently, at the gravity of the criminal activity for which the measure of deportation/expulsion is applied [165].

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[162] ECtHR, *Tanda-Muzinga v. France*, 10 July 2014, § 82; *Mugenzi v. France*, 10 July 2014.

[163] ECtHR, *Sen v. the Netherlands*, Application No. 31465/96 (21 December 2001). See S. VAN WALSUM, *Comment on the Sen case. How wide is the margin of appreciation regarding the admission of children for purposes of family reunification?*, in *European Journal of Migration and Law*, 2002, pp. 511-520.

[164] ECtHR, *Mugenzi v. France*, 10 July 2014 and *Tanda-Muzinga v. France*, 10 July 2014.

[165] In *Mehemi vs. France* (case n. 85/1996/704/896) the ECtHR had to consider the case of an Algerian citizen born and living in France (and whose family was also residing in France) who was expelled as a supplementary sanctions for drug trafficking involvement. The Court found that (§

The Strasbourg Court has thus more extensively recognised States' negative obligation not to divide families in the expulsion context.

In the 2001 judgment in *Boultif v. Switzerland*[166], the ECtHR's has set out a range of criteria that need to be taken into account when determining whether removal is in line with Article 8(2) ECHR where the person has committed criminal offences.

For the Strasbourg Court the following criteria are relevant: the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he or she is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children in the marriage and, if so, their age; the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin.

Again, a higher level of protection has been provided for children in expulsion cases, where the ECtHR's Grand Chamber judgment in *Üner v. the Netherlands*[167] has made explicit two more criteria: the best interests and well-being of

37): "in view of the applicant's lack of links with Algeria, the strength of his links with France and above all the fact that the order for his permanent exclusion from French territory separated him from his minor children and his wife", the measure in question was disproportionate to the aims pursued.

The Court held a similar approach in the case of *Moustaquim vs. Belgium* (case n. 26/1989/186/246) where the claimant was deported as a consequence of its continuous involvement in criminal activities. However, once again the Court insisted on the criterion of the existence of strong family ties and of the proportionality of the measure. It stated, inter alia that: "Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and that the means employed was therefore disproportionate to the legitimate aim pursued. Accordingly, there was a violation of Article 8" (§46).

Likewise in the case of *Nasri vs. France* (case n. 18/1994/465/546), the claimant – an Algerian national, who was born in Algeria deaf and dumb in June 1960, and went to France with his family in February 1965 – was threatened with deportation following conviction from criminal activity. The Court, as in the previous cases: "… takes the view that the execution of the impugned measure would amount to an interference with the exercise by the applicant of his right to respect for his family life" and that "It accordingly falls to determine whether the deportation in question would satisfy the conditions laid down in paragraph 2 (of article 8), namely whether it would be "in accordance with the law", whether it would pursue one or more of the legitimate aims listed in that provision and whether it would be "necessary in a democratic society" to attain the said aim or aims" (§ 34 and 35).

[166] ECtHR, 2 August 2001, Application no. 54273/00, *Boultif v. Switzerland*.

[167] ECtHR, Grand Chamber, 18 October 2006, Application no. 46410/99, *Üner v. The Netherlands*.

any children of the applicant, in particular the seriousness of the difficulties which any children were likely to encounter in the country to which the applicant was to be expelled; the solidity of social, cultural and family ties with the host country and with the country of destination.

To conclude on this point, the case law above analysed has been developed by the Strabourg Court following its tipical dynamic attitude based on the attention to the facts of each case under scrutiny [168], avoiding to articulate clear principles.

This very much explains its problematic connotation deriving form its case-specificy and even its casuistry which – not rarely – leads to even divergent trends, being thus difficult for legal practictioners and, above all, the domestic ordinary courts and constitutional courts to apply the Convention in the "living meaning" defined by the Strasbourg Court, given also the absence of a preliminary ruling system similar to that provided in the EU legal system (thus being akward sometimes for common judges interpreting national provisions consistently with the "living ECHR" as required by the Italian Constitutional Court in its seminal "twin decisions" n. 348 and 349 of 2007).

Above all, the ECtHR's case-law on family reunification is the perfect example of the impact produced by the "living ECHR" as interpreted by its Court, on the Italian legal system and the risks inherent. As it has been argued, it "has injected a great deal of judicial discretion into the national legal systems", with "a 'delegation of powers' from the Strasbourg authorities to the national ordinary courts" [169], leading in some way to a direct application of the European Convention by ordinary courts. These latter, in fact, can exercise the power to render Italian laws more 'flexible' without passing through the centralized system of constitutional scrutiny performed by the Constitutional Court, by applying the canon of the "interpretation in conformity with the ECHR" set forth in the 2007 seminal "twins decision" by the same Constitutional Court [170].

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[168] V. ZAGREBELSKY, *La giurisprudenza casistica della Corte europea dei diritti dell'uomo; fatto e diritto alia luce dei precedenti*, in *La fabbrica delle interpretazioni, (Convegno annuale della Facolta di Giurisprudenza dell'Universita di Milano-Bicocca, 19-20 November 2009)*, Milano, 2012, pp. 61-71.

[169] Quoting A. GUAZZAROTTI, *Strasbourg Jurisprudence as an Input for "Cultural Evolution" in Italian Judicial Practice*, in G. REPETTO, *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective*, cit., p. 63. On this important topic see also M. D'AMICO, B. RANDAZZO (eds.), *Interpretazione conforme e tecniche argomentative*, Torino, 2009. Again recently see V. SCIARABBA, *Il ruolo della CEDU tra Corte costituzionale, giudici comuni e Corte europea*, Milano, 2019.

[170] See Italian Constitutional Court's decisions nos. 348 and 349 of 2007, which will be further commented below in the final remarks in para. 13.

5.2. *The EU Court of Justice's case-law on the right to family reunification for third country nationals within the framework of the Family Reunification Directive in the light of the EU Charter of Fundamental Rights*

The Court of Justice of the European Union (CJEU) has played a crucial role in the implementation of the Family Reunification Directive, providing an extensive case law on the interpretation of the most sensitive provisions of the Directive, by mainly addressing preliminary questions sent by the national courts of the Member States.

In their essay E.G. Gomez Campelo and M. San Martin Calvo (*The right to family reunification in the Eu and the case-law in accordance therewith*, published in this Volume), have already provided for extended research and documentation.

Here it is suffice to stress, as a crucial point for the understanding of the "composite" system of fundamental rights protection in Europe: the wide discretionary power entrusted by the EC directive to the national legislators in the implementation procedure has been heavily curtailed by the CJEUwho has interpreted the Directive as a standard Member States are not entitled to lower, being on the contrary required not to deprive the Directive of its effectiveness [171].

The Family Reunification Directive was the first instrument of EU law in which the EU Charter of Fundamental Rights was referred to, despite that the Charter, at the time of the adoption of the Directive did not yet have binding force [172]. In preamble 2 of the Directive it is stated that measures concerning family reunification should be adopted in conformity with the right to respect for private and family life as laid down in the ECHR and in the EU Charter.

Actually, it was precisely in this case law that for the first time ever the Court mentioned the EU Charter of Fundamental Rights, even if at that time it was not legally binding.

The first case to examine provisions of the Family Reunification Directive was *European Parliament v. Council of the EU* [173], in which the European Parliament claimed that several provisions of the Directive breached the fundamental right to family life. In its 2006 judgment, the CJEU rejected this claim but it furher added

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[171] CJEU, 4 March 2010, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, para. 64.

[172] See on the EU Charter of Fundamental Rights, with a particular attention to the Italian legal order, R. BIFULCO, M. CARTABIA, A. CELOTTO (eds.), *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione europea*, Bologna, 2001; L. TRUCCO, *Carta dei diritti fondamentali e costituzionalizzazione dell'Unione europea. Un'analisi delle strategie argomentative e delle tecniche decisorie a Lussemburgo*, Torino, 2013; R. MASTROIANNI, O. POLLICINO et al. (eds.), *Carta dei diritti fondamentali dell'Unione*, Milano, 2017. See also S. PEERS et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, 2014.

[173] CJEU (Grand Chamber), judgement of 27 June 2006, *European Parliament v. Council*, case C-540/03.

that "the Directive *imposes precise positive obligations*, *with corresponding clearly defined individual rights, on the Member States,* since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation" and that the Directive's provisions preserve only "*a limited margin of appreciation for Member States*" (italics added).

It is precisely the notion and extension of such margin of appreciation for Member States and their discretionary powers that the CJEU's case-law on the right to family reunification for third country nationals has regularly been confronted with, being the "rationale" for its numerous decisions judging incompatible with the Directive and the EU Charter of Fundamental Rights (in the meanwhile having acquired legal value) national provisions that over the last years some Member States have set up with a clear restrictive aim so to make family reunification more difficult.

As stressed by the CJEU once more in a recent judgement concerning the margin of discretion available to Member States when assessing dependency of extended family members in applications for family reunification [174], the Directive imposes only a certain degree of harmonisation since it allows for differences between Member States regarding the opportunities for members of a migrant/refugee's extended family to enter and reside. Still, the fact that some EU provisions are optional in nature, therefore leaving it to the discretion of each Member State to decide whether to give effect to the extension of the personal scope of Directive 2003/86 authorised by the Directive. Still, for the CJEU, this does not mean that Member States have complete freedom in the implementation of that provision in order to assess the persons falling within the scope of that provision.

This very idea of the Directive as a treshold actually calls into question also the role that the EU Charter of Fundamental Rights should play in times of "constitutional duplicity" where there is "no exclusive primacy in the interplay between national and European levels" [175].

With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the EU acquired the status of primary EU law on equal footing with the treaties. Unlike human rights treaties like the ECHR, the scope of the Charter is limited. In Article 51(1) Charter it is laid down that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the EU and to Member States when they are implementing EU law. In *Åkerberg Fransson*, the CJEU held that Article 51(1) Charter must be understood as conforming the previous case law of the Court on the extent to which Member States are bound by

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[174] CJEU, judgement of 12 December 2019, case C-519/18, *TB v. Bevándorlási és Menekültügyi Hivatal*, regarding family reunification for refugees.

[175] To quote the words of the Judge of the Italian Constitutional Court Giuliano Amato (see below in the final remarks).

EU law when implementing EU law and, therefore, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations where national legislation falls within the scope of EU law [176]. In order to determine whether a national measure falls within the scope of EU law, one must determine whether there is a direct link between the impugned national measure and an EU obligation. In *NS*, the CJEU held that Member States are also bound by the Charter when they implement a discretionary competence laid down in secondary EU law [177], thus national courts also have to comply with their obligations concerning the protection of the fundamental rights of migrants [178] (and in this field, as seen, Charter provisions resemble a provision from the ECHR, and in so far as this is the case, must be interpreted in line with the corresponding provision and the case law of the ECtHR).

It is specifically laid down in the Charter that none of its provisions extend the field of application of EU law or has the ability to establish a new power or task for it [179], nevertheless, Article 52(3) shall not prevent Union law providing more extensive protection.

In particular Article 53 of the EU Charter "codifies the idea of the floor of protection, according to which EU law sets a minimum which Member States are free to exceed" [180] as far as the domain at stake has not been harmonised at EU level (as Radu and 'Melloni' jurisprudence have stated).

This brings us to the main point: while the EU Charter has been heavily enforced by the CJEU in relation to Member States legislation, not the same has actually happened when at stake was EU legislation and, again, a high degree of non uniformity can be found in the use the CJEU has done of the EU Charter in several fields flowing from an iper-constitutionalization – as in the case of the right to data protection [181] – to a very low application in other fields where social fundamental rights were or in certain areas, as in field of migration.

The CJEU case law on the right to family reunification for third country nationals, while particularly protective in the case of minors [182], have been critized

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[176] CJEU (Grand Chamber), judgement of 26 February 2013, *Åkerberg Fransson*, case C-617/10.

[177] CJEU, (Grand Chamber), judgement of 21 December 2011, *N.S. and others*, case C-411/10.

[178] CJEU, *N.S. and others*, cit., para. 94.

[179] See O. POLLICINO- M. BASSINI, *La Carta dei diritti fondamentali dell'Unione europea nel* reasoning *dei giudici del Lussemburgo*, in *Dir. inf. inform*., 2015, pp. 741-777; L. CALIFANO, Privacy: *affermazione e pratica di un diritto fondamentale*, Napoli, 2016; C, COLAPIETRO, *Il diritto alla protezione dei dati personali in un sistema delle fonti multilivello*, Napoli, 2018; M. TZANOU, *The Fundamenta Right to Data Protection*, Oxford, 2019.

[180] See F. FABBRINI, *Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective*, Oxford, 2014, p. 39.

[181] See Article 51 of the EU Charter of Fundamental Rights.

[182] Particuarly As regards minor children, two judgements of the CJEU are of particular interest. In the joined cases *O. and S.* and *Maahanmuuttovirasto* the Court confirmed the general rule that the

for being too "shy" as using a rather low level of balancing test against (and with this lowering the potentialities for protection present in the EU Charter), for instance, as in the case of the "integration measures" introduced by a few Member States actually clearly measures aiming at preventing the arrival of family members of the foreign national.

This call into question also a more "cooperative" use of the EU Charter of Fundamental Rights by the CJEU and the national Constitutional Courts, as it will be addressed in the final remarks (see below para. 13).

6. *The scope of application for family reunification of third country nationals: clarifying the entitled persons (sponsor and beneficiaries) in the Italian legal order*

The Family Reunification Directive (2003/86/EC) sets out the terms for the exercise of the right to family reunification for third country nationals residing lawfully in the territory of the Member States, specifying (art. 3) that the Directive applies where the "sponsor" (term identifying the alien resident in European territory asking for family reunification) is holding a residence permit issued by a Member State for a period of validity of one year or more and has reasonable prospects of obtaining the right of permanent residence.

Moreover the Directive contains preferential terms for refugees in Chapter V, although Member States may limit the application of these more favourable rules to certain situations [183], while on the contrary it explicitly excludes beneficiaries of subsidiary forms of protection as sponsors [184], leaving thus free Member States for the extension of its regime.

As for the definition of "sponsor" adopted in the Italian legal order, the right to maintain or re-acquire family unity with family members is granted to foreign na-

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substantive provisions of the Directive must be interpreted and applied in the light of Articles 7 and 24(2) and (3) of the EU Charter of Fundamental Rights and Article 5(5) of that Directive. These provisions require the Member States to assess the applications for reunification in question in the interests of the children concerned and with a view to promoting family life.

In another more recent case, *A and S*, the CJEU held that in matters relating to family reunification of refugees, the date of arrival on Member State territory and not the date of application for family reunification should be taken into account for assessing whether a person falls under the definition of 'unaccompanied minor'. According to the judgement delivered in this case, the term 'unaccompanied minor' must therefore be understood as covering a person who was under the age of 18 when they arrived, attained the age of 18 during the asylum procedure, and after having attained the age of 18 applied for family reunification.

[183] For example by applying it only to family relationships which were formed prior to the entry of the refugee to a Member State (Article 9(2)), or requiring the applications for family reunification to be submitted within a period of three months after the granting of the refugee status (Article 12(1)).

[184] Family Reunification Directive, Article 3(2)(c).

tionals holding one of the following residence permits[185] (thus considered as "sponsor"): a) residence card or long-term resident's EU residence permit; b) residence permit of a year or longer, issued for the purpose of employed or self-employed work or on the grounds of asylum/international protection, education, religious reasons, family reasons or subsidiary protection; c) a permit pending citizenship.

The receipt of a residence-permit renewal application enables a third-country national to apply for a family reunification authorisation.

For refugees and beneficiaries of subsidiary protection special provisions are in place (see below para. 12).

Looking at beneficiaries, the Directive provides that this right extends only to nuclear family members as beneficiaries, although Member States *may* extend the right more broadly to other family members.

As for Italy, according to Art. 29, para. 1, of the Consolidated Act on Immigration, family members eligible for family reunification are only the following:

a) the spouse, if not under 18 years of age and if not legally separated (and unless the existence of another marriage is ascertained);
b) unmarried children under 18 years of age, including children of the spouse and children born out of wedlock, provided that the other parent, if there is another parent, has given his or her consent. It is worth to note that the term 'children' includes adopted children and children in foster care and minors under guardianship in the country of provenance.
c) dependent children who have reached their majority, if they are unable to support their indispensable necessities of life because of their health conditions entailing total disability;
d) dependent parents (not including the parents of the spouse), if they have no other children in the country of origin or provenance who can support them, and parents over 65 if other children cannot support them for serious and documented health reasons. However, in this last case, reunification with a parent is not allowed if the parents is married to a third-country national who is already within national territory.

Taking into consideration the above mentioned categories, it is worth to note that family reunification of parents over 65 and adult children is possible for persons who are physically dependent and have documentation certifying total disability or serious health reasons[186]. In this case, a doctor appointed by decree by the Italian diplomatic or consular mission in the country of origin or provenance of the family member to be reunited issues such documentation, at the expenses of the applicant. An official translation of these documents is required.

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[185] Consolidated Act on Immigration, Art. 28.

[186] Consolidated Act on Immigration, Articles 29(1)(c) and 29(1)(b-bis).

Moreover, the family member of an EU national keeps his or her residence right even if the sponsor dies or leaves the country. If the family members are EU nationals, they keep the residence right if they have accrued the right to permanent residence or if they can meet the requirements for remaining in Italy themselves. By contrast, if family members are third-country nationals, they are entitled to remain in Italy if they have accrued the requirements for permanent stay in Italy and have lived in Italy for at least a year before the death of the sponsor; or if they have a working activity and a sufficient income for themselves and any family members who are in Italy. If the requirements for staying in Italy have not been met for at least one year from the death, the family members who meet these requirements can convert their residence card into a residence permit for work or study reasons. While a family member of an EU national keeps the right to stay in the country in the case of divorce or marriage annulment, this provision is not applicable to third-country nationals.

6.1. *In search for clarification: which notion of "family" in the Italian constitutional landscape, relevant for the right to family reunification of Third-Country Nationals?*

As known in the Family Reunification Directive which applies to a third-country national who wants to join his (or her) spouse (also a third-country national) when moving to, or within, EU territory, has not addressed marriage qualification issues in respect of the interpretation of the term 'spouse'.

This entails that the Directive makes no further specification regarding the applicability of the concept of 'spouse' to same-sex marriage and leaves it to the Member States to decide whether to authorise the entry and residence of the unmarried partner with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership. During the preparatory work that led to the final text of the Directive, political reasons convinced the EU institutions to avoid any further clarification of the concept of spouse and any explicit extension to same-sex couples, as that would be unacceptable to certain Member State [187].

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[187] The original broad approach of the European Commission, according to which the term 'spouse' included also same-sex marriages, is evident in the answer that the Commission gave to a specific question of the Italian delegate and that can be read in Council of the European Union, Interinstitutional File 2001/0111 (COD), no 15380/01, 18 December 2001, 7. The changing approach and the decision to intend the term 'spouse' to refer to heterosexual couples only can be observed in Council of the European Union, *Interinstitutional File*, 2001/0111 (COD), no 10572/02, 10 July 2002, 11. See SCOTT TITSHAW, *Same-Sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives*, in *Boston U Intl LJ*, 2016, p. 45; S. MARINAI, *Recognition of same-sex marriages celebrated abroad: the importance of a bottom-up approach*, in *European Journal of Legal Studies*, 2016, pp. 10-37.

As shown, the wording of Article 29 Constitution seems to be characterized by a gender-neutral notion [188], as it declares that, recognising the rights of the "family as a natural society founded on marriage", the Italian Republic proclaims "the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family".

The Constituents aimed "to withdraw [the family] from the vicissitudes of political controversy to place [it] beyond the reach of majorities and officials", Hence the adjective "natural," as opposed to "marriage" – a typical institution of positive law – in the language of Article 29. It does not claim a certain nature, but affirms that family exists, as a community, before the State [189].

So, apparently, from a linguistic point of view, Article 29 might be the source for legitimizing a non-traditional definition of family, which may imply non-conventional forms of marriage, including same-sex unions [190]. Still, contrary to other constitutions and the ECHR as well, the Italian Constitution in its Article 29 connects the notion of "family" to the notion of "marriage" [191].

Article 29 of the Italian Constitution sees marriage as the 'foundation of a family as a natural society', thus ratifying in Italian law the principle of "favor matrimonii", which allows a legitimate family to enjoy privileged protection with respect to other types of social organisations that only benefit from the general protection offered by Article 2 of the Constitution.

Still, the "elastic" constitutional model of family reflected in the Italian Constitution [192] contributed heavily, together with the principle of "openness" towards the

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[188] See M. WINKLER, *Same-sex marriage, Italian style*, in *Cardozo Journal of Law & Gender*, Volume 23, pp. 11 ff.

[189]See Italian Constitutional Court decision n. 138 of 2010. On the contradictions of Article 29 of the Constitution see R. BIN, *La famiglia: alla radice di un ossimoro*, in *Studium Iuris*, 2000, p. 1068; F. DONATI, *La famiglia nella legalità costituzionale*, in *Rivista AIC*, n. 4/2014.

[190] See F. ALICINO, *The road to equality. The same-sex relationships within the European context*, Luiss SOG-WP25/2015.

[191] See F. BIONDI, *Articolo 29*, in F. CLEMENTI et al. (eds.), *La Costituzione italiana*, Vol. I, Bologna, 2018, p. 198. On the interpretation of Article 29 of the Italian Constitution see R. BIN, *Per una lettura non svalutativa dell'art. 29*, in R. BIN, G. BRUNELLI, A. GUAZZAROTTI, A. PUGIOTTO e P. VERONESI (eds.), *La "società naturale" ed i suoi "nemici". Sul paradigma eterosessuale del matrimonio*, Giappichelli, Torino, 2010, p. 41.

