Deutscher Juristinnenbund

djb

German Women Lawyers Association

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C O M M E N T S

on the Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), version of 04-02-2012

The German Women Lawyers Association (Deutscher Juristinnenbund - djb) explicitly welcomes the evaluation of the implementation of the family reunification directive (Directive 2003/86/EC) initiated by the European Commission, including questioning the legitimacy of some of its provisions. Nonetheless, the djb does not deem it necessary to react to some member states' incorrect implementation of the directive by introducing stricter requirements. Sporadic deficiencies of implementation may be addressed by other means, e.g. treaty violation proceedings.

The djb has in previous years commented on the issues of subsequent immigration of spouses, measures of integration, language requirements and forced marriages. We explicitly refer to the following comments available on the djb website:

- 10 June 2006, http://www.djb.de/Kom/K5/st06-12-AufenthaltsR/
- 23 October 2006, http://www.djb.de/Kom/Fr%C3%BChere%20Kommissionen/KGgFuK/st06-27-Hess-LT-Zwangsverheiratung/
- 18 May 2007, http://www.djb.de/Kom/K5/St-07-08-Zuwanderung/
- 10 March 2011, http://www.djb.de/Kom/K5/st11-02/

We would also like to emphasize that the djb has already on its federal convention 2009 in Karlsruhe discussed the specific problems of migrant women and developed approaches for them which have been included as special recommendations into the new European Agenda for the Integration of Third-Country Nationals.

The Commission rightly states in the introduction of the Green Paper that immigrants depend on family reunification, since this it is a precondition for them to leading a family life. Likewise the djb has repeatedly pointed out that only the presence of the family members enables a normal family life and thus guarantees a greater stability and better personal ties, hence a better integration in the receiving country. The right to family reunification flows from the necessary protection of the family which the German Fundamental Law regards as fundamental unit of society, as well as from the internationally guaranteed right to respect and protection of family life, especially as provided for in the European Convention for the

Protection of Human Rights and Fundamental Freedoms and in Art. 7, 24 of the Charter of Fundamental Rights of the European Union. The European Social Charter, which is referred to in the 5th recital of the preamble of the TEU (as well as in Art. 151 TFEU and in the Preamble of the Charter of Fundamentals Rights EU), in its Art. 16 et seq. contains important rights of migrant workers and their families, especially the right to family reunion stipulated in Art. 19 Para. 6. In evaluating the family reunification directive, special attention should be attributed to the observance of these horizontal clauses. Persons entering member states for the purpose of family reunification still form a quantitatively substantial group of immigrants, their share amounting to one third of total immigration in the EU.

Responses to the questions in detail:

Question 1

Are these criteria (reasonable prospect for the right of permanent residence at the time of application as regulated in Article 3 and a waiting period until reunification can actually take place as regulated in Article 8) the correct approach and the best way to qualify the sponsors?

With respect to the criterion of “reasonable prospects of obtaining the right of permanent residence” there are already doubts as to the certainty of the provision, since it seems uncertain what a “permanent residence” should be. Does this terminology refer only to an unlimited right of residence or also to a temporary, but renewable right of residence (in this sense see p. 2 fn. 10 (EN) of the Green Paper)?

In accordance with Art. 3 (1) of the directive 2003/86/EU the sponsor must in any case hold a residence permit for a period of validity of one year or more. Considering this fact neither the prospect of a permanent residence permit nor a two year minimum period of residence the introduction of which is left to the discretion of member states (Art. 8 (1)) seems to be the right approach and the best means to determine who may be acknowledged as sponsor.

The protection of family life may require admitting the entry of family members also in the case of a period of residence which in the first place is temporary and hence not directed towards permanent residence. In addition, the waiting period of Art. 8 (1) of the directive, in the light of Art. 8 ECHR, Art. 6 of the German Fundamental Law, is not acceptable in the case of a family reunification also affecting very young minor children and should hence be deleted. In the case of persons who are not highly qualified and intend to enter only for the duration of the waiting period, it may even completely obviate family reunion.

Question 2

a) Is it legitimate to have a minimum age for the spouse which differs from the age of majority in a Member State? Are there other ways of preventing forced marriages within the context of family reunification and if yes, which?

b) Do you have clear evidence of the problem of forced marriages? If yes how big is this problem (statistics) and is it related to the rules on family reunification (to fix a different minimum age than the age of majority)?