[192] M. D'AMICO, *I diritti contesi*, Milano 2008, 87; G. BRUNELLI, F*amiglia e Costituzione: un rapporto in continuo divenire*, in C. MANCINA e M. RICCIARDI (eds.), *Famiglia italiana. Vecchi miti e nuove realtà*, Donzelli, Firenze, 2012, pp. 69-74; ,C. ESPOSITO, *Famiglia e figli nella costituzione italiana*, in Studi in onore di A. Cicu, II, Milano, 1951, 553 ss: M. BESSONE, *Rapporti etico-sociali*, in *Comm. Scialoja-Branca*, *sub artt. 29-31*, Bologna-Roma 1976, p. 1 ss.; R. BIAGI-GUERINI, *Famiglia e Costituzione*, Milano, 1989; G. GIACOBBE, *Il modello costituzionale della famiglia nell'ordinamento italiano*, in *Riv. dir. civ.*, 2006, I, p. 481 ss.; A. MORRONE, *sub art. 2*, in *Codice della famiglia*, a cura di M. SESTA, I, Giuffrè, Milano 2009, 34 ss.; M. SESTA, *sub artt. 29, 30, 31 Cost*., in *Codice della famiglia*, cit.; M. MANETTI, *Famiglia e Costituzione : le nuove sfide del pluralismo delle morali*, in *Rivista AIC*, n. 00 del 2010; G. CERINA FERRONI, T.E. FROSINI, *Presentazione* alla Sezione monografica *La*

international legal system (Articles 10 and 11 Italian Constitution), to the construction of a model of family along new lines through the "judicial dialogues" among national and supranational courts (both the European Court of Human Rights and the Court of Justice of the EU) that elected family law among the most preferred area for their experiment [193], as well as under the influence of legislative harmonisations pertaining specific aspects of family law developed by the EU legislator.

6.1.1. *From a traditional concept …*

Going back to its first judgements, one could say that the Italian Constitutional Court adopted a restrictive notion of 'legitimate family', limiting it to the family nucleus formed by the 'marriage of the natural father with the mother, composed of such a couple with legitimate children', excluding the ancestors and the collateral line of the natural parent [194].

Nevertheless, the Constitutional Court has not denied the so-called "extended family" the more generic protection of the principle of social solidarity (Art. 2 of the Constitution), as occurred for unmarried cohabitees [195].

With judgement n. 138 of 2010, the Italian Constitutional Court categorically affirmed that in Italy same-sex marriage does not have any constitutional ranking. In particular, it stated that Articles 2, 3 and 29 of the Italian Constitution could not be interpreted in such a way as to legally recognise same-sex marriage. The Constitutional Court interpreted Article 29, specifically devoted to family and marriage, as embodying a "naturalistic definition of family" that, in turn, is based on a "traditional concept of marriage", both presupposing a gender diversity [196] (the

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tutela della famiglia nelle democrazie contemporanee: tra pluralismo dei modelli e multiculturalismo, in *DPCE* 2010, 392; F. BIONDI, *Quale modello costituzionale*, in F. GIUFFRÈ, I. NICOTRA (eds.), *La famiglia davanti ai suoi giudici*, Napoli, 2014, p. 3 ff.; R. BALDUZZI, *Il modello costituzionale italiano di famiglia e l'evoluzione dei rapporti sociali*, in *Jus-online*, 2015, n. 2

[193] See A. RUGGERI, *Famiglie, genitori e figli attraverso il "dialogo" tra le Corti europee e Corte costituzionale: quali insegnamenti per la teoria della Costituzione e delle relazioni interordinamentali*, in Id., *Itinerari di una ricerca sul sistema delle fonti. XVIII. Studi dell'anno 2014*, Torino, 2015, p. 176 ff.;

[194] See Italian Constitutional Court, judgments no. 79/1969, no. 82/1974 and no. 97/1979.

[195] ICC, judgments no. 559 of 1989 e no. 404 of 1988.

[196] Italian Costitutional Court no. 138 of 2010. For comments see S. DAL CANTO, *Le coppie omosessuali davanti alla Corte costituzionale: dalla "aspirazione" al matrimonio al "diritto" alla convivenza*, su www.rivistaaic.it., luglio 2010; A. LORENZETTI, B. PEZZINI, *Unioni e matrimoni* same-sex *dopo la sentenza 138 del 2010. Quali prospettive?,* Napoli, 2011; B. PEZZINI, *Il matrimonio* same sex *si potrà fare. La qualificazione della discrezionalità del legislatore nella sentenza n. 138/2010 della Corte costituzionale*, su www.rivistaaic.it, luglio 2010; S. PRISCO, *Amore che vieni, amore che vai. Unioni omosessuali e giurisprudenza costituzionale*, Napoli, 2012; A. PUGIOTTO, *Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio*, su www.forumcostituzionale.it, 2010; R. ROMBOLI, *La sentenza 138/2010 della Corte costituzionale sul matrimonio tra omosessuali e le sue interpretazioni*, su www.rivistaaic.it, 2011; A. RUGGERI, *"Famiglie" di omosessuali e famiglie di transessuali: quali*

judgment was afterward confirmed by two successive decisions [197]).

In its 2010 decision the Court considered the provisions of the Civil Code governing marriage, following references from two Courts seized with applications from homosexual couples seeking recognition of their right to marry following refusals by the civil registrar to publish notice of their intention to marry. The referring courts argued that since homosexual marriage is neither expressly permitted or prohibited under Italian law, there is therefore a gap in the legal system which it falls to the Constitutional Court to fill.

Still, using several different hermeneutical canons (evolutive, intentionalist, literal and originalist [198)] the Italian Constitutional Court declared that the provisions of the above-mentioned Article 29, in conjunction with Article 30 (para. 1.), must be interpreted in the traditional manner, in the same way as the constitutional drafters contemplated them in 1948, when the Italian Charter entered into force, ruled that the content of Article 29 reflects the provisions affirmed by the 1942 Italian Civil Code and secondary legislation adopted thereafter, which reserve the rights to marry and found a family for different sex couples only. So far as Article 29 of the Italian Constitution is concerned, only opposite-sex marriage is recognized as marriage by the Italian legal order. The same conclusion has been reiterated by the Court of Cassation in its judgments n. 4184/2012 and 2400/2015 [199].

But the Constitutional Court showed in any case its awareness of sociocultural changes occurring over time in this field. So, in the same 2010 decision it added that Article 2 of the Italian Constitution provides a constitutional protection for same-sex unions that, for this way, are considered 'social groups', within which everyone has the right to develop his personality, so providing gay unions for the first time with a constitutional recognition.

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prospettive dopo Corte cost. n. 138 del 2010?, su www.rivistaaic.it, 4, 2011; L. SCAFFIDI RUNCHELLA, *Il riconoscimento delle unioni same-sex nel diritto internazionale privato*, Napoli, 2012; A. SCHUSTER, *Il matrimonio e la famiglia omosessuale in due recenti sentenze. Prime note in forma di soliloquio*, su www.forumcostituzionale.it, aprile 2012; A. SPERTI, *Omosessualità e diritti. I percorsi giurisprudenziali e il dialogo globale delle corti costituzionali*, Pisa, 2013; P. VERONESI, *Il paradigma eterosessuale del matrimonio e le aporie del giudice delle leggi*, in *Studium iuris*,10, 2010, p. 997 ss.

[197] See Italian Constitutional Court, decisions no. 276/2010, no. 4/2011.

[198] See Italian Constitutional Court, judgment n. 138/2010, para. 8: "as is clear from the *travaux préparatoires* cited, the question of homosexual unions remained entirely unaddressed within the debate conducted within the Assembly, even though homosexuality was by no means unknown. When drafting Article 29 of the Constitution, the delegates discussed an institution with a precise articulation and which was regulated in detail under civil law. Therefore, absent any different references, the inevitable conclusion is that they took account of the concept of marriage defined under the Civil Code which entered into force in 1942 and which, as noted above, specified (and still specifies) that married couples must be comprised of persons of the opposite sex". See C. TRIPODINA, *L'argomento originalista nella giurisprudenza costituzionale in material di diritti fondamentali*, in F. Giuffrè-I. Nicotra (eds.), *Lavori preparatori ed* original intent *nella giurisprudenza della Corte costituzionale*, Torino, 2008, p. 231 ff.

[199] Court of Cassation, Sec. I civil, sentence 4 November 2011-15 March 2012, n. 4184; Court of Cassation, Sez. I civile, sentence 30 October 2014-9 February 2015, n. 2400.

The Court, following Article 2 of the Constitution, retained that social grouping must be deemed to include all forms of simple or complex communities that are capable of permitting and favouring the free development of the person through relationships, within a context that promotes a pluralist model. According to the Court, this concept must also include homosexual unions, understood as the stable cohabitation of two individuals of the same sex, who are granted the fundamental right to live out their situation as a couple freely and to obtain legal recognition thereof along with the associated rights and duties, according to the time-scales, procedures and limits specified by law.

However, the Court found that the aspiration to this recognition, which necessarily postulates legislation of a general nature, aimed at regulating the rights and duties of the members of the couple, could not solely be achieved by rendering homosexual unions equivalent to marriage. The Court thus rejected the questions raised on the grounds that they sought to obtain a substantive judgment not required under constitutional law, and that it fell to Parliament to determine, exercising its full discretion, the forms of guarantee and recognition for the same-sex unions, whilst considered that the Constitutional Court has the possibility to intervene in order to protect specific situations The Constitutional Court thus made it clear that the Italian Parliament had the duty to regulate the status of same-sex social groups, providing appropriate forms of legal protection for them. This also implies that, although the Parliament retains a degree of discretion in this area, the legislation must in any case safeguard the fundamental rights of persons concerned.

Lastly, the Constitutional Court, in judgment n. 170/2014, concerning a case of "forced divorce" after gender reassignment of one of the spouses, vehemently urged the legislator to put an end to the legal vacuum affecting the regulation of same-sex relationships, by providing an alternative to marriage. But at the same in this case the Court judged as constitutionally illegitimate the norm that imposed the dissolution of the marriage if the spouses did not want to dissolve the conjugal bond. Consequently, the Court of Cassation, in 2015 established 'the removal of the effects of the automatic dissolution of marriage vows' [200].

Italian higher courts repeatedly called for the legislative power to fill the existing legal gap by adopting a new law. That law was also requested by the European-supranational system of human rights protection.

6.1.2. … *To its gradual erosion under the influence of European Courts case law*

The contribution of supranational judgments was important, if not decisive, particularly European Court of Human Rights rulings regarding Arts 8, 12 and 14 ECHR regarding respect for private and family life, the right to marry and to found a family, and the prohibition of discrimination, respectively. These rights are also

[200] Corte di Cassazione 21 April 2015 no 8097, *Foro it.*, I, c. 2385 (2015).

enshrined in Arts 7, 9 and 21 of the EU Charter of Fundamental Rights [201].

In fact, in matters of same-sex marriage the European legal system seems open to evolution, as demonstrated by the ECtHR's judgment ruling the *Schalk and Kopf* case, handed down in 2010 two months later than the mentioned decision of the Italian Constitutional Court no. 138/2010.

The adoption of a specific legal framework providing for the recognition and protection of same-sex unions in Italy could no longer be postponed, especially after the Strasbourg Court, in the case *Oliari and Others v Italy* [202], sanctioned Italy for a violation of Art 8 ECHR because of its failure to grant the claimants, a same-sex couple, a juridical instrument that acknowledged their right to officialize their partnership.

A growing body of Italian cases citing *Schalk and Kopf* dealt with an even more complex and delicate problem, the recognition of same-sex partnerships formalized abroad, testifying an on-going process of erosion of the traditional concept of marriage.

In this context the Italian legal system was used, until a few years ago, to avail itself of the typical safeguard of private international law represented by the clause of "public policy", argument used to justify a policy against registration of same-sex marriages celebrated abroad, regarded to be against history and tradition as made clear by two Ministry of Home Affairs Circulars of 2001 and 2007 (both adopted with the aim of clarifying the rules governing civil status documents) [203], and thus non-existent in the Italian legal system.

Still, this policy against registration of same-sex marriages celebrated abroad has been challenged in the light of the supranational ECtHR decisions mentioned above, leading to a growing legal uncertainty arising from the litigation policy. Such cases also gave rise to questions regarding freedom of movement of people, as the main problem was the denial of the retention of a family status for those who acquired it in other European countries.

The case law based on the non-existence argument has recently been set aside by the Italian Supreme Court. In its Judgment no 4184/2012 [204], taking account of the case law of the ECtHR [205], the Supreme Court decided that same-sex marriage

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[201] For a comprehensive overview E. CRIVELLI, *La tutela dell'orientamento sessuale nella giurisprudenza interna ed europea*, Napoli, 2011, 73, 85; A. SCHUSTER, *Le unioni fra persone dello stesso genere nel diritto comparato ed europeo*, in B. PEZZINI, A. LORENZETTI (eds.), *Unioni e matrimoni same-sex dopo la sentenza 138 del 2010: quali prospettive?, N*apoli, 2011, p. 255; G. FERRANDO, *Il contributo della Corte europea dei diritti dell'uomo all'evoluzione del diritto di famiglia*, in *Nuova giurisprudenza civile commentata*, 2005, II, p. 263.

[202] ECtHR 21 July 2015, *Oliari and others v Italy*, Apps nos 18766/11 and 36030/11.

[203] Italian Ministry for Home Affairs, Circular no 2 of 26 March 2001 and Circular no 55 of 18 October 2007.

[204] Corte di Cassazione 15 March 2012 no 4184, *Famiglia e diritto*, p. 665 (2012).

[205] In particular, the Italian Supreme Court made reference to *Schalk and Kopf* (fn 27).

can no longer be considered non-existent, as the ECtHR interpreted the right to marry enshrined in article 12 ECHR also in the light of article 9 of the EU Charter of Fundamental Rights, as no longer limited, in all circumstances, to marriage between two persons of the opposite sex.

The 2012 Supreme Court judgment, in trying to "squaring the circle", introduced a very thin (some said sophisticated, albeit unexplained) distinction between a "non-existent" marriage and a marriage that does not produce legal effects [206]. In fact, it upheld the impossibility of registering a marriage concluded abroad. Yet, this outcome was no longer a consequence of the non-existence or of the invalidity of the same-sex marriage, but of its inability to produce – as a marriage – any legal effect in the Italian legal system. The 2012 decision thus acknowledged that there was no inherent problem of *ordre public*, in light of the ECtHR's *requirements*: the refusal was rather grounded on the circumstance that same-sex marriage has no equivalent in Italian law and thus cannot be recognised for the purpose of acquiring legal effects.

The inability of same-sex marriages to produce any legal effect in the Italian legal system has been confirmed and repeated several times, and eventually also with a decision adopted after the entry into force of law no 76/2016 (see, among others [207], the Italian Supreme Court Decisions no. 2400/2015 and 11696/2018).

Yet, even if the majority of the Italian case law has thus far reached such conclusions with respect to the registration of same-sex marriages celebrated abroad, it should be noted that the case law is not completely settled, showing that this complex issue cannot be regarded as closed.

On one side, in fact, the non-existence argument has not yet been completely abandoned as accomplished expressly by the Italian Council of State which, after having recalled the that the same-sex marriage is incapable of producing any legal effect in the Italian legal system, further argued that, in its view, the same-sex marriage might be more appropriately classified as non-existent [208].

On the other side, the Court of Cassation rulings above mentioned, far from closing the debate, have been called upon to provide grounds also for subsequent decisions which, on the contrary, have admitted the validity of same-sex marriages celebrated abroad [209].

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[206] See G. BIAGIONI, *On Recognition of Foreign Same-Sex Marriages and Partnerships*, in D. GALLO, L. PALADINI and P. PUSTORINO (eds), *Same-Sex Couples before National, Supranational and International Jurisdiction*, cit., 359, 376. 51.

[207] See, Regional Administrative Court of Lazio, Judgment no 3912 of 9 March 2015; Milan Court of Appeal, Decree no 2286 of 6 November 2015; Milan Court of Appeal, Decree no 2543 of 1 December 2015.

[208] Council of State, Judgment no 4899 of 26 October 2015.

[209] In particular, Tribunale di Grosseto 3 April 2014, in *Giur. it.* , 2014, p. 1610 accepted the appeal of a gay couple for the officialization of a marriage celebrated in New York. In the same way,

Among them, two decisions have provoked an intense debate.

An Order of the Grosseto Tribunal of 9 April 2014, in interpreting the above-mentioned 2012 Italian Supreme Court judgement, held that same-sex marriage could no longer be considered to contrast with the public policy clause and, for the first time in Italy, upheld the claim of an Italian couple married abroad and requested that the Registrar record such a marriage. The Order of the Grosseto Tribunal subsequently has been declared invalid by the Florence Court of Appeal, Decree of 24 September 2014, because of procedural flaws. However, the trial was continued in front of the same Grosseto Tribunal which, in its Decree of 26 February 2015, requested again that the Registrar record such a marriage [210].

The same Grosseto Tribunal's path, though due to the peculiarities of the case, was subsequently followed by the Naples Court of Appeal decision of 31 March 2015, which accepted the request for registration of a same-sex marriage celebrated in France by two French nationals who had moved to Italy for the purpose of work. In this case, though, the Naples Court of Appeal relied on the principles of free movement of persons in the EU and non-discrimination between EU nationals to recognize the same-sex marriage celebrated abroad. At the same time, the Naples Court of Appeal stressed that the same solution would not have been possible, if the request for registration had been presented by an Italian same-sex couple who had celebrated their marriage abroad (as was the case in front of the Grosseto Tribunal), as it clearly addressed the need to prevent abuse of law which could have been perpetrated with the sole purpose of bypassing the restrictions of the Italian legal system which prohibits same-sex marriage.

The two above mentioned decisions caused a strong reaction from the Italian Ministry of Home Affairs, which decided to adopt a Circular, on 7 October 2014, reaffirming the prohibition on registration of foreign same-sex marriages in the national civil-status register, stressing the principle that it could only be up to the national legislator to decide whether to bring same-sex marriages into line with those concluded between persons of opposite-sex and to allow the registration of these marriages in the national civil status register.

Corte d'Appello di Napoli, decree 13 March 2015, in *Quaderni di diritto e politica ecclesiastica*, 2015, p. 844; Corte d'Appello di Napoli, decree 8 July 2015, in *Foro italiano*, 2016, I, p. 297, which accepted a claim of a lesbian couple for the officialization of a marriage celebrated in France reforming the decision of Tribunale di Avellino 9 October 2014; Tribunale di Grosseto, decree 26 February 2015, in *Corr. giur.* 2015, p. 911; Tribunale di Milano 2 July 2014, in *Dir. fam.*, 2014, p. 1528; Tribunale di Milano 17 July 2014, available at https://tinyurl.com/ya yc2mae; Tribunale di Pesaro 14 October 2014, in *articolo29.it*, 2014, 257; Tribunale di Pesaro 21 October 2014, in *Guida al diritto*, 2014, 47, 15; Corte d'Appello di Milano 16 October 2015, in *Nuova giur. civ. comm.*, 2016, p. 725; Corte d'Appello di Milano 13 March 2015, in *articolo29.it*, 76 (2016); Corte d'Appello di Milano 9 November 2015, in *Foro it.*, 2016, I, p. 297; Corte d'Appello di Milano 10 December 2015, in *Foro i.*, 2015, I, p. 257

[210] G. Biagioni, *La trascrizione dei matrimoni same-sex conclusi all'estero nel recente provvedimento del Tribunale di Grosseto*, in *Genius*, 2014, p. 195.

6.2. *Reunification of Third-Country Nationals of same-sex partners: the final step made by the Italian legislator recognizing "union partnerships" open also to same-sex partnerships (Law no. 76/2016)*

As said, the Family Reunification Directive has not addressed marriage qualification issues in respect of the interpretation of the term 'spouse', leaving a wide margin of appreciation to each Member State. Still, the interaction between national courts and the Strasbourg Court deeply influenced the Italian family law, causing its gradual evolution.

To this respect, *Oliari and Others v. Italy* and *Taddeucci et MacCall c. Italie* are certainly important cases in the ECtHR jurisprudence related to sexual orientation, building up on previous judgments like *Shalk and Kopf* and *Vallianatos*. The Court, after having underlined "the importance of granting legal recognition to *de facto* family life" (*X v. Austria*); having included same-sex unions as stable committed relationships in the notion of family life (*Shalk and Kopf v. Austria*); and clarified that whether a State enacts through legislation a form of registered partnership, such format must be accessible to all couples regardless to their sexual orientation (*Vallianatos and others v. Greece*), established the positive obligation of the State – in this case, Italy – to ensure recognition of a legal framework for same-sex couples in absence of marriage, in light of article 8 ECHR.

Actually some signals of this evolution had already been seen before these seminal decisions from the Strasbourg Court within the Italian legal order precisely as for family reunification whith Italian citizens in cases of same-sex marraiges in another Member State [211].

Still, after the EChHR *Oliari* case, it became clear that Italy could not waste any more time in legalizing same-sex partnerships.

With Law no 76/2016, entered into force on 5 June 2016, the Italian Parliament thus decided to regulate unmarried partnerships open also same-sex couples, providing an *ad hoc* discipline called "civil partnerships". The law has not provided same-sex partners with the option to marry, but in any case has entrusted them with many rights previously reserved to married couples (e.g. rights related to social welfare, to tax law, to labour law, to migration law, etc).

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[211] A few Italian judgments declared unlawful a refusal to issue a residence permit to a third-country national who had married a same-sex Italian national in another EU Member State, and then applied for family reunification in Italy. The reasoning followed was that, once the creation of a matrimonial union in an EU Member State is proven, the principle of free movement of the EU citizen and of their family member has to be granted irrespective of the national law of the spouses. It is significant that the Ministry of Home Affairs, with its Circular of 26 October 2012, took note of the solution adopted by this case law and affirmed that it had its logical antecedent in the judgment no 1328/2011 of the Italian Supreme Court. According to this judgment, the concept of 'spouse' for the purpose of a family reunification shall be evaluated according to the foreign legal system of the country where the same-sex marriage has been celebrated. This has the consequence that a person who has celebrated marriage to an EU citizen in an EU Member State, shall be considered a family member for the purpose of the right of residence.

To some, the new law has been considered less ambitious than its original formulation, due to the political compromise that has been deemed necessary to convince the more traditional sections of the majority parties to accept the introduction of a legal regime for same-sex couples.

The law maintains a clear distinction between marriage and "union partnership" [212], providing a discipline which is respectful of the autonomy of the partners, who can regulate through a contract their patrimonial relationships [213].

The most notable feature has been the clarification that same-sex partnerships are "social formations" compliant with Articles 2 and 3 of the Constitution, so to clearly exclude any link with Art 29 of the Constitution, which recognizes and safeguards families founded on marriages.

For some commentators, with law no. 76/2016 there was a clear intent to protect the primacy of the heterosexual marriage and to create a parallel, secondary path to access family status for homosexual couples which are qualified (only) as distinct social formations.

The strong need to distinguish same-sex partnerships from families as natural gatherings as per Art. 29 of the Constitution can be regarded in many provisions of law n. 76/2016. Not only the law carefully avoids the use of the word 'family' (which is included only once, in para. 12, where the parties agree upon the chosen dwelling for family life), but it also removes the obligation of faithfulness in personal relationships (para. 11) [214] and regulates nullity of the partnership differently than marriage nullity [215], along with specific provisions different from the ones regarding marriage [216].