Response to a):

The minimum age for subsequent entry of spouses should be determined as 18 years, independently from the age of majority of some Member States. Generally, the problem of forced marriages cannot be met by the determination of a minimum age since the forced marriage takes place independently from a subsequent entry. Determining a uniform minimum age for subsequent entry would at the most ensure a uniform handling of the rules

of subsequent entry with respect to the age limit. The problem that especially very young women and girls, but also young men could be forced or pushed to a marriage at an age at which they will not be able to effectively defend themselves against it does not constitute a question of the age of subsequent entry, but at best one of the age of competence to marry, respectively of life in contexts of an authoritarian nature. If the persons jeopardized by the danger of forced marriage come from a context characterized by patriarchy, it will in general not make any difference whether the person concerned has reached an age of 18 or of 21 years. Raising the minimum age of subsequent entry to 21 years would – in the opinion of the djb – rather lead to an additional impediment of access than to preventing forced marriages.

There are ample other means to prevent forced marriages in the context of family reunification, in specific well developed, low-level and native-language counseling services, an expansion of offers of education for migrants as well as preventive training already at school level. Measures of support for educational programs in third countries may also be conceived. Equally important seems the long-term financially assured expansion of specialized sanctuaries, since affected persons who escape from a family are often in great danger for their lives and health. In this respect it must be noted that men may also be affected by forced marriages.

According to the survey of the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth of 28 March 2011 on “Forced Marriages in Germany – Number and Analysis of Counseling Cases” the majority of forced marriages (52%) takes place or is planned in a foreign country, 28% of these marriages reportedly are effected in Germany. At the same time, a strong majority both of persons born abroad and persons born in Germany are being married in the country of origin. If the persons concerned are born abroad, in 59% of all cases the forced marriage is also effected abroad; the percentage is 49% for persons born in Germany. The designated spouses also live abroad in about 64% of all cases.

Forced marriages frequently go along with an involuntary move to a country being oftentimes completely unknown to the affected person (see above mentioned survey of the Federal Ministry for Family Affairs et al. of 28 March 2011, p. 8 and 39). It is especially this aspect which shows that counseling services, support measures and in particular sanctuaries in the interior are of fundamental importance if forced marriages are to be combatted effectively. If the persons concerned are already removed abroad, a reentry in most cases – and despite new legal regulations - faces almost insurmountable obstacles. This proves that more emphasis should be laid on services of support and counseling in the interior for persons already residing there rather than on limiting migration by means of determining a minimum age for subsequent entry, which affects all migrants.

Response to b):

There is no statistical material available to the djb with regard to the question if there are problems with forced marriages and the rules on family reunification. However, it has to be pointed out in this context that reliable statistical material concerning forced marriages is anyhow unlikely to be attainable. Likewise, the above cited survey of the Federal Ministry for Family Affairs et al. of 28 March 2011, which was limited to a written interrogation in institutions of counseling and protection as well as to a six-month documentation of cases of individual counseling, points out the fact that it is not possible to answer the frequently asked question as to how many persons are affected by this problem.

Question 3

Do you see an interest in maintaining those standstill clauses which are not used by Member States, such as the one concerning children older than 15?

The djb does not see an interest in maintaining the standstill clauses for children older than 12 years at the one hand and those older than 15 years on the other hand. These clauses which constitute special rules not oriented towards the well-being of the child should be deleted.

Question 4

Are the rules on eligible family members adequate and broad enough to take into account the different definitions of family existing other than that of the nuclear family?

The situation of cohabitation including children of minor age for whom there is joint custody seems problematic. In these cases the non-marital partner who share in the right of custody should be admitted to family reunification if the family unity is or shall be lived and the other requirements for issuing a permit are fulfilled.

Likewise, as it seems to be practiced by half of the Member States, the parents of the sponsor should be included into the scope of application of family reunification. The requirements for other family members as stipulated by German law (§ 36 (2) Residence Act) which make the issuance of a residence permit dependent on the need to prevent a situation of extraordinary hardship oftentimes fall short of the peculiar family situation of persons having remained abroad, since those might be able to support family members who have already entered the Member State or are themselves dependent on them without necessarily meeting the high standards for assuming a situation of extraordinary hardship.

Serious problems also arise for adult children, especially young women who at the time of the emigration of the parents still live within the family unity and are dependent on support by the family. It would seem adequate to introduce an expansion as contained in the regulation of family unity in Art. 23 (5) of the new qualification directive 2011/95/EU.