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[212] For a more in-depth analysis of law n. 76/2016, see G. FERRANDO, *Le unioni civili. Prime impressioni sulla riforma*, in articolo29.it, 6, 16 (2016); N. CIPRIANI, *Unioni Civili: Same-Sex Partnerships Law in Italy*, in *The Italian Law Journal*, 2017, pp. 343 ff.

[213] See F. BIONDI, *Art. 29*, cit., p. 199.

[214] Some scholars argued that the removal of the fidelity duty for same-sex partnerships is justified because this duty should be intended as directed not only towards the other spouse but also towards the entire family community including children (see N. CIPRIANI, *Unioni Civili: Same-Sex Partnerships Law in Italy*, cit., p. 352).

[215] Law n. 76/2016 removes a general referral to Arts 117 et seq of the Civil Code, and it specifies which articles it refers to, excluding Art 122. Specifically, the amended law (Art 1, paras. 5-7) seeks to eliminate the reference to the presence of a sexual deviation as an error regarding the qualities of a person that legitimates the upholding of the validity of the act (Art. 122 Civil Code).

[216] For instance, in the norms regulating the celebration (more correctly 'constitution') of same-sex partnerships, which are simpler than the marriage ones, there is no mention of Art 108 Civil Code which forbids the insertion of terms and conditions.

Moreover, in making reference also for "union partnerships" to certain provisions inserted in the Civil Code regulating marriage, the law provides for some notable omissions: for instance, Art. 78 Civil Code is not mentioned so that the relationship between one of the partners and the relatives of the other does not have juridical importance. Thus, same-sex partnerships have effects which are

Still, it can be acknowledged that the regulation of same-sex partnerships appears to be more advanced compared to certain provisions set forth for marriage [217].

Following the entry into force of law no. 76/2016 on civil partnerships between persons of the same sex and cohabitation, the Ministry for Home Affairs with the administrative Circular no. 3511/2016 clarified that the provisions of the Consolidated Act on Immigration concerning family reunification (Article 29) and residence permits for family reasons (Article 30) are to be extended to the parties of a civil union between persons of the same-sex.

6.3. *Family reunification and the prohibition of polygamy*

The Family Reunification Directive provides: "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 authorise the family reunification of a further spouse" (art. 4, para. 4).

To this respect it is worth highliting that in some EU Member States the sponsor being in a poligamous marriage is entrusted with the right to decide which spouse to be reunited or criteria have been selected to decide a priority in reunification, thus excluding others to join. So, even if polygamous marriages are banned, they are still taken into consideration by law.

As for Italy, in 2013 the Italian Supreme Court, deciding a case regarding family reunification [218] reaffirmed the prohibition of polygamy in Italy, as provided

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strictly tied to the couple while the condition of being a 'relative in law' is a feature of marriages. Consequently, a child born during a civil union is not a child of the couple, but only a child of the biological parent. Moreover, the new law explicitly excludes same-sex couples from the possibility of jointly adopting a child and crucially removes the "stepchild adoption" (i.e, the adoption by one partner of the other same-sex partner's child), which was initially included (para. 20), thus resolving the issue that monopolized most the political debates during the approval of the law.

[217] Among these details, one can include the subject of the common family name, which, in same-sex partnerships can be freely chosen by the partners (para. 10), whereas Art 143 bis Civil Code. provides that in marriages the wife may add to her family name her husband's family name, but it does not allow for the opposite. Still, this situation partly changed with the recent introduction of legislative decree no 5/2017, which introduced modifications and additions to marital status, giving also a restrictive interpretation of Art 1, para. 10, of law no 76/2016, establishing that the common family name choice would not imply any General Registry formality.

And again, with regard to the dissolution of the partnership, the law recalls only part of the norms established for marriages (paras. 22-25). Law no 76/2016 does not provide for separation (whereas in marriages, there is a two-step process, with separation and then divorce). The regulation of registered partnerships eliminates the requirement of separation and provides a new reason for the dissolution of the partnership based on a unilateral decision of one of the partners. Thus, the partner who wants to dissolve the partnership, after a three-month period after the unilateral decision, in order to end the relationship can file a divorce request to the Court or resort to one of extrajudicial management methods for family crises. This represents a simplification which lightens the burden Courts have to deal with.

[218] Italian Court of Cassation, judgement no. 4984/13.

by Article 29 of the Consolidated Act on Immigration, so that reunification with a second wife is not allowed [219]. This ban, however, had not always been applied by Italian courts [220].

The case decided by the Court of Cassation was quite peculiar. A Moroccan national had applied for reunification with his mother having no means of subsistence in the country of origin. Still, the separated husband of this woman, living in Italy, had already obtained reunification with another wife, and for this reason the Italian consulate in Casablanca denied the visa for, otherwise, a situation of polygamy would have emerged in case the applicant's mother had entered and remained in Italy. The Maroccan citizen brought a legal action against this denial and both in the first and second instances received a positive decision, as the courts considered that, notwithstanding the prohibition of reunification of a polygamous spouse if another spouse is already in Italy provided in Art. 29 of the Consolidated Act on Immigration, in this case the provision could not be applied because the request for reunification had been submitted by her son and not by her spouse.

The Court of Cassation, upholding the decision of the court of second instance, decided that Article 29 of the Consolidated Act on Immigration does not make distinctions depending on who the applicant is, but aims at avoiding that a condition of polygamy arises in the Italian legal system.

7. *Family reunification and children: assuring the best interests of the child*

A key area of concern, both within the Council of Europe and the EU, is the situation of children separated from their families who are particularly vulnerable and may be exposed to numerous risks such as human trafficking, sexual and labour exploitation, violence or other human rights violations.

In every measure affecting children, the "best interests of the child" should be a primary consideration, a principle laid down in Article 3(1) UN Convention on

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[219] Consolidated Act on Immigration, Art. 29, para. 1-*ter*.

[220] See A. CRESCENZI, *Family Reunification and the Italian Case*, cit., p. 145, who recalls "It should be observed, however, that this prohibition was bypassed in practice. This is what happened in the mid-1990s in a case concerning an application for reunification with two women. At the time, the Regional Administrative Court (TAR) of Emilia Romagna declared that the application for family reunification of a Moroccan national with his two wives was not admissible (Decision No. 296/1994). Even though the specific situation of the applicant was against the law, however, this did not prevent a certain tolerance by the Italian institutions. The two women, in fact, regularised their stay in Italy on different grounds with respect to the initial application for family reunification, by requesting a residence permit for work reasons. After granting that residence permit, the national institutions did not make any check to verify whether the two women lived in the same place and if they were living a situation of de facto polygamy".

the Rights of the Child (CRC) promptly assurging as the most relevant not only for international children's rights [221].

Assessment of the best interests of the child in family reunification cases needs to take into account elements including the child's views, the preservation of the family unit, the care protection and safety of the child, their situation of vulnerability, and their right to health and to education.

The ECtHR in its jurisprudence has highlighted the importance of taking the best interests of the child into account, consistently holding that the best interests of the child should be a primary [222] or even paramount [223] consideration in the balancing of interests, but it also stresses that children cannot be used as a "trump card" to get lawful residence in the host State [224].

In its case law, the European Court of Human Rights has provided increasingly detailed guidance on how the best interests of the child are to be determined and taken into account in the family reunification context, helding that when children are granted international protection and apply for family reunification, it is essential that their application is assessed promptly, carefully and with particular diligence ("*[…] rapidement, attentivement et avec une diligence particulière*") [225].

In the EU context, Article 24(2) of the EU Charter of Fundamental Rights codifies the "best interests of the child" concept in EU law as enshrined in Article 3(1) of the CRC, with a provision that is more concise than in the CRC: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration" [226].

In Article 24 Charter, two other children's rights are highlighted. Article 24(1) states that children have the right to protection and care necessary for their well-being and have the right that their views are taken into consideration. Article 24(3) establishes that every child has the right to maintain a personal relationship and direct contact with both his or her parents on a regular basis

These principles are further mentioned in secondary EU legislation.

Likewise, the Family Reunification Directive requires Member States examining an application to "have due regard to the best interests of minor children" (Article 5). Under the EU Dublin Regulation, a Member State is responsible for reu-

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[221] Bueren, G. van, *The International Law on the Rights of the Child*, The Hague, 1998, p. 45.

[222] ECtHR (Grand Chamber), *X. v. Latvia* [GC], No. 27853/09, paragraph 95, ECHR 2013.

[223] ECtHR (Grand Chamber), *Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07, paragraph 135, ECHR 2010.

[224] ECtHR, *El Ghatet v. Switzerland* (2016), paragraph 46.

[225] *El Ghatet v. Switzerland,* the Court found a violation of Article 8 of the Convention as the best interests of the child had not been sufficiently placed at the centre of the domestic court's reasoning in respect of family reunification.

[226] According to the Explanation relating to the Charter Article 24 is based on Articles 3 (best interests), 9 (unity of family), 12 (participation) and 13 (expression) of the CRC.

niting the unaccompanied child with the relative, provided that such reunification is in the best interests of the child, established through an individual examination assessing whether the relative can take care of the child.

In the Italian legal order, the Italian Constitutional Court has increasingly recognized the "best interest of the child" principle in its case law referring to Art. 30 of the Constitution recognizing the "right and duty of parents to maintain, instruct and educate their children, including those born outside of marriage".

Though not explicitly mentioned at Constitutional level, thanks to the Italian Constitutional Court the principle of best interests of the child has become prominent in the Italian legal order as considered implicit to the provisions of the Italian Constitution concerning human rights and the protection of children [227], becoming the main argument for its decisions regarding children both in area of civil law [228], as well as in the field of criminal law [229].

With respect to non-national children and immigration the best interests of the child must be given priority in all proceedings regarding family reunification, as it is provided explicitly in the Consolidated Act on Immigration with specific reference to the right of family reunification for children (Art. 28, para. 3) [230].

Thus the best interest of the child represents an element of primary consideration in all administrative [231] and judicial procedures aimed at enforcing the right to

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[227] See for a wide analysis E. LAMARQUE, *Prima i bambini. Il principio dei* best interests of the child *nella prospettiva costituzionale*, Milano, 2016.

[228] Italian Constitutional Court, judgment n. 385/2005 stated that the protection of the best interests of the child and the protection of women are the aim of measures supporting motherhood.

[229] Italian Constitutional Court, Judgment n. 149/2003 on the provisions governing the sentencing of children aim at allowing the child to leave criminal proceedings as soon as possible, through alternative measures. The Constitutional Court stated that the protection of the best interests of the child cannot automatically equal to his/her immediate release from trial. It requires that the release from trial does not go against the need to ensure to the child the most complete defence opportunities.

[230] Italian Consolidated Act on Immigration, Art. 28, para. 3, "In all the administrative and jurisdictional proceedings aimed at implementing the right to family unity and concerning minors, it is necessary to take into consideration with priority the higher interest of the minor, compliantly with what provided for by article 3, paragraph 1, of the Convention on the rights of the child dated 20 November 1989, ratified and made executive pursuant to law n. 176 dated 27 May 1991".

[231] Among the administrative measures adopted to promoteg the best possible inclusion of the child in the social fabric, through the Asylum, Migration and Integration Fund, during 2017, the Ministry of the Interior financed projects aimed at offering psychological support and better information on possible paths to be pursued and, on the other hand, to increase qualitatively and quantitatively, the primary and secondary reception of minors intercepted on Italian territory without an adult's presence. At the end of December 2017, the Ministry of the Interior also allocated 10 million euros to prepare inclusion circuits for unaccompanied foreign minors present in secondary reception facilities Integration into the target society is considered to be in the minor's best interests. The following also target this goal: inclusion in Italian public schools, registration in the National Health Service and sports, cultural and work projects developed and managed by voluntary associations, cooperatives and the third sector in general. The child's best interests are also a priority considera-

family unity concerning the child. However, there are cases where the child's best interests must be balanced with state interests, as in the – rare – case of expulsions for reasons of public order and national security. Also in this case, however, the methods of implementing the deportation order must be determined in compliance with the minor's best interests.

Art. 28 of the Consolidated Act on Immigration provides that eligible for reunification are unmarried children under 18 years of age (on application submission), including children of the spouse and children born out of wedlock, provided that the other parent, if there is another parent, has given his or her consent; (the term 'children' includes adopted children, children in foster care and minors under guardianship in the country of provenance). Also dependent children who have reached their majority are eligible, if they are unable to support their indispensable necessities of life because of their health conditions entailing total disability.

In case of doubts about the family relationship, verifications can be ordered, such as DNA testing, whose cost is incurred by the sponsor who applies for reunification.

A practice that does not seem to be replicated elsewhere but could represent a useful mechanism to ensure the best interests of the child are respected exists in Italy in addition to the family reunion procedure.

Art. 31, para. 3, of the Consolidated Act on Immigration (Legislative decree 286/1998) permits the Juvenile Court to authorize the entry or stay of a family relative, for a specified period of time if there are "serious reasons" related to the child's physical and psychological development, taking account of the age and health of the child on Italian territory.

This possibility provides an additional way to ensure the best interests of the child are respected and to uphold the principle of family unity.

A 2010 judgment of the Supreme Court of Cassation in Italy considerably expanded the scope of what may constitute "serious reasons" under Article 31 of Legislative Decree no. 286/98. In view of the special protection enjoyed by the family and the interests of the child in the Constitution, in European and international law, the Court found that it was not necessary to prove the existence of exceptional or urgent circumstances [232]. According to the Court, the interpretation of the "serious reasons" concept includes "any real damage, concrete, perceptible

tion for their housing situation: if the family surveys are successful, if the child so wishes and if this solution is considered to be in its best interests, the Italian authorities can arrange for assisted voluntary repatriation, aimed at protecting the right to respect for family life. A further solution, preferable to inclusion in the community, is family assignment which entails even greater possibilities for integration in addition to a better psycho-physical well-being for the child. There is no standard procedure or protocol for determining the child's best interests. It is an element that must be balanced with other types of interests (for example with interests in the community or parents) and with all the concrete elements of the situation in an assessment that varies from case to case.

[232] Italian Court of Cassation, Judgement no. 21799/2010.

and objectively serious that in consideration of the age or the conditions linked to the overall psycho-physical balance is derived or is highly probable will result in the minor, by the removal of the family member or by his own definitive eradication from the environment in which it grew". Since then the Court has ordered a permit to be issued to the family member whenever it found that the removal of that family member would seriously impair the physical or mental integrity of the child.

The same Italian Supreme Court of Cassation, in a 2012 judgment [233], referred to this provision and stressed the need to tangibly and effectively assess the possible harm to a minor if a family member living in Italy as an irregular migrant were to be removed. The judgment required the Juvenile Court to assess the effective exercise of the family member's parental responsibility and authorize his or her entry or residence if his or her removal would seriously affect the child's mental and physical development.

Similarly, the Juvenile Court of L'Aquila used this same provision in a 2013 judgment [234] to order a residence permit to be issued on the basis of this provision to the foreign grandmother of a minor child whose father was dead. The grandmother of the child had come to Italy since the son-in-law, who subsequently died, was abusing his wife and child. The Court found that the presence of the six-year-old child's maternal grandmother contributed to his emotional stability and that his separation from her would cause serious harm jeopardizing his mental and physical development.

7.1. *Adopted children: family reunification of minors under the Arabic scheme of "Kafalah"*

The Italian Court of Cassation (United Sections) [235] ruled on *Kafalah*, a form of legal guardianship that several Muslim countries adopt to protect abandoned children.

Kafalah is generally defined as "the commitment to voluntarily take care of the financial support, of the education and of the protection of a minor, in the same way a parent would for a child". Under *Kafalah*, the foster father or the foster mother, assumes responsibility to support the foster child, until he or she reaches adulthood, without creating any legal parent-child status [236].

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[233] Italy: Supreme Court of Cassation (Corte di Cassazione), Judgement n. 9535/2012.

[234] Italy: Juvenile Court of L'Aquila, Judgement 25 November 2013 RG. n. 265/13 VG.

[235] Italian Court of Cassation 16 September 2013 no 21108.

[236] See A. LANG, *Le Sezioni Unite chiariscono quando la* kafalah *è presupposto per il ricongiungimento familiare del cittadino italiano*, in *Dir. imm. citt*., 2013, p. 91; A. CRESCENZI, *Family Reunification and the Italian Case*, cit., p. 142; cf. M. NISTICÒ, Kafala *islamica e condizione del fi glio minore. La rilevanza della kafala nell'ordinamento italiano*, in http://www.gruppodipisa.it; A. MA-

Actually, *Kafalah* is also internationally recognized as an instrument of protection: among the international conventions, the UN Convention on the Rights of the Child, adopted in New York on 20 November 1989, in its Art. 20, emphasizes the importance of Contracting States' providing protection for minors deprived of their family environment. Such protection includes several institutions, among which *kafalah* is expressly listed.

The Italian Court of Cassation, deciding a long and complex case [237], introduced in 2013 a new principle: in certain well-defined circumstances, local authorities cannot refuse to issue entry visas, for purposes of family reunification, to foreign minors taken under *kafalah* by Italian citizens residing in Italy. The Court was asked to determine whether it was possible to place Italian and foreign citizens on the same level in matters of *kafalah* and family reunification.

Overruling previous decisions, where foreign minors given under *kafalah* to Italian citizens by means of a measure granted by a foreign court had not been recognised as entitled to entry visas for family reunification, the 2013 Supreme Court's decision stressed that interpreting family reunification rules in a manner that denied Italian citizens the right to reunification with the child given to them

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ROTTA, *Italy and Kafalah: Reinventing Traditional Perspectives to Accommodate Diversity?,* in *It. Law Jour*., 2016, p. 191.

[237] An Italian engineer had worked for many years in several African countries. In 2006, he decided to settle with his wife and his daughter in Rabat. In 2007, the engineer and his wife applied for custody of an abandoned child in accordance with Moroccan law. One year later, after the family had undertaken a series of initiatives in favour of orphaned and abandoned children, it was entrusted with an orphaned child under the Islamic institution of kafalah. The judicial measure was issued by the Court of Tangier on 16 February 2009. On 19 January 2010, the couple was authorized to apply for the child's passport and to leave Morocco. When the Italian engineer was posted to Kazakhstan for work, the rest of the family decided to return to Italy. They asked the Italian Consulate in Casablanca to issue, for the child, an entry visa for family reunification. On 4 February 2010, the visa was denied on the following grounds: kafalah, unlike adoption, was unsuitable to justify the request; the minor would not live with his foster parents; and the Court of Tangier would issue the authorization of expatriation. The decision was challenged by the engineer before the Court of Tivoli, in conformity with the Consolidated Act on Immigration. The Italian court ordered the consular authority to issue the entry visa, on the grounds that the minor had been living with the Italian family since his birth and that the Moroccan court had allowed him to leave the country. Both the Italian Ministry of Foreign Affairs and the Italian Consulate in Casablanca appealed against the sentence. In 2011, the Court of Appeal in Rome overturned the ruling issued at first instance. The Italian engineer appealed against the judgments, and the reasons for the appeal were illustrated in a memorandum. The public authorities cross-appealed against the judgment. On 1 December 2011, in closed session, it was decided to refer the case file to the First President of the Court, in order to submit the issue to the Court's Joint Divisions. In particular, it was necessary to decide whether it was possible to give an extensive interpretation to the notion of 'relative' contained within legislative decree no. 30/2007, which sought to enforce Directive 2004/38/EC. The cross-appealing authorities submitted a memorandum in which they asserted that, on 9 May 2011, the Juvenile Court in Rome had ruled on the adoption of the child and the Italian Consulate accordingly issued the entry visa for family reunification. Thus, given that the matter at issue had ceased to exist, the petition was allegedly inadmissible due to mootness.

under *kafalah* was not compatible with Italian constitutional principles and international conventions (referring to the principle of the best interest of the child as set out in the CRC and the Charter of Fundamental Rights), being also discriminatory towards minors from Muslim countries, for whom this instrument is the only form of protection.

The Italian Supreme Court argued that priority should be given to the protection of a foreign minor and his or her best interest over the need to protect borders, thus recognising the possibility of issuing an entry visa to a minor for reasons of family reunification, pursuant to Article 29 of the Consolidated Act on Immigration.

This principle has been confirmed by the Italian Supreme Court in subsequent decisions where it acknowledged the need to provide a broad interpretation of "family member" in the national provisions, which includes relations like the *kafalah*, provided that certain conditions were fulfilled [238], recently also recognizing not only the "publicistic" *kafalah* decided by a court, but also a *kafalah* approved ("omologata") by a national authority of foreign State [239].

8. *Requirements for exercising the right to family reunification*

The Third-Country National applying for family reunification in Italy must demonstrate the following requirements.

a) *Sufficient financial resources*

A sponsor has to have a yearly gross income, current or presumed, from legal sources that is not lower than the yearly social allowance, increased by half such an amount for each family member to be reunited, as provided for by the law. The amount of the social allowance is set on a yearly basis, and a circular adjusts this amount, including for the case of family reunification [240]. For the purposes of income determination, any additional dependent family member previously reunited as well as any child born in Italy (and shown on the residence permit) constitute an economic "weight": they should all be declared on applying for the authorisation.

The sponsor has to provide evidence of such sufficient resources [241].

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[238] Italy: Supreme Court (Cassazione, I sez. Civ.), 22 May 2014, case 11404.

[239] Italy: Supreme Court (Cassazione, I sez. Civ.), 24 November 2017, case n. 28154.

[240] For instance, the yearly amount of the social allowance for 2016 was equivalent to € 5,825.00. For reunification of two or more children under 14, the minimum income required for 2016 amounted to € 11,650.00. For any other family member reunited (children, spouse or parents) besides children under 14, the amount is € 11.650,00 plus € 2,912.50 for each person.

[241] The applicant sponsor should submit his or her income tax return and other specific docu-

It is worth to note, with reference to the economic conditions, that a judgement of the European Court of Justice of 4 March 2010 (C-578/08) established that the assessment of sufficient economic resources cannot lead to the automatic application of the minimum amount based on the yearly social allowance; consideration should be given to nature and solidity of the family relationship, the length of the marriage, the length of the stay in the Member State, and the family- cultural or social ties with the country of origin. These arguments can be used in legal proceedings, when challenging a rejection decision taken on the ground that the applicant's income does not reach the amount of the social allowance.

Moreover, the Italian Court of Cassation has specified that what matters for the purpose of family reunification is not the income previously produced, but the proof on the part of the sponsor that he or she can produce the necessary income through work on a yearly basis. Such a situation may even arise in the course of the reunification procedure [242].

b) *Accommodation suitable for the size of the family.*

The sponsor has to prove to having an accommodation meeting sanitary requirements, as confirmed by the competent municipal offices [243]. If there is a child under 14 with one of the parents, the only requirement is the consent of the holder of the accommodation in which the child will live (no other documentation is required).

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mentation according to the type of work performed. For employed work, the latest income tax return, a copy of the work contract, the latest payslip or certified copy of the payroll, and a self-certification from the employer proving that the work relationship is still on-going. For domestic work, the latest income tax return, if there is one, otherwise the hiring notification served at the Employment Office or at National Social Security Institute, the social security contribution paying-in slip referring to the quarter before the application submission date, and a self-certifi cation of the employer proving that there is a work relationship. For self-employed work, the documentation required is an income tax return (Modello unico).

[242] Italian Court of Cassation, judgement no. 6938/2004.

[243] Current accommodation criteria, recommended in a ministerial circular, concern four aspects:

(1) minimum surface area per person (1 person – 14 m2, 2 persons– 28 m2, 3 persons – 42 m2, 4 persons– 56 m2, for each additional person +10 m2);

(2) the accommodation should consist of (bedroom for 1 person – 9m2, bedroom for 2 persons – 14 m2, a living room of at least 14 m2; for studios 1 person – 28 m2 (bathroom included) and 2 persons – 38 m2 (bathroom included);

(3) minimum height (2.70 m, which can be lowered to 2.55 m in mountain municipalities and 2.4 m for corridors, bathrooms, access areas, and storerooms);

(4) ventilation (that is to say, the living room and the kitchen must have a window that can be opened, while the bathrooms must have either a window or a mechanical aspiration system); and (5) heating system (all accommodations must have a heating system if climate conditions make it necessary).

As regards accommodation-related documentation, the foreign national must submit specific documents [244].

c) *Healthcare insurance.*

When applying for reunification with parents over 65, a health insurance is required covering all risks in Italy or registration with the National Health Service with the payment of a fee set by the Ministry of Labour [245].

The accommodation requirements are determined at the local level (regional and municipal) and those of income are decided at national level.

9. *The Italian procedure for family reunification: between legal requirements and practical problems*

Foreigners who want to enter Italy to join a family member must have previously obtained a family visa. However, the Italian Consolidated Act on Immigration also permits to a family member eligible for family reunification, already in Italy with a regular status (i.e. a touristic visa), to apply for a permit to stay for family reasons, without having previously obtained a family visa: it is the so-called "special family reunification" ("ricongiungimento familiare in deroga" [246]).

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[244] The following documents must be submitted for the request: a copy of a rental agreement, agreement of free loan for use or deed of ownership of the accommodation; idoneità abitativa and sanitary certificate, that is to say the certificate issued by the municipal office confirming that the accommodation meets the standards and sanitary requirements provided for by law; if the foreign national is hosted: certified statement of the accommodation holder, giving consent to the reunification with family members (indicated by their names), with reference to the portion of the accommodation that is made available to the migrant; in the case of reunification with a child under 14, either alone or with one of the parents, the certificate of idoneità abitativa may be replaced by the consent of the holder of the accommodation in which the child will live (if the family members are two can not use the statement only but documentation is required).

If the applicant indicates an accommodation other than that in which he or she lives, the accommodation requirements is considered to be met if it is confirmed that the applicant intends to move to that accommodation on arrival of the family member. The same applies if he or she intends to provide the family member with a different accommodation other than his or her own. Beneficiaries of refugee and subsidiary protection statuses do not have to prove they meet any accommodation requirements. Foreign researchers who are in Italy and apply for family reunification do not have to prove they meet any accommodation requirements.

[245] On submission of the application, the applicant may simply sign a statement of engagement to underwrite an insurance policy. The insurance policy should be underwritten within eight days of entry into the territory of the State and before submitting the application to the Immigration Desk. The insurance policy should have no expiry date and should cover disease, accident and maternity risks. In practice, it is very difficult to obtain this documentation, as insurance companies are usually reluctant to sell policies to people over 65.

[246] Consolidated Act on Immigration, Art. 30, para. 1, lett. c).

The family reunification procedure, according to Article 29 of the Consolidated Act on Immigration, consists of two phases.

The first phase is devoted to request a family reunification authorisation, to be submitted at the Immigration Office by the migrant sponsor. The first phase, under the responsibility of the Immigration Desk, involves a check of the objective criteria to be fulfilled for obtaining the relevant authorisation. These requirements concern, as seen above, the applicants' residence document, income level and dwelling situation.

In the second phase, the family members who are in the country of origin or of transit have to apply for a family reunification visa at the consulate.

In particular, the first phase starts with the submission by the migrant who legally resides in Italy of the family reunification authorisation at the Immigration Office of the Prefecture with jurisdiction for the applicant's place of residence. Since 2008, applications at the Immigration Office have to been done electronically, upon registration on the website of the Ministry of the Interior, with the forms available on the website, and providing specific documentation to be attached [247].

A waiting period is set before a sponsor's family members can reunite.

After the competent Immigration Desk has received the application made on line, it makes an appointment with the applicant, who will have to submit the documentation concerning accommodation and income. The Immigration Desk gives the applicant a receipt for the application and the documentation submitted during the appointment. After checking that the relevant requirements are met, within 180 days from receiving the application, the Immigration Desk issues the authorisation or a refusal decision and notifies the consular authorities of the country of origin or provenance of the family member to be reunited. Since January 2014, this authorisation has been sent electronically to the Italian consular authorities of the country of origin or provenance of the family member to be reunited. The applicant receives a written communication with the telephone number of the Immigration Desk to contact in order to make an appointment for his or her family member, who has to apply for a residence permit within 8 days from entry into Italy, and then for registration at the municipal office of residence.

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[247] The application has to be complemented with the following documents:

- a copy of the residence permit held by the sponsor. Its total validity should be of at least one year (if the residence permit has never been renewed, it is possible to submit the receipt of a renewal request);
- a € 16.00 – revenue stamp (the revenue stamp number has to be entered in the relevant field of the electronic form); the actual revenue stamp is then exhibited at the time of the interviews with the Immigration Desk);
- the Passport of the applicant (sponsor);
- a copy of the passports of the family members;
- documents relating to income and housing.

Once the authorisation has been obtained from the Immigration Desk, the family member for whom an application for family reunification has been submitted has to apply for a visa at the competent Italian consular or diplomatic authority in his o her State of residence, submitting documents that prove the family relationship. The authorisation may be used for six months from the date of issue.

The second phase, under the responsibility of the consular authority, is closely related to the first one and involves a check of subjective requirements for obtaining an entry visa (family ties and other requirements of the family members to be reunited with the foreign national who is in Italy).

When all requirements are fulfilled, a declaration of "no impediment" is transmitted to the diplomatic representation of the family member's country of origin. Once obtained the family visa, the family member can enter the Italian borders and apply for a permit to stay for family reasons within 8 days.

Within 48 hours of entry into Italy of the family member authorised for reunification, the sponsor has to submit (and keep a copy of) a declaration stating that he or she is providing accommodation to the family member to the competent office.

Then, within eight days of entry, the sponsor has to notify the arrival of the family member to the Immigration Desk of the competent Prefecture. He or she will then be called to collect the documentation needed for applying for a residence permit for family reasons (at a post office), even if a deadline for such procedure can be very lengthy as in some cities, the wait for the appointment with the Prefecture/Provincial police authorities (Questura) may exceed several months and, regrettably, during this time the family member does not have access to any service as he or she has not yet been able to apply for a residence permit.

It is worth to note that in Italy no civic integration exams are in place (before or after admission).

Still, as made clear in a recent study carried out by the European Migration Network (EMN) [248], which assessed both legal and practical challenges in the implementation of the Directive, several Member States procedures on family reunification – and among them the Italian ones – were considered raising three major problems faced by applicants.

The first concerns the obligation to appear in person at a diplomatic mission to submit their application; this obligation creates a practical problem in particular for applicants to smaller Member States that do not necessarily have a diplomatic representation in every country. The second major problem concerns the often very long processing time of an application. The third major problem is the lack of documents necessary to process the application, especially the proof of identity and family ties. From the perspective of national authorities, the study reported as a major challenge the detection of forced or sham marriages or registered partner-

[248] EMN study (2017), p. 37.

ships and false declarations of parenthood, which require thorough investigations and in turn may affect the processing time of applications.

10. *Rights granted to family members reunited*

According to the Consolidated Text on Immigration, and in conformity of the Italian Constitutional Court's case law regarding fundamental social rights for foreign citizens (see above para. 3.1.), once reunited the family members are entrusted with several rights, as follows.

a) *Access to education*: All family members are entitled to access the education and training system.
b) *Access to employment and self-employed activity:* a residence permit for family reasons has the same validity as the sponsor's residence permit and allows access to assistance services, enrolment at study or vocational training courses, and employed or self-employed work. On request, and if the relevant criteria are met, a residence permit for family reasons may be converted into a residence permit for work reasons.
c) *Right to apply for autonomous right of residence independent of that of the sponsor, also in case of dissolution of family ties.* The residence permit for family reasons is strongly linked to the permit to stay of the foreigner who requested the family reunification, with the same duration and rights granted (art. 30 of the Consolidated Law on Immigration). If a foreign national who has applied for family reunification holds a long-term resident's EU residence permit, the family members are usually granted a regular resident permit for family reasons by the Police authorities (Questure). Such a residence permit entails all the other rights.

With the entry into force of law no. 122/2016, children under 14 are no longer registered on their parent's residence permit, but they have their own, issued as 'residence permit for family reasons.' If the relevant requirements are met, children who are still dependent on their parents when they turn 18 may be granted a "residence permit for family reasons" of the same validity of the resident permit of the parent they are dependent on. The above provision accounts for the fact that parents are required to support their children until they have reached their economic independence and suitable integration into the social context.

If a foreign national who has applied for family reunification holds a long-term resident's EU residence permit, the family members are usually granted a regular resident permit for family reasons by the Police authorities (Questure). According to the practice of some Questure, after applying for a residence permit, it is possible to seek residence registration and obtain pending charges and criminal records certificates. Then, with these documents, it is possible to apply for a long-term

resident's EU residence permit for the family members as well, without making a new application.

Finally, the family member of an EU national keeps his or her residence right even in the case of death or of departure of his or her sponsor (who holds the residence right). If the family members are EU nationals, they keep the residence right if they meet the requirements for permanent residence or if they meet the requirements for remaining in Italy themselves. By contrast, if the family members are third-country nationals, they are entitled to remain if they fulfil the requirements for permanent residence and have stayed for at least a year in Italy before the death of the sponsor; or if they prove they have a working activity and sufficient income for themselves and their family members who are in Italy. If the requirements for staying in Italy have not been met for at least one year from the death, the family members who meet relevant requirements can convert their residence card into a residence permit for work or study reasons.

A family member of an EU national keeps the right to stay in the country in the case of divorce or marriage annulment. This provision is not applicable to third-country nationals. The permit for EU long-stay visa issued to minor children if the person who requested the reunification is in possession. The spouse is released only after five years of residence.

11. *Reasons for rejection or denial of renewal*

The revocation or the denial of renewal of the permit to stay for family reasons may occur when the conditions for its issuance do not recur anymore or for reasons of public order when the foreigner has committed a serious crime and represents a threat to the public order. Conviction for such an offence does not entail an automatic denial of the permit renewal, but must be evaluated together with the conduct of the foreigner, his/her level of social integration and his/her family ties in Italy (art. 5 and 5(5bis) Consolidated Law on Immigration).

According to the judgement of the Court of Cassation of 8 April 2004, «In adopting a decision refusing the issuance or the renewal of the residence permit or withdrawing the residence permit of a foreign national who has exercised the right to family reunification or of the reunited family member, account is also taken of the nature and actuality of the family relationship of the person concerned and of any family and social ties with his or her country of origin, as well as, for a foreign national who is already within national territory, of the length of his or her stay on the said national territory.» Likewise, as regards a removal order, the same judgement specifies that, «in adopting a removal order in respect of a foreign national who has exercised the right to family reunification or of the reunited family member, account is also taken of the nature and actuality of the family relationship of the person concerned and of any family and so-

cial ties with his or her country of origin.» This means that there should no longer be an automatic decision of refusing a residence permit or of removing a person if he or she lives in Italy not alone, but with family members, legally residing in Italy.

12. *Family reunification rules for refugees and beneficiaries of subsidiary protection*

Family reunification for refugees and other persons in need of international protection has special significance because of the fact that they are not able to return to their country of origin [249].

The more favourable rules of Chapter V of the Family Reunification Directive exempt refugees from the waiting period and from complying with income, housing and integration requirements (Article 12), and obliges Member States to be flexible regarding evidence to establish the family relationship (Article 11(2)). Member States are allowed to adopt a wider definition of the family members in case of refugees (Article 10 (2)), but they have to apply Chapter V at least to members of the nuclear family of refugees, mentioned in Article 4(1) of the Family Reunification Directive.

Beneficiaries of subsidiary protection (BSPs) are outside the scope of the Family Reunification Directive [250] due to the absence of a definition of the scope of subsidiary protection in EU law at the moment the Directive was adopted [251].

Later on, with the first Qualification Directive (2004/83), a common definition of subsidiary protection has been established, and the recast Qualification Directive (2011/95) shows that the rights of refugees and beneficiaries of subsidiary protection are now only differentiated with regard to the duration of the residence permit and the right to social assistance. The Qualification Directive provides for the right to family unity to refugees but also to beneficiaries of subsidiary protection where their family members are already residing in the Member State but does not give a right to family reunification beyond that.

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[249] United Nations High Commissioner for Refugees (UNHCR), *Summary Conclusions: Family Unity*, Expert roundtable organized by UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8-9 November 2001, in FELLER et al. (eds.), *Refugee Protection in International Law: UNHCR'S Global Consultations on International Protection*, Cambridge, 2003, pp. 604-608, available at: http://www.unhcr.org/419dbfaf4.pdf (UNHCR, Summary Conclusions, Family Unity), paras. 9 and 10.

[250] Article 3 (2) of the Family Reunification Directive. It does not exclude beneficiaries of international protection in accordance with EU law.

[251] COM(2000)624. This is one of the reasons that Article 19 of the Family Reunification Directive, which includes a rendez-vous clause for reviewing the Directive, refers to Art. 3 of the Family Reunification Directive.

To this respect, it is worth noting that in its 2014 "*Guidelines on the application of the Family Reunification Directive*", the European Commission stressed that "the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees", and encouraged Member States to grant similar rights to both groups [252].

Moreover, the EU Commission emphasised that "in any case, even when a situation is not covered by European Union law, Member States are still obliged to respect Article 8 and 14 ECHR. When interpreting Article 14, the ECtHR requires a reasonable and objective justification and, in some cases, requires substantiated reasons for differential treatment of groups or persons who are in a similar situation" [253].

Along this path, nine Member States, including Italy, apply the Family Reunification Directive also to beneficiaries of subsidiary protection [254].

In Italy beneficiaries of subsidiary protection, just like holders of an asylum (international protection) residence permit, may apply for family reunification and have the advantages in the procedure.

As early as in 2007, Italian legislation granted the right to family reunification to beneficiaries of subsidiary protection on the same conditions applicable to migrants who reside in Italy legally. Article 22 of legislative decree no. 251/2007 broadened the scope of Directive 2003/86/EC, adopted by legislative decree no. 18/2014, aiming at giving a similar status to refugees and beneficiaries of subsidiary protection. Therefore, a foreign national who is granted subsidiary protection is entitled to family reunification on the conditions set in Article 29-*bis* of the Consolidated Act on Immigration.

A simplified procedure is in place in the Italian legal order for foreign nationals with refugee status or subsidiary protection who hold a residence permit for protection or humanitarian reasons. In these cases, they are not required to provide evidence of their economic conditions, nor of their dwelling situation.

Moreover, if a refugee cannot exhibit official documents proving his or her family relationships, due to his or her status, or to the absence of a recognised authority, or to the presumed unreliability of the documents issued by the local authority, the diplomatic missions or consular posts issues such certifications, based on checks made at the expenses of the persons concerned (in particular, DNA

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[252] European Commission, *Communication from the Commission to the European Parliament and the Council on Guidance for application for Directive 2003/86/EC on the right to family reunification*, COM(2014)210 final, pp. 24-25.

[253] Point 6.2 of Commission Guidelines on the application of the Family Reunification Directive, COM(2014)201. See the relevant recent case-law of the ECtHR: *Hode and Abdi v UK*, 6 Nov. 2012, 22341/09, §§ 54-55; *Pajić v Croatia*, 23 Feb. 2016, 68453/13, § 8183; *Taddeuci v Italy*, 30 June 2016, 51362/09, § 9498; *Biao v Denmark*, 24 May 2016, 38590/10, § 122137.

[254] European Commission, 2008 *Implementation Report on the application pf Directive 2003/86/EC on the right to family reunification*, (available at: http://eur-lex.europa.eu/legalcontent/EN/Txt/PDF/?uri=CELEX:52008dc0610&fro m=EN).

testing) or based on documents issued by international organisations considered to be suitable by the Ministry of Foreign Affairs and International Cooperation (for instance, IOM). The rejection of the application cannot be motivated exclusively due to the absence of probative documents.

According to Art. 29 bis, subparagraph 3 of the the Consolidated Act on Immigration (Legislative Decree n. 286/1998), if the refugee is an unaccompanied minor, entry and residence for the purposes of family reunification is allowed for first degree direct relatives in the ascending lines, thus favoring the restoration of the family unit, with requests that may be advanced at any time.

Eventually, it is to note that while in some Member States reuniting family members do not have access to the same residency status and rights as their sponsors [255], in Italy also beneficiaries of subsidiary protection are entrusted with the same rights as other

13. *Final remarks: the right to family reunification as a "laboratory" for the "composite" constitutional system of adjudication of fundamental rights among the EU Charter of Fundamental Rights, the ECHR and national Constitutions?*

The "fragmented landscape" [256] for the protection of the fundamental right to family reunification decribed in this contribution while appears confirming that the image of a "Europe of bits and pieces" [257], said many years ago, sounds most appropriate than ever, at the same time clearly pushes, from a methodological perspective, towards greater cooperation between national courts – and more than ever constitutional courts – and European Courts.

The scholarly debate in recent years has tried to address the complex structural relationship between the European and domestic legal orders, using the prysm of different still convergent methodological approaches being developed to categorize a constitutional theory of the European integration. The mutual interaction between domestic and European legal orders has been described, progressively, as based on a necessary constitutional tolerance [258], "contrapunctu-

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[255] F. Nicholson, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, UNHCR, II ed., 2018, pp. 118 ff.

[256] To recall the title of a recent book: L. VIOLINI, A. BARAGGIA (eds.), *The Fragmented Landscape of Fundamental Rights Protection in Europe*, 2018.

[257] D. CURTIN, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, in *Common Market Law Review*, 1993, pp. 17-69.

[258] J.H.H. WEILER, *In defence of the status quo: Europe's constitutional sonderweg*, in ID. and M. WIND (eds.), *European Constitutionalism beyond the State* (2003), 7-23. and ID., *On the power of the Word: Europe's constittutional iconography – Prologue*, 3(2&3) ICON 173 (2005) 184-190.

al"[259], as a space of "constitutional interdependence"[260]. By stressing the co-existence of national and supranational levels in a layered structure reflecting a multi-level constitutionalism[261], with the creation of a 'union of constitutions'[262], some scholars even spoke, in an more integrated manner, about a composite European constitution[263], in which neither the supranational nor the national constitutional level can fully operate alone without the necessary completion of the other.

Be that as it may, as remarkably argued recently[264] the present scenario marks a major novelty: the end of the loneliness of the courts, even the constitutional courts and supreme courts in their constitutional adjudication (intended as the function entrusted to those courts, both supreme and constitutional, of adjudicating fundamental rights and enforcing the separation of powers[265]) because "in a context that is constitutionally interconnected it is no longer possible to play any game alone. Indeed, Courts operate in legal systems populated by several other actors from whom Courts must take advantage of"[266].

Thus, not only one could not picture the overall protection afforded to such right without looking at the different legal orders, but the overall landscape described above clearly shows why the right to family reunification for third country nationals can be a perfect "playground" for fruitful mutual influences among the different three legal orders – EU, ECHR, and national legal orders – which have

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[259] M.P. MADURO, *Contrapunctual law: Europe's constitutional pluralism in action*, in N. Walker (ed.), *Sovereignty in transitions* (2006), 501.

[260] See M. CARTABIA, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, 16(6) GLJ – Special Issue on "The preliminary references by Constitutional Courts to the CJEU" 1791 (2015).

[261] I. PERNICE, *Multilevel Constitutionalism in the European Union*, in *Eur. Law Rev*., 2002, p. 511.

[262] A. MANZELLA, *La ripartizione di competenze tra Unione europea e Stati membri*, in *Quad. Cost*., 2000, p. 531 (2000) and ID., *L'unitarietà costituzionale dell'ordinamento europeo*, in *Quad. Cost*., 2012, p. 659.

[263] L.F.M. BESSELINK, *A Composite European Constitution*, 2007; G. DAVIES, M. ABVELJ (eds.), *Research Handbook on Legal Pluralism and EU Law*, 2018.

[264] S. CASSESE, *Fine della solitudine delle corti costituzionali, ovvero il dilemma del porcospino* [The end of the Constitutional Courts' loneliness, or rather the dilemma of the porcupine], in *Ars Interpretandi*, 2015, pp. 21-32.

[265] M. ROSENFELD, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in ICON, 2004, p. 633; J. FEREJOHN, P. PASQUINO, *Constitutional Adjudication: Lessons from Europe*, in *Tex. L.R.*, 2004, p. 1671.

[266] Quoting M. CARTABIA, in *Constitutional Adjudication within a European Composite Constitution. A view from the bench (interviews to Judges Giuliano Amato, Marta Cartabia, Daria de Pretis, Silvana Sciarra*), in *Italian Journal of Public Law*, 2018, p. 500. See M. Cartabia, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, 16(6) GLJ – Special Issue on "The preliminary references by Constitutional Courts to the CJEU" 1791 (2015).

developed into a "composite" constitutional system, requiring interactions also among their respective judicial bodies acting as human rights adjudicators in a parallel composite system of judicial review [267], so to preserve legal pluralism in Europe.