Question 5

a) Do these measures efficiently serve the purpose of integration? How can this be assessed in practice? Which integration measures are most effective in that respect?

b) Would you consider it useful to further define these measures at EU level?

c) Would you recommend pre-entry measures? If so, how can safeguards be introduced in order to ensure that they do not de facto lead to undue barriers for family reunification (such as disproportionate fees or requirements) and take into account individual abilities such as age, illiteracy, disability, educational level?

Response to a):

As far as integration measures such as the mandatory visit of linguistic courses, of integration courses which respond to the special needs of migrants, and the counseling of and assistance to migrants in spheres of life relevant to them (educational opportunities for adults and children, search for employment, acknowledgement of foreign training qualifications etc.) are offered or introduced as mandatory subsequent to entry, they are conducive to the integration and “arrival” in the respective Member State und thus are to be appreciated. In this context, the djb is convinced that learning the respective language is the basis for any further integration whatsoever. The greatest effectiveness is to be attributed to those integration measures which, on the one hand, demand certain performances on the

side of the migrant (e.g. visiting a linguistic course upon entry), on the other hand clearly express vis-à-vis the migrant that their interests and needs which are to be legally protected are taken seriously and respected. In this, the respect for family living communities plays a central role.

Measures which right from the onset combine the acquisition of language with integration into working life have proven to be especially effective. A sufficient offer of practical training, courses of adaptation training and subsidized employment is conducive to language acquisition and at the same time to the constitution of social ties in the state of immigration. It supports the independence and self-determination of women and as such also proves to be an effective measure against forced marriages.

Response to b):

As can be seen from previous experience, it makes sense to determine more accurately the measures on the level of the EU. This holds true especially for the question whether it is permissible to require certain measures of integration prior to entry and how to account for individual circumstances under the aspect of proportionality (see under c).

Response to c):

In the opinion of the djb it is neither reasonable nor in accordance with the intention of family reunification to require the fulfillment of measures of integration prior to entry.

The provision of language acquisition prior to entry as applicable in Germany, for example, accounts for a substantial impediment to subsequent entry of spouses who intend to immigrate from a region with little offers of linguistic courses. The provision has a discriminatory effect in particular for women whose language acquisition in their country of origin is hampered by child care, pregnancy, family duties and/or reasons of cultural tradition. As such, it leads to a distinct barrier for family reunification in some cases even completely obstructing it. Individual special circumstances and abilities are not being taken into account in this respect.

The Federal Administrative Court, in accordance with the Federal Constitutional Court, deems the requirement introduced in August 2007 by the Directive Transformation Act that a spouse who intends to immigrate subsequent to a foreign national living in Germany must at least be able to communicate in the German language on a basic level (§ 30 (1) Sentence 1 No. 2 Residence Act) to be compatible with Art. 6 of the German Fundamental Law, Art. 8 ECHR and Art. 7 (2) of the directive 2003/86/EC. The Court holds that the provision's constitutionality is not hindered by the lack of a general exemption for cases of exceptional hardship, since an unproportional separation of spouses may be prevented in other ways in the individual case, for example by issuing a residence permit for the purpose of language acquisition in accordance with § 16 (5) Residence Act (Federal Administrative Court ruling of 30-03-2010 – 1 C 8/09 -, confirmed by Federal Constitutional Court, decision of non-acceptance of complaint dated 25-03-2011 – 2 BvR 1423/10 -).

The djb still does not go along with this opinion, since family reunification is being substantially hindered, in many cases made impossible, by introducing the requirement of evidence of language ability prior to immigration, and since the provision of § 16 (5) Residence Act does not sufficiently take into account the individual circumstances. Assuming, for example, that an illiterate woman with several small children might be able to be alphabetized on the one hand and on the other hand learn a foreign language within an adequate length of time oriented at the intention of the directive of family reunification –, does not seem convincing.

Question 6

In view of its application, is it necessary and justified to keep such a derogation in the Directive to provide for a three year waiting period as from the submission of the application?

Given the already long period of validity of the directive, it seems neither necessary nor justified to keep the provision of Article 8 subpara. 2, conceived as a derogation, since it in general works against family reunification. It should therefore be deleted.

Question 7

Should specific rules foresee the situation when the remaining validity of the sponsor's residence permit is less than one year, but to be renewed?

In any case it should be guaranteed that a family reunification is not impeded by a duration of validity of the sponsor's residence permit of less than one year.