As seen, the field of family reunification reflects a typical feature of contemporary constitutionalism as "a space of constitutional interdependence and interaction" [268] produced by the overlapping of national (constitutional), European and international legal sources and judicial decisions – both from national Constitutional Courts and European Courts – and this raises challenging issues for legal practictioners whenever a fundamental rights is at stake.

It is not by chance that some scholars have addressed them as a real "labyrinth" for the interpreter [269], who is frequently asked to choose among several possible directions.

To this respect, in recent years the Italian Constitutional Court has devoted a significant attention to the judicial application of the ECHR and EU law (comprising the EU Charter of Fundamental Rights) into the Italian legal order order, redefining progressively the vertical relationship between national judges and these external legal sources both for the common courts and the Constitutional Court itself, so to guarantee to the Constitutional Court, better equipped in exercising constitutional adjudication of fundamental rights, to have a say "prior" to the intervention of the European Courts when the case raises a question of compatibility either with the ECHR or the EU's Charter of Fundamental Rights in relation to fuindamental rights that are also protected by the Italian Constitution.

As for the ECHR, according to a case-law inaugurated in the seminal "twin decisions" nos. 348 and 349 of 2007 [270] – whose principles have been subsequent-

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[267] See M. CARTABIA, *Of Bridges and Walls*: the "Italian Style" of Constitutional Adjudication', in *Italian Journal of Public Law,* 2016, p. 37 at p. 49.

[268] Quoting the words of the former President of the Italian Constitutional Court M. CARTABIA, *Of Bridges and Walls: the "Italian Style" of Constitutional Adjudication*, in *Italian Journal of Public Law*, 2016, vol. 1, p. 1.

[269] See V. MANES, *Il giudice nel labirinto. Profili delle intersezioni tra diritto penale e fonti sovranazionali*, 2012.

[270] See Italian Consttutional Court, judments no. 348 and no. 349 of 2007, in *Giur. cost*., 2007, p. 3475 ff. For comments see: A. RUGGERI, *Ancora in tema di rapporti tra CEDU e Costituzione: profili teorici e questioni pratiche*, nel sito Internet dell'Associazione italiana dei costituzionalisti, all'indirizzo www.associazionedeicostituzionalisti.it; ID., *Conferme e novità di fine anno in tema di rapporti tra diritto interno e CEDU*, in *Forum Quaderni costituzionali*; C. PINELLI, *Sul trattamento giurisdizionale della CEDU e delle leggi con essa confliggenti*, nel sito Internet dell'Associazione italiana dei costituzionalisti, cit.; S.M. CICCONETTI, *Creazione indiretta del diritto e norme interposte*, ibid.; A. MOSCARINI, *Indennità di espropriazione e valore di mercato del bene: un passo avanti e uno indietro della Consulta nella costruzione del patrimonio costituzionale europeo*, in *Federalismi.it*, n. 22/2007; F. DONATI, *La CEDU nel sistema italiano delle fonti del diritto alla luce delle sentenze della Corte costituzionale del 24 ottobre 2007*, in *Osservatorio sulle fonti*; M. CAR-

ly heavily revised in 2015 – the Italian Constitutional Court affirmed that this reform has given the ECHR a higher status than domestic ordinary law and, in the event of conflict, courts hearing the case must request the intervention of the Constitutional Court, activating constitutional review [271]. In its turn, the Constitutional Court may declare the domestic law void on the ground of the indirect violation of Article 117, para. 1, of the Constitution. Still, as made clear by the Constitutional Court, Italian ordinary courts are under three specific duties: a) they must construe the ECHR's provisions according to the meaning that has been given them by the Court of Strasbourg; b) they must interpret the domestic law in accordance, as far as possible, with the provisions stated by the ECHR, following a "consistent interpretation" (*interpretazione conforme*) [272]; c) whenever such an interpretation is not possible, ordinary courts must raise a constitutionality issue before the ICC on the grounds of violation of Article 117, para. 1, of the Constitution as explicitly said in a subsequent decision [273].

TABIA, *Le sentenze "gemelle": diritti fondamentali, fonti, giudici*, in *Giur. cost*., 2007, p. 3564 ss.; A. GUAZZAROTTI, *La Corte e la CEDU: il problematico confronto di standard di tutela alla luce dell'art. 117, comma I, Cost.*, *ibid.*, p. 3574 ss.; M. LUCIANI, *Alcuni interrogativi sul nuovo corso della giurisprudenza costituzionale in ordine ai rapporti tra diritto italiano e diritto internazionale*, in *Corr. giur*., 2008, p. 85 ss.; F. GHERA, *Una svolta storica nei rapporti del diritto interno con il diritto internazionale pattizio (ma non in quelli con il diritto comunitario),* in *Foro it*., 2008, I, p. 50 ss.; F. SORRENTINO, *Apologia delle "sentenze gemelle" (brevi note a margine delle sentenze nn. 348 e 349/2007 della Corte costituzionale),* in *Dir. soc*., 2009, p. 213 ss.; F. BILANCIA, *Con l'obiettivo di assicurare l'effettività degli strumenti di garanzia la Corte costituzionale italiana funzionalizza il "margine di apprezzamento" statale, di cui alla giurisprudenza CEDU, alla garanzia degli stessi diritti fondamentali*, in *Giur. cost.,* 2009, p. 4772 ss.; A. TRAVI, *Corte europea dei diritti dell'uomo e Corte costituzionale: alla ricerca di una nozione comune di "sanzione"*, in *Giur. cost*., 2010, p. 2323 ss.; E. GIANFRANCESCO, *Incroci pericolosi: CEDU, Carta dei diritti fondamentali e Costituzione italiana tra Corte costituzionale, Corte di giustizia e Corte di Strasburgo,* in *Riv. AIC*, n. 1 del 2011.

[271] For an illustration of the Italian model of constitutional review and its evolution see V. BARSOTTI, P.G. CAROZZA, M. CARTABIA, A. SIMONCINI*, Italian Constitutional Justice in Global Context*, Oxford, 2015; T. GROPPI, *The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?,* in *JCL*, 2008, p. 100 ff.; P. PASSAGLIA, *Rights-Based Constitutional Review in Italy,* in *ConsultaOnLine,* 2013; G. ZAGREBELSKY, V. MARCENÒ, *La giustizia costituzionale, II. Oggetti, procedimenti, decisioni*, Bologna, 2018; E. MALFATTI, S. PANIZZA, R. ROMBOLI, *Giustizia costituzionale*, Torino, 2018; A. RUGGERI, A. SPADARO, *Lineamenti di giustizia costituzionale*, 2019.

[272] G. MARTINICO, *The Importance of Consistent Interpretation in Subnational Constitutional Contexts: Old Wine in New Bottles?*, in *Perspectives on Federalism*, 2012, p. 283; E. LAMARQUE, *The Italian Courts and Interpretation in Conformity with the Constitution, Eu Law and The ECHR* , in *Rivista AIC*, 2012, pp. 1-27; M. RAVERAIRA, *Le critiche all'interpretazione conforme: dalla teoria alla prassi un'incidentalità "accidentata"?*', in *Giur. It*., 2010, p. 1669; M. LUCIANI, *Le funzioni sistemiche della Corte costituzionale, oggi, e l'interpretazione "conforme a*, in AA.VV., *Studi in memoria di Giuseppe G. Floridia*, Napoli, 2009, p. 425; V. MANES, *Metodo e limiti dell'interpretazione conforme alle fonti sovranazionali in materia penale*, in *Arch. pen*., 2012, pp. 17.

[273] Italian Constitutional Court, decision no. 239/2009.

These princples regarding the domestic treatment of the ECHR and specificallyof the ECtHR's case-law interpreting it, have been substantially revised with a new trend inaugurated in 2015, aiming at addressing one of the main problematic features of the Strabourg Courts'case law, namely its casuistry nature, and sometimes even reflecting contradicting trends.

As the cases regarding the right to family reunification under Articles 8 and 14 ECHR analysed above clearly show (but the same could be said for the Strasbourg Court's case law on any article of the ECHR) the ECtHR understands the Convention as a "living instrument," and consequently it never stops developing new interpretations of it, drawing from legal trends in supranational and national courts inside and outside Europe. As the ECtHR doesn't follow any *stare decisis* doctrine, precedents are not firm. This means that new interpretations of the Convention can keep springing out of the ECtHR and repeatedly be used to challenge the same Italian legal provisions, thus also causing the "consistent interpretation to the ECHR" a canon leading to substantial uncertainties among judicial decisions.

With decision no. 49/2015 the Italian Constitutional Court thus aimed precisely at clarifying which role Italian common judges must accord to the ECtHR's ever-changing jurisprudence when they use the canon of "interpretation in conformity with the ECHR".

In this decision it stated that domestic judges must rely on only, and conform their interpretation of the Convention to, the ECtHR's "*well established case law*", whereas in fields where its jurisprudence is unsettled, Italian courts shouldn't follow it.

Substantially, as it has been noted [274], with its 2015 decision, the Italian Constitutional Court went further than ever before in protecting the national legal system from the influence of the European Convention of Human Rights, by both laying down a list of conditions which the European Court of Human Rights's decisions must fulfill before it can be used to challenge a national law, and charging the ordinary courts with the task of controlling compliance with the items in the list before referring a law to the Italian Constitutional Court.

The Constitutionl Court thus held that ordinary courts should interpret national law in accordance with the ECHR, but nevertheless they must first of all interpret national law in accordance with the Italian Constitution, which has an axiological prevalence on the ECHR.

In particular, for the first time, the Italian Constitutional Court, with decision no. 49/2015, enumerated the situations in which the ordinary courts may be bound

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[274] For comments see A. PIN, *A Jurisprudence to Handle with Care: The European Court of Human Rights' Unsettled Case Law, its Authority, and its Future, According to the Italian Constitutional Court*, in *Int'l J. Const. L. Blog*, May 1, 2015; D. TEGA, *A National Narrative: The Constitution's Axiological Prevalence on the ECHR – A Comment on the Italian Constitutional Court Judgment No. 49/2015*, in *Int'l J. Const. L. Blog*, May 1, 2015.

by a Strasbourg ruling, namely: a) when the ruling concerns a specific individual dispute remitted to the national court; b) when a line of Strasbourg case-law is «well-established»; c) and when the ruling is a pilot judgment.

To the contrary the decision also listed which features of the ECtHR's case law should refrain domestic judges from accepting it as the correct interpretation of the Convention, namely: a high degree of jurisdictional creativity, which implies that the new principle is not well settled in case law; conflicts within the ECtHR's jurisprudence; its adoption by a Chamber, and not by the Grand Chamber itself; The ECtHR judgment's misunderstanding of the Italian legal context; and the existence of dissenting opinions attached to the relevant case law.

The Italian Constitutional Court actually confirmed also that a judgment by the ECtHR is not binding if it is not compatible with the Italian Constitution according to the ICC, which is the only body entrusted with the power to come to such a conclusion.

It is clear the intent of the Italian Constitutional Court to overcome the ECtHR's hyper-activism, asking for more dialogue and cooperation in asserting that the ECtHR has a role in serving Conventional rights, but it is not alone, clearly aiming at overcoming the idea of ECtHR's monopoly over the interpretation of the Convention.

Looking instead at cases of contrast with the EU law, until 2017 according to a well settled case law of the Italian Constitutional Court "the protocol" for common judges to decide cases of conflict with EU provisions was based on whether the EU provision at stake was with direct effect or instead not self-executing.

Namely, if the conflict was with an EU provision having direct effect[275] the resolution of such antinomy, based on Articles 11 and 117 of the Constitution, was only a matter for the common courts required, due to the primacy of EU law, to give precedence to the EU provisions by simply not applying the domestic law.

Instead, in the case where conflicts raised between a national provision and EU provisions not self-executing (as EU directives are), the common judge must raise an issue of constitutional legitimacy in front of the Constitutional Court. Consequently, in this hypothesis, the ICC is meant to rule – on issues of constitutional legitimacy – in the light of internal constitutional parameters (so in the light of the

[275] The notion of "direct effect" in the EU legal order has become increasingly complex under the case-law of the CJEU, as showed by Daniele Gallo, according to whom the direct effect of an EU law provision shall be asserted only when it is directly applicable due to its unconditional character *and* when its application creates an interest for the individual. Where the provision requires a further act of transposition, there is no direct effect. Where there isn't such an interest, there is no direct effect: see D. GALLO, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa*, Milano, 2018.

To a simpler conclusion come M. CARTABIA, M. GENNUSA, *Le fonti europee e il diritto italiano*, Torino, 2011, p. 35, according to whom one can tell if an EU provision has direct eeffect … only if CJEU has said so.

fundamental rights protected in the domestic Constitution) principles and, possibly, in the light of the European ones, according to a sequence identified on a case-by-case basis. This, in order to ensure that the rights guaranteed in the EU Charter will be interpreted as sources of law, in accordance with the constitutional traditions.

In the area of fundamental rights the overall picture regarding conflicts with EU law has been dramatically changed by some relevant *révirements* adopted by the Constitutional Court since 2017 in cases where the EU Charter of Fundamental Rights applies.

With its judgment n. 269/2017, the ICC inaugurated a new orientation, identifying new criteria specifically devoted to the application of the provisions of the Charter of Fundamental Rights of the EU by lower judges [276], in an "obiter dictum" clarifying what the lower judges should do when a national law is potentially infringing both the Italian Constitution and the EU Charter.

In particular, the Court held that the criteria usually applied to regulate the relationship between national law and European law (namely, non application of national law in case of conflict being directly decided by the common court) should be reconsidered, taking into account that the EU Charter of Fundamental Rights has a "special" content, a "typically constitutional" content.

For the Constitutional Court, whenever the content and the scope of application of a EU Charter's right overlap with a right enshrined in the Constitution, priority must be given to the question of constitutionality, whatever the nature of the EU clause at stake, so that the "centralized system of the constitutional review of laws"

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[276] On this judgment, L. SALVATO, *Quattro interrogativi preliminari al dibattito aperto dalla sentenza n. 269/2017, in Forum costituzionale*, 18 December 2017, www.forumcostituzionale.it; A. GUAZZAROTTI, *Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sent. n. 269/2017*, in *Forum costituzionale*, 18 December 2017, www.forumcostituzionale.it; R. CONTI, *La Cassazione dopo Corte cost. n. 269/2017. Qualche riflessione, a seconda lettura*, in *Forum costituzionale*, 28 December 2017, www.forumcostituzionale.it; ID., *Qualche riflessione, a terza lettura, sulla sentenza n. 269/2017*, in *Rivista di Diritti Comparati*, 2018, p. 1 et seq.; G. SCACCIA, *L'inversione della "doppia pregiudiziale" nella sentenza della Corte costituzionale n. 269/2017: presupposti teorici e problemi applicativi*, in *Forum costituzionale*, 25 January 2018, www.forumcostituzionale.it; D. TEGA, *La sentenza n. 269 del 2017 e il concorso dei rimedi giurisdizionali costituzionali ed europei*, in Forum costituzionale, 24 January 2018, www.forumcostituzionale.it; L.S. ROSSI, *La sentenza 269/2017 della Corte costituzionale italiana: obiter "creativi" (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione europea*, in *Federalismi.it*, 31 January 2018, www.federalismi.it; M. NISTICÒ, *Taricco II: il passo indietro della Corte di giustizia e le prospettive del supposto dialogo tra le Corti, in Osservatorio Costituzionale AIC*, 17 January 2018, www.osservatorioaic.it. G. SCACCIA, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, in *Rivista AIC*, 2018, p. 1 ss., pp. 5-6; M. MASSA, *La prima parola e l'ultima. Il posto della Corte costituzionale nella tutela integrata dei diritti*, in *DPCE*, 2018, G. PISTORIO, *Conferme e precisazioni nel «cammino comunitario» della Corte costituzionale. Commento a prima lettura della sentenza n. 269 del 2017*, in *www.diritticomparati.it*, 11 gennaio 2018.

is preserved (the Court motivated this new stance also stating that "The quest for effectiveness and legal certainty in fundamental rights protection requires that such conflict situations are taken charge of by the Italian Constitutional Court itself, even in light of 'the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure"[277]).

In 2019 the Italian Constitutional Court confirmed this reading in three decisions (no. 20, 63 and 117 of 2019)[278] and particularly with decision no. 20/2019 clarified how its new "doctrine" applies to the case of 'dual preliminarity', interpreting in a more "EU-friendly" way that cumbersome procedural priority to activate constitutional review first.

The Constitutional Court has, in fact, reaffirmed that the precedence of the constitutional review cannot affect the power of the ordinary judge to lodge a preliminary reference to the CJEU, thus when both fundamental rights protected in the Constitution and in the EU Charter are deemed to be violated the Court has only "invited" the common judges to refer questions to the Constitutional Court; but – at the same time – the Court states that a referral decision under Art. 267 TFEU can be made by the judge "*at every stage of the proceeding and for every reason he may deem it for necessary*", while in its previous decision inaugurating the new trend such a possibility appeared to be limited for the referring judges to issues that the Constitutional Court had not dealt with.

In this second "refined version" of this doctrine the Constitutional Court provides for a less rigid model of interaction with the ordinary judges, as they are not prevented anymore from the prior involvement of the CJEU in the preliminary reference procedure when both national and European fundamental rights are at stake (in this way the "doctrine" of the CJEU imposing the duty on domestic courts to disapply the national law in contrast wit EU law has been respected).

Actually, with subsequent decisions, the Constitutional Court held, on one side, its right to use the EU Charter rights "that protects, substantially, the same rights of the Constitution" to review national legislation (decision no. 63/2019, for some leading to an "internalization" or "constitutionalization" of the EU Charter[279)], and on the other side has demonstrated to adopt more frequently referral orders to the CJEU using the preliminary ruling of Art. 267 TFUE asking the "compatibility" of a Directive and a Regulation with several articles of the EU Charter (see order no. 117/2019 and order no. 182/2020).

This "strategic" use of the preliminary ruling to the CJEU by the Italian Constitutional Court, before reviewing the constitutionality of the national implementing law, is particularly significant for several reasons.

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[277] Italian Constitutional Court, decision no. 269/2017.

[278] See G. Repetto, G. Martinico, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court,* in *Eur. Const*, 2020,

[279] G. Repetto, G. Martinico, *Fundamental Rights and Constitutional Duels in Europe*, cit., p. 736.

In the first instance, it allows to revoke those initial worried concerns some scholars addressed to this "new course" of the Constitutional Court, fearing a Court "*souverainiste*" [280] and less cooperative.

On the contrary, it brings to the forefront the "rationale" proclaimed by the Constitutional Court for its 2017 *révirement*, namely – as the Court stated – the need for "framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to *enhance dialogue with the ECJ*", so that "*the maximum protection of rights is assured at the system-wide level (Article 53 of the EUCFR)*" (point 5.2. italics added).

Futhermore, it shows the said loyal cooperation "in action" as the Constitutional Court through these referral orders to the CJEU pays tribute to the primacy of EU law as the national implementing provisions under scrutiny in the constitutional review process were implementing EU mandatory provisions, thus requiring for their interpretation and validity the exclusive competence of the CJEU.

And actually the very same cooperation through the preliminary reference is required any time that an EU legislative measure encloses what the CJEU qualifies as embodying an "autonomous meaning specific to EU law" – like in the case of the Family Reunification Directive the notion of "dependency" relevant for determining the "extended family" Member States have the option to shape (see above para. 5.2) – and with this the CJEU strategically recognizes that is, in principle, for the national court to carry out that classification while at the same time paying heed to the case law of the CJEU, strategically focused on preserving the autonomomy of EU law as a way to prevent the fragmentation and guarantee to the contrary a certain level of EU law uniformity as a requisite for the overall architecture [281].

But it is the "type" of preliminary ruling to the CJEU that reveals, as said, the strategic use from the Italian Constitutional Court of this mechanism and reveals the underline intent of the new stance adopted.

The Court, in fact, did not adopt a preliminary ruling "for interpretation" of EU law, – in general the most used by national courts, leading to an indirect form of supervision by the CJEU of domestic legislation.

The Constitutional Court, instead, adopted the "other" preliminary ruling, the one aiming at the "review of the validity" of EU provisions, that inevitably leads the CJEU to adjudicate the case in the light of the fundamental rights protected by

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[280] In particular D. GALLO, *Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, in *Eur. Law Journ*., 2019, p. 434.

[281] On the autonomy of EU law see K. LENAERTS, *The autonomy of European Union Law*, in *Dir. Un. Eur*., 2018, vol. 4, p. 617-632; see also G. DAVIES, *Does the Court of Justice own the Treaties? Interpretative pluralism as a solution to over-constitutionalisation*, in *Eur.Law Journ.*, 2018, pp. 358-375.

the EU Charter of Fundamental Rights, thus acting as a true Constitutional Court of the EU.

This was precisely what happened in the famous case *Digital Rights Ireland* of 8 April 2014 regarding the Data Retention Directive when, after a referral order for compatibility raised by the Austrian Constitutional Court (who actually joined the Irish Supreme Court referral), the CJEU declared invalid the Data Retention Directive *ab initio* as in contrast with the fundamental rights to private life and the right to data retention protected by the EU Charter (thus the initive of the Austrian Constitutional Court addressed the origin of these violations as already inherent in the Eu provisions that the national measures aimed at transposing).

As argued by the former President of the Constitutional Court, Marta Cartabia, "the preliminary ruling procedure is one of the more powerful procedural connectors among courts serving the cause of constitutional pluralism (…) an opportunity for national Constitutional Courts to be *agents* rather than passive *recipients* of the European constitutional construction (… as) in the "pluralistic" constitutional framework of Europe, there might be equivalence, but also diversity in the interpretation of the same legal principles and fundamental rights by different judicial actors, through referral orders for preliminary ruling on the validity of EU provisions " (italics original) [282].

In the Italian scholarly debate it has been convincingly argued that the Court that speaks first plays a crucial role as a Constitutional Court – ordinarily entrusted with the constitutional adjudication of fundamental rights – are better equipped for "framing the constitutional questions that other courts and, more in general, other institutions, will be called to answer" [283], and a preliminary ruling sent by a Constitutional Court has an added value for the European courts as it brings to their attention more arguments that are useful for a better comprehension of the case, enriching their understanding of the national contexts (as the *Taricco Saga* clearly showed).

The new approach showed by the Constitutional Court towards both the ECHR and the EU Charter of Fundamental Rights appears to reflect the idea that regarding fundamental righst the it is willing to keep a conversation going between the specific features of national constitutional rights and those protected at EU level, aiming at promoting dialogue with the European Courts in a cooperative way,

The field of family reunification for third contry nationals appears to be a promising area for mutual fruitful cooperation among the European Courts and

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[282] M. CARTABIA, *Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling*, in *Germ. Law Journ*., 2015, p. 1794, p. 1795.

[283] N. LUPO, *op. cit.*, "Constitutional Courts are in the best position to frame constitutionally sensitive questions through the preliminary reference mechanism to the Court of Justice in order to let the composite European Constitution work properly and to allow national constitutional identities to be effectively taken duly into account by the Court in Luxembourg".

the domestic Constitutional Courts, given that it is protected as a fundamental right both under the Italian Constitution and the EU Charter of Fundamental Righs and given the discretionary powers left to the national legislators by the EU Family Reunification Directive. Actually, it could be seen as an ideal "laboratory" where experiencing the new trait put forward by the Italian Constitutional Court as agent of the European constitutional construction by scrutinizing not only the discretionary measures of the Italian legislation regarding family reunification in the light of the fundamental rights protected by the domestic Constitution and, also – though in cooperation with the CJEU under preliminary references for the validity of EU acts – indirectly tackling the mandatory EU provisions to be effectively put under scrutiny

But, for this to happen, it is crucial that courts (and, before them, the legal practitioners as well) accept the invitation launched by the Constitutional Court to "go to Rome" first.

Will common judges increasingly refer immediately to the Constitutional Court the national legislation regarded in contrast both with the Constitution and the EU Charter – instead of raising in advance a preliminary ruling in front of the CJEU –, so to allow the Italian Constitutional Court "speaking first" shaping the case before the European Court by asking the right questions to the Court of Justice and proposing its interpretations of the Italian constitutional tradition of fundamnetal righst and values of the 1948 Constitution?

Time will tell. Still this is a crucial endeavour that could contribute heavily to overcome the critics (rightly) addressed [284] to the Court of Justice of the EU for the low level standards used in adjudicating fundamental rights in many fields.

[284] See recently in the Italian context R BIN, *Critica della teoria dei diritti*, Milano, 2018. But well in advance M. LUCIANI, *Costituzionalismo irenico e costituzionalismo polemico*, in *Giur. cost*., 2006, p. 1661.

THE RIGHT TO FAMILY REUNIFICATION IN THE BULGARIAN LEGAL ORDER *

Sofia Razboynikova

1. *Introduction*

Bulgaria is a country of emigration, meaning that more Bulgarians leave the country than foreigners arrive. Immigration is gradually increasing but remains relatively low in the EU context. In terms of asylum, Bulgaria established the National Bureau for Territorial Asylum and Refugees in 1992, which later became the State Agency for Refugees. However, due to its socio-economical profile, the country never became a major asylum destination.

For a long time 'refugees' in Bulgaria were associated with a series of poems by the prominent Bulgarian poet Yavorov, who forcefully described the plight of the Armenians fleeing from the genocide in neighbouring Turkey in the beginning

* The present report has been realized in the framework of the European project "Lawyers for the protection of fundamental rights" GA n° 806974) and specifically within the work package on the review of the European legal framework on fundamental rights. Against this background, the beneficiaries of the said project chose to focus the analysis on two specific topics:

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.

The present report explores the first topic on "The right to family reunification in the Bulgarian legal order", realized by Sofia Razboynikova, attorney-at-law, member of the Sofia City Bar.

of the 20th century. Some 20,000 Armenians came to Bulgaria then. As well as them, Bulgaria has welcomed mostly ethnic Bulgarians from other parts of Europe seeking refuge in the country in the turbulent years after the fall of the Ottoman Empire and the successive rearrangements of the borders of the newly independent states from the Balkans all the way up to the Second World War.

Right after the Russo-Turkish war (1878) between 200,000 and 300,000 ethnic Bulgarians who were left within the boundaries of the Ottoman Empire came to Bulgaria. Most of them came from Macedonia and Aegean Thrace (Greece). Following an uprising in today's North Macedonia to improve the plight of the Bulgarians living there, another refugee wave of some 150,000 people stemmed to the country. After the heavy losses the country sustained in the Balkan Wars (1912-1923) against Serbia, Greece and Romania, some 350,000 ethnic Bulgarians fled from what were no longer Bulgarian territories to the newly drawn country. Another 120,000 ethnic Bulgarians came after the First World War when Bulgaria fought on the side of the Germans.

During the Communist regime (1945-1989), Bulgaria, a satellite of the Soviet Union, kept its borders closed and hence immigration was severely restricted. It basically manifested in students from the so-called Third World, who were granted scholarships to study in Bulgarian universities; a very small group of political refugees, mostly people with leftist convictions from Greece and Turkey; and Vietnamese workers in the 1980s, whom the Bulgarian government hosted in response to the surplus labor in Vietnam at the time.

After the fall of the Iron Curtain, in the early 1990s, the largest group of immigrants came from Russia, Ukraine and other countries from the post-Soviet era. Chinese economic migrants and retirement migration, e.g. Britons, added to the picture.

Bulgaria signed the 1951 Refugee Convention and the Protocol to it in 1993. Since then (when statistics about refugees and asylum-seekers are kept) the country has been receiving a moderate number of applications, with a peak of 2,888 applications in 2002. But even then the scale of the flow was not exceeding the capacity and the existing institutional structure to handle it. The top countries of origin were Afghanistan, Syria, Iraq, Pakistan followed by stateless people mostly from former Soviet Union republics. Before accessing the EU in 2007 the total amount of applications for international protection was 15,321 to 1,412 of whom State Agency for Refugees (SAR) granted refugee status and humanitarian status to another 3,497 [1].

In 2013, well into its third year, the war in Syria had already displaced millions and Syrians became the largest refugee population in the world. Bulgaria, though, remained largely unaware of the refugee crisis despite the fact that neighbouring Turkey was hosting hundreds of thousands of Syrian refugees. In July

[1] Statistics and reports SAR http://www.aref.government.bg/en/node/179.

2013, the numbers of asylum seekers started rising sharply. Whereas the total number of people crossing the border irregularly was about 1,700 in 2012, it reached 14,637 in 2013 and 22,705 in 2015[2]. By mid-September 2013 the reception facilities were overcrowded by 30% of their maximum capacity. All available spaces had been converted into dormitories – from the TV and internet rooms to the child-care spaces. Up to 100 people shared a single bathroom.

The Bulgarian government responded by endorsing a plan to "tackle the crisis situation following the enhanced migration pressure"[3]. This plan prioritized staffing the Bulgarian-Turkish green border with 1,400 extra border police officers and building a 33-km long fence on the border with Turkey. Four emergency centres were set up. The emergency centre in Kovachevtsi accommodated young families with children and conditions seemed to be good. The other ones, however, were hastily transformed abandoned schools with no appropriate conditions by any standard. Amnesty International visited the refugee centres in November 2013 and reported overcrowdedness, poor accommodation and sanitation conditions, no medical or psychological support except for emergencies, and no information provided to asylum seekers on their status or procedure or length of stay in the centres[4]. The poor living conditions in reception centres and the slow asylum procedures led to several protests by asylum seekers. Many volunteer groups and charities organised regular food, clothes, sanitation and medicines distribution to refugees centres.

In the beginning of January 2014, the UN refugee agency (UNHCR) issued a position paper urging States participating in the Dublin Regulation (Regulation No. 604/2013) to temporarily suspend transfers of asylum-seekers back to Bulgaria. The agency concluded that asylum-seekers in Bulgaria faced a genuine risk of inhumane or degrading treatment due to systemic deficiencies in reception conditions and asylum procedures. It must be noted that although the domestic asylum system in Bulgaria which joined the European Union in 2007 is in line with the European legislation, the so-called asylum *acquis*, practical challenges regarding asylum seekers have been pointed prior to the Syrian crisis, such as arbitrary access to the asylum procedure and detaining asylum seekers as illegal immigrants and starting criminal proceedings against them[5]. The law entitles asylum-seekers to social benefits, health care and psychological assistance, as well as an interpreter but in practice access to these rights is often hindered. The State Agency

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[2] Ministry of Interior, Statistical data.

[3] The plan was approved by a decision of the Council of Ministers on 7 November 2013.

[4] Amnesty International Briefing: Refugees in Bulgaria Trapped in substandard conditions (13 December 2013).

[5] European Council on Refugees and Exiles, *"Dublin II Regulation: National Report": European network for technical cooperation on the application of the Dublin II Regulation – Bulgaria*, May 2012, available at: http://www.refworld.org/docid/51404db22.html.

for Refugees, the domestic agency in charge of asylum seekers and refugees, does not provide legal aid and applicants often have to rely on non-governmental organisations. Even more importantly, vulnerable groups such as children, unaccompanied minors, people with disabilities, and women are not afforded the respective standard of protection.

The influx of Syrian refugees apparently pushed old deficiencies in the domestic asylum system to the fore. In early February 2014, EU Home Affairs Commissioner Cecilia Malmström noted that refugees in Bulgaria were increasingly vulnerable, and she warned that this could force the activation of the Dublin Regulation's crisis management mechanism for the first time ever.

Under enhanced external pressure, the Bulgarian authorities started slowly to make improvements. Tents in refugee centers disappeared and were replaced by containers. Former schools were renovated and warm food was made available. The registration of asylum seekers was stepped up. Despite some progress, though, delays in the registration of asylum seekers continued and there was no support for vulnerable persons and unaccompanied children. More importantly, in its March 2014 update on the situation with refugees in Bulgaria, UNHCR voiced concerns over measures to restrict access to Bulgaria, in particular along the Turkish border. Indeed, while 3,600 people entered the country in October 2013, the numbers have trickled to 126 in February, 232 in March and 247 in April 2014. Speaking in Washington, D.C. on the third anniversary of the start of the war in Syria, the UN High Commissioner for Refugees Antonio Guterres said that it was "totally unacceptable" for Bulgaria to close its border after receiving 8,000 Syrian refugees when its neighbour, Turkey, has registered roughly 640,000. Perhaps this is what the executive director of Frontex, the European agency for external border security, meant by saying in March 2014 that the situation at the Bulgarian-Turkish border was 'under control'. Human Rights Watch, however, used a more appropriate term, 'pushback', a practice that is illegal under European Union, domestic and international law. Their report [6] was issued in the end of April 2014 and cited 519 individual cases of push-backs to Turkey as well as numerous migrant testimonies describing beatings by border guards. Roughly at the same time Border Monitoring Bulgaria, which has been following immigration and asylum policies and practices in Bulgaria since 2011, reported continuing practices of push-backs, often accompanied by physical violence and/or psychological abuse conducted by border police officers [7]. The Bulgarian Interior Minister referred to the findings in the reports as 'striking lies', while the head of the State Agency for Refugees called the authors of the reports 'morons and liars'.

[6] https://www.hrw.org/news/2014/04/16/bulgarias-false-good-news-refugees.

[7] http://bordermonitoring.eu/2014/04/child-beaten-at-eu-border-brutal-push-backs-continue-in-bulgaria/.

The surge of refugees triggered inadequate reactions not only on the part of politicians and senior government officials. It ignited xenophobia in what is perceived as a traditionally tolerant Bulgarian society. Yet a survey of the Open Society Institute – Sofia, conducted prior to the influx of refugees in the country, confirmed that hate speech was already widespread in the country, with Roma, ethnic Turks and sexual minorities the main object of hate speech. Only in November 2013 seven migrants and even an ethnic Turk mistaken for a Syrian were attacked in the streets of the Bulgarian capital Sofia; many of the incidents were not reported to the Interior Ministry. In a December 2013 poll by Gallup almost one-third of the respondents insisted that Bulgaria accept no more refugees. According to an earlier poll by Alpha Research, some 60% believed that refugees were a threat to national security and public health. The far-right parties were quickly on the rise, too, perhaps hardly surprising bearing in mind that the strongly nationalistic Ataka ('Attack') party has 23 seats in Parliament.

In March 2014 in the town of Harmanli, where one of the refugee centres is located, a group of mothers rallied multiple times insisting that the refugee centre be closed because the refugees posed a threat to public order. The residents of the small village of Rozovo went even further and in April 2014 effectively ousted three Syrian refugee families, among whom six children. The refugees were officially registered and had rented a house in the village. They stayed only a day. The only institution that responded to this incident was the National Ombudsman. The Prosecution Office did not react, although incitement to hatred and discrimination on national and ethnic grounds is a criminal offence. Nor did the Anti-discrimination Commission, the police or the government. The three families were welcomed in another village where they now live.

According to a 2018 report published by Caritas Bulgaria[8], key deficit of Bulgaria's migration and integration policies is the absence of a deputy prime minister responsible for the coordination of these policies at the top government level. The National Council on Migration and Integration was established in 2015 as a college advisory body in charge of the elaboration and coordination of state policies in the field of migration and integration of persons seeking or have been granted international protection in the Republic of Bulgaria[9]. However, public information about its activities is scarce. Anti-immigration discourses are used by many political actors both from the far right (for example MEP Angel Dzhambazki, IMRO) and mainstream parties. Among the most outspoken anti-migrant proponents are the Bulgarian Socialist Party leader and President Rumen Radev.

Courts and human rights monitoring bodies have taken into account the

[8] The Bulgarian migration paradox, available at: https://caritas.bg/en/news/caritas-news/the-bulgarian-migration-paradox-cb/.

[9] http://www.saveti.government.bg/web/cc_1603/1.

treatment of beneficiaries of international protection in Bulgaria when assessing the legality of readmissions. In a case of 15 December 2016, the United Nations Human Rights Committee ruled against the return of a Syrian family from Denmark to Bulgaria on the grounds that their residence permit would not protect them against obstacles to accessing healthcare, or risks of destitution and hardship [10]. Similar arguments are brought up in the Human Rights Committee decision of 1 February 2017 granting interim measures to prevent the return of an Afghan family with three young children from Austria to Bulgaria [11]. Notwithstanding the decision, the family was returned to Bulgaria by the Austrian authorities shortly after it. National courts in some European countries have also halted transfers of beneficiaries of protection to Bulgaria on account of substandard conditions [12].

On 8 November 2018 the European Commission sent a letter of formal notice to the Bulgarian government concerning the incorrect implementation of EU asylum legislation. The Commission found that shortcomings in the Bulgarian asylum system and related support services are in breach of provisions of the recast Asylum Procedures Directive, the recast Reception Conditions Directive and the Charter of Fundamental Rights. Concerns related in particular to: the accommodation and legal representation of unaccompanied children; the correct identification and support of vulnerable asylum seekers; provision of adequate legal assistance; the detention of asylum seekers as well as safeguards within the detention procedure. The Commission indicated that if Bulgaria would not act within the following two months, the Commission would proceed with sending a reasoned opinion on this matter [13].

Perhaps the single positive news regarding refugees in Bulgaria is the strong volunteerism that has spilled all over the country. Bulgaria does not have traditions in volunteering like other countries do; it even does not have a law regulating voluntary work. The inadequacy of government response to the influx of refugees and the growing anti-migrant sentiments and xenophobia discourse were offbalanced by spontaneous solidarity and abundance of volunteer and charity activities undertaken in support of the refugees in the country. Citizens organised themselves via a Fb page to raise funds, identify particular needs of children and toddlers, find places to live for people who have been granted refugee or humanitarian status and had to leave the transition centres, donate food, medicines, clothes, shoes, baby formulas, toys, etc. Refugees and 'Friends of the Refugees', an in-

[10] Human Rights Committee, R.A.A. v. Denmark, Communication No 2608/2015, 15 December 2016.

[11] Human Rights Committee, Communication No 2942/2017.

[12] See e.g. German High Administrative Court of Lüneburg, Decision 10 LB 82/17, 29 January 2018.

[13] https://europa.eu/rapid/press-release_MEMO-18-6247_en.htm.

formal group of volunteers supporting the asylum seekers in various ways, were awarded 2013 'Human of the Year' by the Bulgarian Helsiniki Committee [14].

Despite this fable light of hope, refugees in Bulgaria still face a lot of challenges. Not only formal deficiencies such as continuing weaknesses in the Bulgarian asylum system, but urgent need as well to improve the asylum adjudicating process and to provide access to education, health care and integration support. Not only a defying government that calls reputed international human rights organisations 'liars', but more importantly strong resentments in a society that sees the 'other' as a source of imminent threat and danger.

2. *The right of asylum and international protection in the Bulgarian legal order: a brief overview*

According to the Bulgarian law, there are four types of special protection granted in the Republic of Bulgaria: asylum in a narrow sense of the term, refugee status, humanitarian status and temporary protection.

Asylum [15] is the protection granted by the President of the Republic of Bulgaria to aliens persecuted for reasons of their convictions or activity in advocating internationally recognised rights and freedoms. Bulgaria's commitment to grant asylum is enshrined in the Constitution [16]. The prerequisites for granting asylum are assessed by a specially designated commission with the President. For the period 2012-2018, 154 asylum applications were submitted, only one was granted, but the status was subsequently revoked [17]. The report will not discuss this type of protection of foreigners in Bulgaria, and henceforth the term asylum will be used in its broad sense.

Refugee status in the Republic of Bulgaria is granted by the chairperson of the State Agency for Refugees (SAR) to an alien who has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a specific social group or political opinion and/or conviction (Art. 8 Law on Asylum and Refugees ('LAR').

Humanitarian status, which is the equivalent of subsidiary protection EU law, is granted by the chairperson of SAR to an alien forced to leave or to stay outside his country of origin or residence for reasons of threat to his life, security or freedom as a result of violence arising out of situations such as armed conflicts,

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[14] http://www.humanoftheyear.org/arhiv/chovek-na-godinata-2013/.

[15] Asylum is a broad term which is often used as a synonym of international protection.

[16] Art 27, § 2 of the Constitution provides that „the Republic of Bulgaria shall grant asylum to aliens persecuted for their beliefs or activities in defense of internationally recognized rights and freedoms."

[17] https://m.president.bg/bg/cat23/Komisia-po-predostaviane-na-ubejishte.

or who faces a threat of torture or other forms of inhuman or degrading treatment or punishment. Humanitarian status may also be granted for other humanitarian reasons or on other grounds stipulated in the Bulgarian legislation, as well as on the grounds indicated in the Conclusions of the Executive Committee of the United Nations High Commissioner for Refugees (Art. 9 LAR).

Temporary protection is granted by the Council of Ministers for a specific period in the event of mass influx of aliens who are forced to leave their country of origin or residence as a result of an armed conflict, civil war, foreign aggression, large-scale violations of human rights or violence in the territory of the relevant country or in a specific area thereof and who, for those reasons, cannot return there (Art. 1a LAR).

The applications for asylum, refugee status and humanitarian status are granted on the basis of the individual examination. As regards temporary protection, every member of the group is considered prima face a refugee.

The aliens in the Republic of Bulgaria who have been granted asylum or refugee status have equal rights and obligations. A recognised refugee acquires the rights and obligations of a Bulgarian national with the exception of the right to participate in general and municipal elections, in national and regional referenda, as well as to participate in the establishment of political parties and be a member of such parties; to hold positions for which Bulgarian nationality is required by law; to be a member of the armed forces; and other restrictions explicitly laid down by law.

An alien with recognized international status has the right to request family reunification on the territory of the Republic of Bulgaria. Permission for family reunification is granted by the chairperson of the State Agency for Refugees. A recognised refugee or an alien with humanitarian status have the right to an identity card and to a foreign travel certificate, which is issued under the conditions and procedure laid down in the 1951 Convention relating to the Status of Refugees, the Law on Bulgarian Identity Documents, and the Law on Asylum and Refugees.

Aliens with respect to whom a temporary protection has been granted have the right to reside in the country for the entire duration of the temporary protection; to an identity document; to social security contributions; to food, shelter and clothing, work, medical care and services under the procedure and conditions set in the act whereby temporary protection is granted.

Unfortunately, in Bulgaria, as probably in other Central and Eastern European countries, when reviewing administrative asylum decisions, judges have no possibility directly to alter a decision but merely to annul and remit it. As a result, national courts cannot replace such decisions when they find them to be unlawful. They can merely annul the decision and refer the case back to the administrative authority for a fresh decision. This judicial or procedural "ping-pong" refers to the undesirable situation in which a case is repeatedly shuttled back and forth be-

tween the courts and administrative authorities. This leads to delays in ruling final decisions on the status or on family reunification.

According to data of the SAR, 2015 was the year with the highest inflow of asylum seekers since 1993, with 20,391 people coming to Bulgaria. The increase started in 2013 when 7,144 sought asylum in the country and jumped to 11,081 in 2014. Between 2015 and 2016, the number of rejected applications for asylum grew sharply from 623 in 2015 to 1,732, meaning a decline of positive decisions to 44% in 2016, compared to 91% in 2015, according to Eurostat data. According to SAR for the last 19 months (01.2018-07.2019) 4,618 decisions were issued of which only 996 were positive. So there is a decline in applications for internatioanl protection as well as in granting it (less than 21%).

3. *Integration of foreign citizens*

The Bulgarian law does not provide for civic integration exams, language tests or other integration measures for aliens or their family members. In 2016 the European Migration Network ('EMN') published a Study regarding family reunification of third country nationals ('TCNs') in Bulgaria [18]. One of the shortcomings that this report outlines is the lack of integration of TCNs in practice. EMN recommends the introduction of civil exams and language tests. Although these could be seen as a hindrance for the approval of applications for family reunification and could extend the application process, by their nature these measures are integration measures that guarantee the family members' integration and full participation in the social life of the country. An additional step that would enhance integration and which the Report establishes to be lacking in the Bulgarian legislation is the vocational guidance for family members. The advantages of such a measure are numerous, the most evident being fast social integration and enhanced economic activity, engagement and initiative.

In early 2019, the Bulgarian Helsinki Committee ('BHC') published a study on refugee integration, which found that that 2018 was the fifth zero year for integration [19]. The first National Programme for the Integration of Refugees (2011-2013) (NPIR) was adopted in 2010 and implemented by the end of 2013. However, since then all beneficiaries of international protection have been left without any integration support. This resulted in an extremely limited access or possibility for these individuals and their families to enjoy even the basic social, labour and

[18] https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/reports/studies_en.

[19] https://www.asylumineurope.org/reports/country/bulgaria/content-international-protection/2018-fifth-%E2%80%9Czero-integration-year%E2%80%9D#footnote3_ex3lkxs.

health rights, hence hardly by surprise their willingness to permanently settle in Bulgaria was reported to have decreased to a minimum [20]. An Integration Regulation was finally adopted in 2016, decentralsing the integration of beneficiaries of international protection and transferring decision-making as regards integration measures to the mayors of the local municipalities. However, it remained largely on paper throughout 2016 and 2017, as none of the 265 local municipalities applied for funding for the integration of individuals granted international protection in Bulgaria. Another bylaw was adopted on 19 July 2017 [21], which in essence repeated the provisions of the former Integration Regulation. Since its adoption, only 13 status holders benefitted from integration support. All of them, however, were relocated with integration funding provided under the EU relocation scheme, and not under the general national integration mechanism. The national "zero integration" situation continues for five years now.

In its report from April 2018, the Council of Europe Special Representative on migration and refugees also underlined that while the decentralisation of integration responsibilities from the government to municipalities could in principle be a sensible step forward, the fact that the discharge of such responsibilities was not mandatory but left to the discretion of municipalities raised questions about the effectiveness of integration measures in Bulgaria, illustrated by fact that no municipality had volunteered to conclude Integration Agreements, although funds would be allocated to them for every refugee participating in such agreements [22].

Amendments to the LAR from April 2019 signal that the state is withdrawing even further from its obligation to support the integration of persons who have been granted international protection, since as of that date the SAR no longer has a statutory duty to organize the activities for providing social, medical and psychological assistance to foreigners who have received international protection, but only to promote their integration. The SAR's duty to develop programmes for the integration of foreigners who have been granted asylum has also been repealed (Art. 53, § 1, (4) and (6) LAR).

In August 2019 the Bulgarian government announced the establishment of a new National Council on Migration, Borders, Asylum and Integration. This new Council shall replace the current National Council on Migration and Integration, which has been active since 2015. The new National Council's tasks relate to

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[20] CERD, Concluding observations on the combined twentieth to twenty-second periodic reports to Bulgaria, CERD/C/BGR/CO/20-22, 31 May 2017, available at: http://bit.ly/2wSzIpq.

[21] Regulation on the terms and procedure for concluding, implementing and terminating agreements for integration of foreign nationals granted asylum or international protection, adopted by Decree No. 144 of 19 July 2017 of the Council of Ministers (SG 60/2017).

[22] Council of Europe, Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees to Bulgaria, SG/Inf(2018)18, 19 April 2018, available at: https://bit.ly/2HtHSgv, 17.

formulating and coordinating the implementation of national policies in the area of migration and integration of third-country nationals. The Council will also monitor the implementation of the National Strategy for Migration, Asylum and Integration 2015-2020 and will ensure the adoption and implementation of a national strategy for integrated border management. The establishment of new council meets the EU's requirement that by autumn of 2019 each Member State sets up a national mechanism to ensure the implementation of national integrated border management strategies. By that time Bulgaria should also adopt a border management strategy that is fully in line with the Technical and Operational Strategy for European Integrated Border Management, adopted by the Management Board of the European Border and Coast Guard Agency (FRONTEX) on 27 March 2019.

4. *Family reunification*

Family reunification justifies the majority of residence permits issued to TGNs over the last five years - 16,144 in total, compared to 5,386 issued for education purposes and 6,284 for work 6,284 [23].

It should be noted that Directive 2011/95/EU [24] does not provide for the extension of refugee or subsidiary protection status to the family members of a person granted that status. Article 23 of that directive merely requires Member States to amend their national laws so that family members, within the meaning referred to in Article 2(j) of the directive, of the beneficiary of such a status are, if they are not individually eligible for the same status, entitled to certain benefits, which include, inter alia, a residence permit, access to employment or to education, and which are intended to maintain family unity.

Directive 2003/86/EC on the right to family reunification also excludes from its scope sponsors who are beneficiaries of temporary or subsidiary protection. However, in its guidance for the application of the directive [25] the Commission stresses that the Directive should not be interpreted as obliging Member States to deny beneficiaries of temporary or subsidiary protection the right to family reunification. Bulgaria is one of the Member States that grants to the family

[23] https://www.nsi.bg/bg.

[24] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for an uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

[25] Communication from the Commission to the European Parliament and the Council on guidance for the application of Directive 2003/86/EC on the right to family reunification (COM(2014) 210 final).

members of foreigners with international or temporary protection the same status as the one granted to their sponsor (Art. 8(9), Art. 9(6), Art. 39a LAR). The EU *acquis communautaire* serves as the basis of the Bulgarian legal regulation of this matter. The notion of family reunification did not exist in the Bulgarian law prior to Bulgaria's accession to the EU. Furthermore, the transposition of Directive 2003/86/EC in Bulgarian national law is not only a precondition for the legal development in the country, but it also represents the pure legal basis.[26] Until April 2019 the Bulgarian legislation did not provide for any additional rights, rules or restrictions other than the ones laid down in the Directive or the European Charter to account for any local particularities.

However, by way of amendments to the LAR from April 2019, Bulgaria has restricted the scope of persons eligible for international protection as family members of a foreigner who has been granted such protection. According to Art. 8, para. 9 and Art. 9, para. 6, as of April 2019 such status shall be granted to family members only insofar as the family ties precede the entry of the foreigner into the territory of the country. Similarly, Art. 34 which governs the rules for family reunification stipulates that "a foreigner who has been granted international protection shall be entitled to request to reunite with his family on the territory of the Republic of Bulgaria, provided that family ties precede the entry of the alien into the territory of the country". This new version of the relevant provisions departs from Art. 2(1)(d) of Directive 2003/86/EC according to which "family reunification" means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry. The latter provision is transposed in the Law on Foreigners in the Republic of Bulgaria ('LFRB', §1, para. 1a of the Additional Provisions). There is still no case-law in relation to the application of this new requirement and it is difficult to foresee how the courts will interpret this restriction. It should also be borne in mind that the definition of "family members" has not been changed in the LAR and is in line with the Directive 2003/86/EC (§ 1, p. 3 LAR).

According to the legislature, this amendment is intended as a preventive measure against sham marriages done to circumvent the law and obtain international protection. In this regard, the family members of a person who has been granted international protection, where the family relationships have occurred after the entry into the territory of the Republic of Bulgaria and after the granting of the protection, will be able to obtain a long-term residence permit (for an initial term of five years, renewable) and enjoy all ensuing general rights foreseen in the LFRB.

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[26] EMN Focused Study 216. Family Reunification of TCNs in the EU: National Practices. BG EMN NCP, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/reports/studies_en.

Thus, currently, according to the LAR, a family member of a person who has been granted international protection is a person with whom he or she is in a proven stable and lasting relationship. This person is entitled to the status granted to his or her sponsor. However, if their relationship has occurred after the alien entered the country, according to the amended LFRB which does not recognize long-term partners as family members, that person will not be able to apply for a residence permit.

However, one can ask whether judgments such as those of the Supreme Administrative Court ('SAC') in case No. 1535/2010, where the court annulled the refusal to grant humanitarian status to the spouse and respectively father of a woman and respectively child who have been granted such a status would be impossible. In the case cited, the mother and father apparently got together in Bulgaria before 1996 when the child was born. In 2008, the child was granted humanitarian status for health reasons, and his mother received humanitarian status as the child's caregiver. The parents married in 2009. SAR's rejection relies on the fact that the marriage has been concluded solely for the purpose of obtaining status. It was quashed by the SAC on grounds that it was undisputed that the man had always been a caring father and partner, and now a husband. The Bulgarian Family Code of 2009 give absolutely equal rights concerning children to couples who cohabit together without marriage and to married ones. Art. 122, para. 2 of the Family Code explicitly stipulates that parents have equal rights and obligations, regardless of whether they are married or not, and Art. 125 of the Family Code further imposes on each parent both the right and obligation to care for the physical, mental and social development of the child, his or her education and personal and material interests.

5. *Definition of sponsor and family members*

The definitions of sponsor and family member in the Bulgarian legislation are identical to those of the Directive.

5.1. *Sponsor*

The sponsor can be a foreign national with the right to reside for no less than one year on the territory of the Republic of Bulgaria (regardless of the type of residence permit) or with a long-term EU residence permit (Art. 33d LFRB)[27]. If the family member meets the other statutory requirements s/he will be granted the right to reside for up to one year. Members of the family of a foreign national

[27] Reunification is allowed only with a family set up in the territory of the Member State of the European Union, which has issued his or her long-term residence permit.

with a long-term residence permit can be granted a residence permit for one year with the possibility of a renewal without exceeding the term of the sponsor's residence permit (Art. 24e LFRB).

The sponsor of the application for family reunification can also be a foreign national who has been granted international protection. In this case there is no requirement concerning the sponsor's length of stay or residence in Bulgaria. Unaccompanied children who have been granted international protection have the right to reunite with their parents, but also with another adult member of their family or with a person who is in charge of them by law or custom when the parents are deceased or missing (Art. 34 LAR).

It must be noted that the national legal framework is more favourable compared to Article 3 of the Directive, which is allowed by the Directive, as it has not transposed the criterion of reasonable prospects for obtaining the right of permanent residence, nor does it requiere the sponsor to have stayed lawfully in the territory for a period not exceeding two years, before having his or her family members join.

5.2. *Eligible family members*

Eligible for family reunification are members of the nuclear family – spouse and minor children. Adult unmarried children and parents may be granted with residence permit in case they can prove dependency of the sponsor or his/her spouse.

5.3. *Spouse/stable long-term partner/same-sex partner*

It should be noted that in respect of TCNs, the Bulgarian law recognizes only civil marriages. Both LFRB and LAR grant the sponsor's spouse the right to family reunification. As mention above, since April 2019, in cases of aliens who have been granted international protection, the law requires the marriage to have been concluded prior to entry in Bulgaria. In line with the Directive, LAR recognises as a family member the long-term partner of the sponsor who have been granted international protection as long as a long-term and stable relationship may be proved [28].

Under LFRB, the spouse is required to live in the same household with the sponsor. LFRB does not allow family reunification with long-term partners. Third country national migrants, as well as foreigners who have been granted international protection, cannot reunite with their same-sex partners in Bulgaria under the terms and procedure of family reunification. There is exception only for

[28] The exemption is in case of granted temporary protection where only the spouse and minor unmarried children are eligible for reunion with the sponsor.

members of the staff of a diplomatic or consular mission or an international organization where the law recognises the registered partner as a family member. (Art. 23a, § 3 LFRB).

A recent judgment of the Supreme Administrative Court [29] deserves a mention here as it upholds the first instance judgment of the Sofia City Administrative Court [30] allowing a same-sex spouse of an EU citizen to reside in Bulgaria on grounds of the right of free movement. The courts interpret Directive 2004/38/EC and CJEU judgment of 5 June 2013 in case C-673/2016 and conclude that according to EU law, for the purpose of granting derivative right of residence to a third-country national, the marriage between same sex persons that has been concluded in another Member State in accordance with that Member State's law, is without prejudice to the institute of marriage in the receiving Member State, in this particular case Bulgaria, as laid down in its domestic law, therefore the refusal to issue a residence permit to the spouse of a EU citizen is unlawful. The case concerns a marriage between a French and an Australian female concluded in France. The family entered Bulgaria in 2017 but the Australian national was refused the right of permanent residence on grounds that the Bulgarian law recognizes marriage only between a man and a woman. In its judgment SAC cite the CJEU, "To allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that state, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of Union citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist" (Relu Adrian Coman and Others, C-673/16, EU:C:2018:385, paragraph 39).

The judgment was met angrily by the Bulgarian general public, mainly because it was presented by the media as 'recognition of same-sex marriages by the court'. However, it is an important step towards the promotion of fundamental principles of EU law by the Bulgarian court. A court judgment may not and shall not lead to amendments of the statutory regulation of the institute of the family in Bulgaria as laid down in the Constitution and the Family Code. It shall not lead to changes in the notion of long-term partner as regards the lawful residence of third country nationals in the country. The judgment nevertheless spurred debates as to whether it recognized more rights of same-sex couples married abroad or gave precedence to the law of another EU Member State.

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[29] Judgment No. 11351 of 24 July 2019 of the Supreme Administrative Court in administrative case no. 11558/2018.

[30] Judgment No. 4337 of 26 June 2018 of the Sofia City Administrative Court in administrative case no. 3500/2018.

5.4. *Minor children*

Bulgaria has transposed fully the respective provisions of the Directive concerning minor children. According to LFRB, eligible to reunite with the sponsor are:

– children of the foreigner and his/her spouse, including adopted children, who are under 18 years of age and are not in matrimony;
– children of the foreigner, including adopted children, who are under 18 years of age and are not in matrimony, in the cases where the sponsor enjoys the parental rights and the children are the sponsor's dependents;
– children of the sponsor's spouse, including adopted children, who are under 18 years of age and are not in matrimony, where the children are the sponsor's dependents.

Following the last amendments of April 2019 to the LFRB, in cases of shared custody reunification with children under 18 shall be provided only if there is express consent of the other party. Where there is no general agreement of the parents, the dispute between them shall be settled by the district court of the child's place of residence. This new requirement, although compatible with the Directive, may make it impossible to grant a right of residence to a child who does not live in Bulgaria.

5.5. *Adult unmarried children*

Bulgarian law also grants the possibility of family reunification to the adult unmarried children of the sponsor or their spouse, if they are objectively unable to provide for their ownneeds on account of their state of health. There is no case law yet applying this provision, which stipulates that the two preconditions must be cumulatively met: prove the existence of a serious illness and the absence of another carer in the country of residence.

5.6. *Parents of each of the spouses*

Only persons who have been granted international protection are entitled to request reunification with their parent or their spouse's parent in the territory of Bulgaria. It is required that the parent is unable to take care of himself/herself due to old age or serious illness, which in turn requires that he or she must live together with the sponsor/spouse, i.e. that there is nobody to look after him or her in the country of residence.

The case-law of the Supreme Administrative Court on this matter, scarce as it is, as a rule upholds the rejections of the State Agency for Refugees to allow reunification. The court requires evidence that the parent's illness is sufficiently serious to require external physical care and assistance to be rendered specifically by

the sponsor[31]. According to the case-law of the Supreme Administrative Court, the applicant for reunification with a parent must demonstrate either of the circumstances referred to in the law: 1) that the parent with whom s/he wants to be reunited, is not capable of taking care of himself or herself due to old age and must therefore live in the applicant's household; or 2) that the parent with whom s/he wants to be reunited, is not capable of taking care of himself or herself due to serious illness and must therefore live in the applicant's household. The conditions envisaged in either of the two circumstances must be met cumulatively. Old age or serious illness alone does not suffice to establish that the prerequisites for a positive decision are met, unless the person's incapacity to look after himself or herself is established, too[32]. Unlike the Italian law, there is no lower age limit, above which it is deemed that dependent parent needs support. Our observations from the case-law are that in their decisions or judgments the State Agency for Refugees and Supreme Administrative Court do not take into account the average life expectancy in the Arab countries, which for various reasons such as the climate, state of medical care, wars, stress, lack of food, water and basic living conditions etc. is shorter than in Europe.

LFRB does not provide for reunification with a parent in the territory of Bulgaria, except for diplomats where the law does not set a restriction as regards relatives of the ascending line. However, the LFRB does allow for financially insured parents of a foreigner who holds a permanent residence permit to be granted an extended residence permit (for up to one year) (Art. 24, para. 1, item 7).

6. *The Bulgarian procedure and requirements for family reunification*

Only the sponsor can apply for family reunification. The sponsor has to be a holder of – and not an applicant for – a residence permit. The application for family reunification is submitted by the sponsor when the family does not reside in the territory of the country. When the family is in the territory of the country and only one of them has been granted international protection, the others must apply for the same status to the SAR.

The law does not require any waiting period before the sponsor, including a beneficiary of international protection, may apply for a family reunification.

[31] Judgment no. 8971 of 2 July 2018 in administrative case no. 6234/2018 of the Supreme Administrative Court; judgment no. 13909 of 19 December 2016 in administrative case no. 2370/2018 of the Supreme Administrative Court, where the court explicitly states that the fact that it is impossible to carry out an emergency surgery in Iraq to change the hip of the sponsor's mother is irrelevant since the family reunification institute is not a means for sending a person for treatment abroad.

[32] Judgment no. 2568 of 8 March 2016 in administrative case no. 2929/2015 of the Supreme Administrative Court.

There is no maximum time limit for submitting a family reunification application either. The application has to be submitted in person to the chairperson of the SAR (for persons with international protection) or to the Migration Directorate with the Ministry of Interior (for all other cases).

Family reunification may be refused on the basis of an exclusion clause [33] or with respect to a further spouse in cases of polygamy when the status holder already has a spouse in Bulgaria.

In case of a person who has been granted international protection, when the status holder is unable to provide official documents or papers certifying marriage or relationship, this fact may be established by a declaration on his or her behalf.

After the application for reunification has been submitted, an interview is held with the applicant. The State Agency for National Security and Consular elations Directorate at the Ministry of Foreign Affairs also submit an opinion on the application. The statutory time limit for deciding upon an application is one month. Generally, the statutory time limit is respected in practice. Rare cases of delays are largely due to late official positions of the Ministry of Foreign Affairs, State Agency for National Security or Bulgarian consul in the respective country.

The law does not provide for the possibility to challenge a negative opinion on the application for reunification. However, in its case-law the Supreme Administrative Court overcomes this obstacle by interpretation of Article 18 Directive 2003/86 which guarantees to the sponsor and the members of his or her family the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered. This right is further guaranteed by Article 47(1) of the EU Charter of Fundamental Rights and Article 13 read in combination with Article 8 of the ECHR. Pursuant to these provisions, the SAC reiterates the obligation for the national judge to admit for judicial review the authorities' opinion on the request for family reunification. The complaint may be filed by any of the persons concerned [34].

Family members who have been issued a family reunification permit may obtain visas from the respective diplomatic or consular representation. The Bulgarian authorities have an obligation to facilitate the reunification of separated families by assisting the issuance of travel documents, visas as well as for their admission into the territory of the country. However, the Bulgarian Helsinki Committee reports that in practice the Bulgarian consular departments have discontinued issuing travel documents to minor children who have not been issued national doc-

[33] Insofar as this is compatible with their personal status and there are no circumstances specified in the law, including the commission of a serious crime or a threat to the public or to national security.

[34] Ruling no. 607 of 17 January 2017 in administrative case no. 13985/2016 of the Supreme Administrative Court.

uments after their birth, under the pretext of avoiding eventual child smuggling or trafficking [35].

After the foreign national arrives in the country, he or she submits a new application for permanent residence, to which he or she must enclose medical insurance for the period of his or her stay in the country. When parents are reunited, the authorities hold an interview with both persons to establish possible circumvention.

Applications for family reunification must be accompanied by certified translations of birth certificates. DNA tests or other alternatives are not foreseen.

As regards the material requirements, the sponsor must provide evidence of the following:

– accommodation for the members of the family, which is certified by means of a property deed or rental contract. There is no requirement for the size of the living space. Check-ups at the residence's address are also foreseen although such are performed on a random basis and not in all of the cases. There is no requirement for regular checks by the child protection services in cases where minor children arrive in the country. In practice, many families are registered at the same address;
– The TCN must provide evidence of sufficient means to support the family members without making recourse to the national social assistance system. The required minimum is the amount of the minimum monthly wage (BGN 560) or pension in the country. The TCN must provide evidence for sufficient funds to support the family members for the whole duration of their residence in Bulgaria. Past and/or future income of the TCN is not considered. The sponsor provides bank reference for the current balance of his account.
– The sponsor enjoys automatic access to healthcare insurance. However, family members must present a valid health insurance. Yet the authorities cannot refuse the renewal of residence permits on the basis of diseases that occurred after the initial issuance of the residence permit.

Pursuant to Article 8, para. 4 LFRB, after approval for family reunification, family members are issued visas following a simplified procedure under the terms and procedure laid down in an act of the Council of Ministers.

Fees for issuing residence permits are BGN 200 (appr. EUR 100) for a residence permit up to six months and GN 500 (appr. EUR 250) for a residence permit for up to one year. These amounts are relatively high, especially when due by refugees or persons who have been granted humanitarian status, especially bearing in mind that these amounts are due for every single family member.

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[35] http://www.asylumineurope.org/reports/country/bulgaria/content-international-protection/family-reunification/criteria-and.

6.1. *Marriages of convenience*

Under the national legislation on migration, marriages of convenience are those marriages concluded by the applicant solely for the purpose of enjoying the right of residence. The burden of proof as regards the abuse of grounds falls on the authorities who want to restrict the person's right to receive a residence permit on the basis of marriage [36]. It is necessary to provide convincing arguments while complying with all substantive and procedural guarantees.

A residence permit or extension of the stay shall be denied to a TCN who has married a Bulgarian citizen or a TCN who is adopted by a Bulgarian citizen or by a foreigner who has obtained a residence permit if there is evidence that the marriage is concluded or adoption is made solely to circumvent the norms regulating the regime of aliens in the Republic of Bulgaria for the purpose of obtaining a residence permit. The decision to refuse a residence permit shall be made by the services for administrative control of foreigners based on data giving rise to a reasonable conclusion that the marriage was contracted or adoption was made solely to circumvent the norms regulating the regime of aliens in the Republic of Bulgaria and to obtain a residence permit. Such data may be the fact that the spouses or the adoptee and the adopter do not live together; lack of contribution to the obligations of marriage; the fact that the spouses did not know each other before the marriage; conflicting information about personal data of the spouse or adopted child such as name, address, nationality, profession, the circumstances of their acquaintance or other important personal information; the fact that the spouses or the adoptee and adoptive parent do not speak a language understood by both; the payment of money for marriage outside the usual dowry; the presence of previous marriages or adoptions concluded to circumvent the rules governing the regime of aliens; the fact that the marriage was concluded or adoption took place after the alien has obtained a residence permit.

All those data may be established through interviews (conducted by officers of the service for administrative control of foreigners), in the written statements of the concerned or of third persons, by means of official documents or by inspections and investigations made by public authorities. The services for administrative control of foreigners are obliged to hear the parties concerned (LFRB, Art. 26).

In their case-law regarding the denied extension of spouses' residence permits, the courts have thoroughly examined whether there is a marriage of convenience or a disorder in the relationship [37]. The statutory requirement to have sufficient data to justify a reasoned conclusion, does not require the decision-making authority

[36] Judgment no. 2183 of 28 February 2006 of the Supreme Administrative Court in administrative case no. 8842/2005.

[37] Judgment no. 7035 of 3 July 2007 of the Supreme Administrative Court in administrative case no. 3011/2007.

or the court to perform a full inspection to establish and rebut the civil marriage. In this sense, it is sufficient to have reasonable doubt about the marital relationship [38].

7. Problems related to applications for international protection lodged by members of the same family (Article 22 LAR)

According to the Supreme Administrative Court, in itself the fact that proceedings for international protection of the individual family members take place in parallel may not justify a conclusion that as a direct and immediate result the decision-making authority will not be effective in its ruling or will not comply with the provisions ensuring maintenance of family unity. This is so since while complying with the rule laid down in Article 75, para. 2 of the LAR as regards assessment of all relevant facts in the application for protection (including family relationship, general refugee story and general facts related to the origin and status of the individual family members and the family as a whole), the parallel proceedings should not result in any legal errors as regards the facts established by the State Agency for Refugees or the application of the substantive law.

Until 2018 the case law varied as to whether the right to family life required joint processing of applications for international protection in single joint proceedings [39] or rather separate independent proceedings, since there was no direct linkage and it was not feasible to carry out individual protection proceedings [40]. On 5 December 2016 Sofia City Administrative Court raised several preliminary

[38] Judgment no. 1556 of 13 February 2006 of the Supreme Administrative Court in administrative case no. 6401/2005, Judgment no. 14329 of 21 November 2018 of the Supreme Administrative Court in administrative case no. 2220/2018.

[39] To respect the right to family life and the right to family reunification, the administrative authority must review the applications for international protection in joint proceedings, and respectively suspend proceedings until the proceedings reviewing the application of the persecuted family member have been completed. See, fro example, judgmentno. 6335 of 13 May 2014 of the Supreme Administrative Court in administrative case no. 16192/2013; judgment no. 8332 of 19 June 2014 in administrative case no. 5586/2013; judgment no. 7157 of 28 May 2014 in administrative case no. 10566/2013; judgment of 28 April 2014 in administrative case no. 2366/2015) .

[40] Judgment no. 5779 of 16 May 2016 in administrative case no. 6792/2015, Third Division of the Supreme Administrative Court; judgment no. 2273 of 29 February 2016 in administrative case no. 2283/2015, Third Division of the Supreme Administrative Court: the right to family life is not infringed in any way in this case, joining administrative proceedings is a legal possibility but not an imperative obligation; „(…) it must be borne in mind that similarly to the request for protection which must be made personally and of that person's own free will, the assessment of the administrative authority is due on the personally declared personal ground under the Law on Asylum and Refugees."

questions to the CJEU concerning the interpretation of Directive 2011/95/EU[41] and Directive 2013/32/EU[42]. The referring court asks, in particular, how applications for international protection lodged separately by family members must be processed. In its fifth question, the referring court further asks whether Directives 2011/95 and 2013/32, read in conjunction with Articles 7, 18 and 47 of the Charter of Fundamental Rights and taking into account the best interests of the child, must be interpreted as precluding applications for international protection lodged separately by members of a single family from being assessed in a single procedure or the assessment of one of those applications from being suspended until the conclusion of the examination procedure in respect of another of those applications[43].

In its judgment the Court provides that it follows from the requirements of an individual assessment and of an exhaustive examination of applications for international protection laid down in Article 4(3) of Directive 2011/95 that applications lodged separately by members of a single family, although potentially subject to measures intended to address any interaction between applications, must be subject to an examination of the situation of each person concerned. Those applications cannot therefore be subject to a single assessment. In particular, as to whether it is appropriate to process simultaneously procedures for assessing applications for international protection lodged separately by family members or whether it is, on the contrary, for the determining authority to suspend the assessment of an application until the conclusion of the examination procedure in respect of another of those applications, the Court considers, first, that in a case such as that at issue in the main proceedings, in which one family member relies, in particular, on threats in respect of another family member, it may be expedient to ascertain in the first place, in assessing the latter's application, whether those threats are grounded and to ascertain in the second place, where necessary, whether the spouse and the child of that person at risk are themselves, because of the family tie, also subject to the threats of persecution or serious harm. The Court found that Directives 2011/95 and 2013/32 must be interpreted as not precluding applications for international protection lodged separately by members of a single family from being subject to measures intended to address any interaction between applications, but as precluding those applications from being subject to a single assessment. They also preclude the assessment of one of those applications from being suspended

[41] On standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

[42] On common procedures for granting and withdrawing international protection.

[43] Ruling no. 6819 of 5 December 2016 of Sofia City Administrative Court in administrative case no. 5353/2015.

until the conclusion of the examination procedure in respect of another of those applications [44].

8. *Unaccompanied minors*

According to data of the State Agency for Refugees, in November 2016 alone, 1,755 people sought asylum in Bulgaria, of which 32% were minors, i.e. children below the age of 18. The total number of unaccompanied minors coming to Bulgaria stood at 1,815 in 2016, compared to 2,750 in 2015 (Eurostat). For the first seven months of 2019 there were 328 applications for international protection filed by unaccompanied minors.

According to the specifics of the legal status of unaccompanied minors after their entry into Bulgaria, they can be categorized in three groups:

1) Those applying for international protection under the Asylum and Refugees Act. The State Agency for Refugees is the main institution in charge of guaranteeing the rights of these minors. Applications for international protection by foreigners are examined in the framework of the administrative proceedings under the Law on Asylum and Refugees. Depending on the investigation and the information gathered in the course of the proceedings, the administrative body makes a decision. While the decision is pending, the unaccompanied minors shall enjoy all rights conferred upon persons seeking international protection.
2) Those who have been granted refugee or humanitarian status.
3) Those who are unwilling to apply for international protection and whose legal status is governed by the Law on Foreigners in the Republic of Bulgaria. – These foreign children who do not wish to apply for international protection or who have been denied this type of protection are subject to special measures by the territorial units of the national Social Assistance Agency. These children are issued a residence permit until they reach the age of majority, and after the age of 18 they can be granted a residence permit on humanitarian reasons for up to one year. They may apply for family reunification [45].

A report by UNICEF (2016) highlights the importance of identifying unaccompanied minors at the earliest possible stage, i.e. at their very first encounter with government authorities, as this has a decisively positive impact: there are rights and guarantees that specifically apply to them. Unaccompanied minors should be appointed a legal representative immediately upon identification of the

[44] Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Ogla Ahmedbekov (C-652/16, pp. 58-74).

[45] Art. 7a, Art. 28a LFRB.

minor, in order to guarantee determination of, and respect for, the minor's best interest and his/her access to his/her rights. If the minor is accompanied by an adult who is not a parent but there are sufficient grounds to ascertain that he/she is responsible for the minor by law or custom/proven practice of the Bulgarian state, this accompanying person may be formally appointed as the minor's legal representative, unless this would go against the minor's best interest (Art. 25 LAR).

In October 2015, some amendments were introduced to the Law on Asylum and Refugees. According to the new provisions, a guardian from the municipal administration needs to be appointed by the mayor of the municipality or by an official authorised by him/her for any unaccompanied minor seeking or receiving protection. Due to the divergent positions of the different institutions, for more than two years now the proposed Coordination Mechanism for interaction between national and local child protection authorities in cases of unaccompanied minors has not been finalised and adopted by the Bulgarian Government. A new working group formed by officials of governmental institutions, international organisations and civil society organisations has been set up to revise this Mechanism. Its main objective is to make the institution of guardianship really efficient and to ensure that it is in the best interest of unaccompanied minors, so as to guarantee that they have effective access to health, educational and social services. New amendments to the Law on Foreigners in the Republic of Bulgaria are currently being publicly discussed (mandatory legislative procedure for draft laws and legislative amendments or supplements). They are aimed at guaranteeing the best interest of the children who have entered in the territory of the country as unaccompanied minors.

According to the European Social Policy Network, the Bulgarian law needs to envisage specific criteria for the designation of an "accompanying person" in conformity with the applicable Bulgarian legislation and administrative custom. A key criterion in that respect is the minor being effectively taken into the care of such an accompanying person [46].

The problem in this regard is that when the child is not accompanied by a parent, the authorities do not examine in depth the relation between the child and the person who claims to be accompanying the child, thus exempting from their duty to appoint a representative of the municipal administration as the child's legal representative [47]. It is not uncommon, upon entry in the country, or when a group of illegally residing foreigners are detained, that adult foreigners are assigned as representatives of the children from the same group, without to even make sure whether they speak the same language [48]. Thereafter the children are abandoned

[46] ESPN Flash Report 2017/34, June 2017.

[47] Amnesty International report 2017/2018.

[48] Cf. For example ruling no. 14193 of 22 December 2016 of the Supreme Administrative Court in administrative case no. 12078/2016; Instruction no. 3004 of 16 April 2019 in adminis-

and exposed to risks of trafficking, violence and prostitution as they stand even less chances than adult migrants to seek protection from the competent institutions.

In its 2017/2018 report Amnesty International reported that "Reception conditions for unaccompanied refugee and migrant children remained inadequate. Children were routinely denied adequate access to legal representation, translation, health services and psychosocial support. Basic education was not available in the centres and most children were not enrolled in local schools. Limited social and educational activities were available several days a week and organized exclusively by NGOs and humanitarian organizations.

The authorities lacked developed systems for early identification, assessment and referral mechanisms for unaccompanied children. Children often did not have access to qualified legal guardians and legal representation. In February, mayors and residents of several towns refused to accommodate two unaccompanied refugee children in facilities in their communities. The boys were moved several times and finally separated, causing the younger boy to abscond."

Amnesty International raised concerns about the adopted, then in the first reading, amendments to the Law on Foreigners which repealed the requirement for an individual assessment of the best interests of the child before placing children in short-term immigration detention. It warned that the proposals would legitimize the practice of "attaching" unaccompanied children to often unrelated adults travelling in the same group in order to avoid the prohibition of detention of children.

As mentioned above, according to the provisions of the LFRB, family reunion of unaccompanied foreign children is not allowed, including and after they reach the age of 18.

Unaccompanied unmarried children who have been granted international protection have the right to reunite with their parents, but also with another adult member of their family or with a person who is in charge of them by law or custom when the parents are deceased or missing.

9. *Impact of the ECtHR case-law on the legislation and case-law in Bulgaria*

Unfortunately, the Bulgarian case-law or legislation are not amended as a result of the ECtHR judgments against other Member States. There is no internal mechanism in place to follow and analyse the case-law of supranational tribunals and lead to due amendments of the relevant provisions and practices that lead to identical violations.

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trative case no. 4140/2019 of Sofia City Administrative Court; Instruction no. 5959 of 8 August 2019 in administrative case no. 8838/2019 of Sofia City Administrative Court.

The law and case-law in Bulgaria change only after a series of judgments finding violations.

As regards foreigners, the first group of cases that have been supervised by the Committee of Ministers for more than 10 years, is Al-Nashif and others group of cases (Al-Nashif, Hasan, Bashir and Others, Musa and Others against Bulgaria (Applications Nos. 50963/99, 54323/00, 65028/01, 61259/00).

This group of four cases concerns expulsion measures and orders to leave the country, taken between 1999 and 2003, against foreign nationals based on grounds of national security. In this group of cases, the Court considered that the applicants had not been protected against arbitrariness because they had not benefited from independent supervision of the measures taken against them (violations of Articles 8 and 13). The cases Al-Nashif and Bashir and others concern, in addition, the complete absence of judicial review of the lawfulness of the detention of the applicants (violations of Article 5§4). Finally, in the case of Bashir and others, the Court found a failure to inform the applicant promptly of the reasons for his arrest (violation of Article 5 § 2).

Following the European Court's judgment in the Al-Nashif case[49], where the lack of independent review was criticised, the Supreme Administrative Court changed its case-law in 2003 and started examining appeals against expulsion orders based on national security grounds, considering that it was directly bound by the Convention in this respect.

The possibility to appeal against such orders was expressly provided for in the LFRB in April 2007 (Article 46). At present, these appeals are reviewed by the Supreme Administrative Court. As regards the modalities of review of the expulsion measures, the provisions of Article 42(4) and 44(2) of the LFRB, introduced in 2009 and in 2011 respectively require that before deciding to expel an alien re-

[49] http://hudoc.echr.coe.int/eng?i=001-60522 – The case concerns Mr. Al-Nashif, a stateless person of Palestinian origin, and two of Mr Al-Nashif's children, both Bulgarian nationals, born in Bulgaria. Mr Al-Nashif arrived in Bulgaria in 1992 with Ms Saleh, whom he had married in Kuwait. They lived together in Sofia, where their sons were born. Mr Al-Nashif ran a butcher's shop and beverages production business and was involved in religious activities. In February 1995 he obtained a permanent residence permit. The same month he married his second wife, Ms M, a Bulgarian national, in a religious Muslim ceremony. Under Bulgarian law, the marriage had no legal effect. He continued to live with his first wife, however, and moved with her to Smolyan, where he continued in the same line of work and also taught Islamic classes. In 1999 Mr Al-Nashif's residence permit was withdrawn and a deportation order was issued stating that he posed a threat to national security, without providing reasons. In later submissions the Ministry of the Interior stated that Mr Al-Nashif had engaged in unlawful religious activities which had endangered national interests. Details were not provided. He was detained pending deportation and denied contact with others. Two of his judicial appeals were declared inadmissible and a third appeal had not been examined when he was deported on 5 July 1999. The relevant law provided that national security measures concerning aliens were not subject to appeal. This was confirmed on 4 April 2000 by the Supreme Administrative Court, which also held that such measures need not be reasoned.

siding permanently in Bulgaria, the authorities should take into account his or her personal and family situation, level of integration and the strength of his or her connections with the country of origin. The Government consider that the measures described above have overcome the specific reasons for the violations found in the cases concerning expulsions until 2003. The Government further acknowledge that in more recent cases (concerning facts after 2003), the European Court found violations of Article 8 due to a number of shortcomings in the judicial review introduced after the Al-Nashif judgment (e.g. failure to ensure adversarial proceedings, failure to verify the existence of specific facts justifying the executive's conclusion that a person represents a risk to national security, overstretching the concept of national security, lack of adequate judicial control of the proportionality of the expulsion measures, lack of publicity of judicial decisions concerning appeals against expulsion measures).

The supervision of the execution of general measures under this group of cases was closed by way of Resolution CM/ResDH(2015)44 [50] of the Committee of Ministers on 12 March 2015; however, the Committee continues to supervise another group of cases, namely C.G. and Others group [51]. The cases in this group concern shortcomings in the procedure for judicial review of decisions to expel foreign nationals on national security grounds, such as lack of adversarial proceedings and lack of review of the factual elements substantiating the threat to national security or of the proportionality of the expulsion. They also concern the lack of public judicial decisions (violations of Articles 8 and 13). In the *C.G. and Others* [52] case the Court also found a violation of the right to procedural safeguards relating to expulsion (Article 1 of Protocol No. 7), since the first applicant

[50] http://hudoc.echr.coe.int/eng?i=001-153248.

[51] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168093316c.

[52] The first applicant, a Turkish national who settled in Bulgaria in 1992, married a Bulgarian national (the second applicant), with whom he had a daughter (the third applicant). He was granted a permanent residence permit in Bulgaria. In 2005 his residence permit was withdrawn and a deportation order was issued stating that he posed a threat to national security. The decision, relying on the relevant provisions of the LFRB, referred to a classified report by Plovdiv Internal Affairs but gave no factual grounds for the deportation. At 6.30 a.m. on 9 June 2005 the first applicant was summoned to a police station, where he was served with the order and detained with a view to his expulsion. He was deported to Turkey the same day, without being allowed to get in touch with a lawyer or his wife and daughter. His subsequent appeal to the Minister of Internal Affairs was dismissed. In the ensuing judicial review proceedings, the Bulgarian courts rejected the first applicant's complaints concerning the unlawfulness of his expulsion. Their decisions were based on information contained in the Ministry of Internal Affairs' report, which stated that, following secret surveillance, it had been established that the first applicant was involved in drug-trafficking. On that basis, the courts refused to make any further enquiries into the facts of the first applicant's case or examine any other evidence. (Since being deported, the first applicant has seen his wife and daughter a few times a year in Turkey. They have also remained in contact by telephone.).

was denied, without justification, the possibility to exercise his rights under that provision at domestic level before being expelled, even though the facts alleged against him concerned the protection of public order and not national security. In the cases of *Auad* and *M. and Others*, the Court criticised the failure of the courts to examine rigorously the applicants' claims relating to a risk of ill treatment in the destination countries and the absence of an automatically suspensive remedy (potential violation of Article 3 in the *Auad* case and violations of Article 13 in both cases). Finally, certain cases concern violations related to detention pending expulsion and slow and ineffective judicial control over it (violations of Article 5 §§ 1(f) and 4).

CONCLUSION

Having analyzed the European framework as well as the internal situation of three Member States – Spain, Italy and Bulgaria – applicable to the fundamental right, with a particular attention to the right to family reunification, it's needed to answer the key research question elaborated in the introduction about the role of the CFR in the protection of fundamental rights as well as the role of legal practioners in the application of this supranational tools of protection. How has the CFR been integrated until present into the national systems? Is the European tool effective in the protections of the individuals?

Indeed, the CFR devotes two articles – Arts. 7 and 9 – directly to the family and to the protection of family life. In particular, Art. 7 establishing that "*Everyone has the right to respect their private and family life, their home and their communications*" creates a parallel mechanism in the EU legal order to the international one of the European Convention of Human Right. The mentioned right listed in the CFR should be considered as 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 of the European Union, as well as, at international level by all States Parties to the European Convention. Likewise, Art. 9 recognizes the right to marry, as well as the right to found a family. This article guarantees the right to found a family in accordance with the national laws that regulate the exercise of such right. Finally, Art. 33 CFR ensures the protection of the family from the legal, economic and social point of view. Consequently, family reunification is classified as fundamental rights and protected with the multi layers mechanism (international and european ones).

Even if the international framework and the European legal order ensure the protection with different tools – general principle of law, CFR, International Conventions – and applies into the national systems thanks to the supremacy of EU law, however the analysis carried out in the national report seems to underline still a lack of direct application of the CFR by the national judges. Indeed, the application of the CFR is generally made thanks to the National Constitutions.

As for the majority of the rights protected by the CFR, it is not an absolute right. Indeed, Art. 52 states 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, Art. 53 CFR 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.

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, the analysis on the family reunification has been carried out by distinguishing the categories of subject from a third State residing in the European Union who tries to regroup their family and the one of the 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 European Union or, on the contrary, a national of a third State. In the first case, the European family reunification falls under Directive 2004/38/CE applicable to citizens of the European Union and, in the second case, the immigration regime is applicable according to Directive 2003/86/CE for third-country nationals.

The Spanish Supreme Court in 2010 partially amends the Royal Decree 240/2007 broadening the subjective scope of application of the Royal Decree compared with the obligations imposed by the Directive 2004/38/ EC. This modification implied the inclusion of the family members, listed in the Decree, disregarding their nationality. The intention behind the intervention of the Supreme Court has clearly been to promote equality in Spain – for the purposes of reunification – between foreign family members, independently from their nationality, who accompany or join either European citizens or Spanish citizens, both residents in Spain.

In view of the above, it could be conclude that the implementation in Spain of the European legislation on family reunification and, specifically, of the provisions contained in Art. 7 CFR and Article 8.1 ECHR has been applied correctly, however in a rather restrictive way, especially for what concerned some aspects, such as the regulation of the fundamental rights of immigrants, which could initially be opposed to the provisions of Art. 13.1 of the Spanish Constitution, which guarantees foreigners the same rights as Spaniards. The constitutionally recognized equality between Spanish citizens and foreigners does not extend to the right to family privacy referred in the CFR. The Constitutional Court has stated that this constitutional norm only refers to the prohibition of illegitimate interference by third parties in the family environment. Even if *the possibility of reunification must be applied with less restrictive criteria when the applicant is a citizen of the European Union*, the analysis carried out in the report demonstrates that the

Spanish jurisprudential interpretation is not very flexible in the matter of foreigners as general trend.

In the Italian legal order the latest decision n. 20/2019 of the Italian Constitutional Court has clarified how its new doctrine applies to the case of '*dual preliminarity*', interpreting the procedural priority in a more EU-friendly way. Firstly, in this recent decision the Constitutional Court reiterates that the precedence of the constitutional review cannot affect the power of the ordinary judge to lodge a preliminary reference to the CJEU, but at the same time the Court states that a referral decision under Art. 267 TFEU can be made by the judge "*at every stage of the proceeding and for every reason she may deem it for necessary*" (while in the 2017 decision such a possibility seemed to be limited for the referring judges to issues that the Constitutional Court had not dealt with. Secondly, the Constitutional Court paves the way to a less rigid model of interaction with the ordinary judges: they are not prevented any more from the prior involvement of the CJEU in the preliminary reference procedure when both national and European fundamental rights are at stake. In the 2017 decision, the Constitutional Court seemed to have codified its preeminence by making its prior involvement a necessity for judges. The new approach showed in decisions no. 269/2017 and no. 29/2018 appears to reflect the Constitutional Court's decision to focus, in its balancing exercise, more on the domestic parameters than on the European ones, so as to keep a conversation going between the specific features of national constitutional rights and those protected at EU level.

Finally, as for what concern the Bulgarian legal system the case-law or legislation unfortunately doesn't seems to be amended as a result of the ECtHR judgments against other Member States. There is no internal mechanism in place to follow and analyses of the case-law of supranational courts and lead to due amendments of the relevant provisions and practices that lead to identical violations. The law and case-law in Bulgaria generally change only after a series of judgments finding violations directly against Bulgaria.

Until 2018 the case law in Bulgaria varied as to whether the right to family life required joint processing of applications for international protection in single joint proceedings or rather separate independent proceedings, since there was no direct linkage and it was not feasible to carry out individual protection proceedings. In 2016 Sofia City Administrative Court raised several preliminary questions to the CJEU concerning the interpretation of Directive 2011/95/EU and Directive 2013/32/EU. The referring court asks, in particular, how applications for international protection lodged separately by family members must be processed. One of the element has especially be the interpretation of the best interests of the child. The Court of Justice of the European Union clarified that those applications cannot be subject to a single assessment. The Court found that Directives 2011/95 and 2013/32 must be interpreted as not precluding applications for international protection lodged separately by members of a single family from being subject to

measures intended to address any interaction between applications, but as precluding those applications from being subject to a single assessment. They also preclude the assessment of one of those applications from being suspended until the conclusion of the examination procedure in respect of another of those applications.

In conclusion, it seems that the road for the full implementation of the CFR into the national legal system of the Member States is still uncomplete. In this lack of completeness it could be relevant the role of legal practioners. Possibly one of the tool for increasing such implementation could be the specialized legal trainings for lawyers and, more in general, for practitioners in order to continue stressing the importance of the CFR and disseminating the knowledge of the case-law applicable. Finally, in the field of protection of fundamental rights, is still lacking the awareness by practitioners that in case of a clash between a provision of EU law and a provision of national law national courts must apply EU law and disapply conflicting national law.

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