Thereby it should be possible, by way of exception, to let the duration of validity of the residence permit of the family member exceed that one of the sponsor, as long as the residence permit of the sponsor is renewable.

Question 8

Should the family reunification of third country nationals who are beneficiaries of subsidiary protection be subject to the rules of the Family reunification Directive?

Should beneficiaries of subsidiary protection benefit from the more favourable rules of the Family reunification Directive which exempt refugees from meeting certain requirements (accommodation, sickness insurance, stable and regual resources)?

The djb shares the position that the need of protection of refugees and persons to whom subsidiary protection status has been granted is identical. The legal position of both groups of persons therefore should urgently be approximated also with respect to family reunification. Specifically persons with traumatic experiences of escape to whom the status of subsidiary protection is to be granted because they have escaped from serious harm in the sense of Article 15 of the directive 2004/83/EG (now: Art. 15 directive 2011/95/EU) (the death penalty or execution; torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict) notably depend on support by the family, but also on the certainty to know that the members of their family are in safety. Family reunification hereby is highly conducive to stabilizing the persons concerned, which in turn is a precondition for integration also of those persons to whom subsidiary protection status has been granted.

The legal position of persons with status of subsidiary protection should be approximated to that one of recognized refugees; they should, in observance with the recast of directive 2004/83/EU by directive 2011/95/EU, be included in the scope of application of the directive on family reunification and the same benefits should be attributed to them as to recognized refugees (privileged requirements concerning security of livelihood, sufficient accomodation, health insurance etc.). This aspect is being taken into account by directive 2011/95/EU the purpose of which is according to its Article 1 to lay down standards for a uniform status for refugees or for persons eligible for subsidiary protection, and for the substance of the protection granted. Accordingly, preexisting special rules for persons with subsidiary protection with respect to the conservation of the family unity have been deleted in the context of Articles 23 and 24 of the directive 2011/95/EU.

Question 9

a) Should Member States continue to have the possibility to limit the application of the more favourable provisions of the Directive to refugees whose family relationships predate their entry to the territory of a Member State?

b) Should family reunification be ensured for wider categories of family members who are dependent on the refugees, if so to which degree?

c) Should refugees continue to be required to provide evidence that they fulfil the requirements regarding accommodation, sickness insurance and resources if the application for family reunification is not submitted within a period of three months after granting the refugee status?

Response to a):

Article 9 (2) of the directive whereby Member States may confine the application of this chapter to refugees whose family relationships predate their entry, should in the opinion of the djb be deleted without substitute. Refugees often have to wait for several years for the final decision on their application for protection. Family ties which have come into being (only) during this period of time must not remain unconsidered. Young refugees who have built up their own family ties only during the time of their escape deserve the same protection in this respect as those whose family ties already go back to the time preceding their departure. It should also be considered that refugees, due to their situation, in general notably depend on stable family ties.

Response to b):

Subsequent entry should be allowed for first-degree relatives in direct line (parents, children) as well as for spouses. In this context, one may think of an opening clause for other close relatives, analogous to the provision of Article 23 (5) of directive 2011/95/EU.

Response to c):

The provision of Article 12 (1) sentence 3 of the directive whereby the Member States may require the refugee to meet the conditions referred to in Article 7 (1) of the directive (accommodation, health insurance, resources to maintain himself/herself) if the application for family reunification is not submitted within a period of three months after granting refugee status does not adequately account for the specific situation of refugees and the members of their family and should thus be deleted. At least the period of three months seems to be too short. It may be specifically difficult for refugees to obtain the documents necessary for family reunification. In addition, establishing contacts to family members will often be difficult. It has to be kept in mind that it is challenging to cope with the new situation after recognition as refugee -, i.e. finding accommodation, work etc. -, and at the same time taking into account the needs of subsequently entering family members.

Question 10 (Proving family ties)

Do you have clear evidence of problems of fraud? How big is the problem (statistics)? Do you think rules on interviews and investigations, including DNA testing, can be instrumental to solve them? Would you consider it useful to regulate more specifically these interviews or investigations at EU level? If so, which type of rules would you consider?

There is no statistical material available to the djb with respect to the number of cases of fraud. However, it has to be pointed out that in general investigations in the area of family reaching as far as requiring DNA testing constitute fundamental invasions into the personal rights of the persons concerned which may only be permissible in individual cases of a

specific nature and under strict observance of the rule of proportionality. In the case of requiring DNA testing, in addition, costs may not be bearable for families with several children. At this point, limits have to be determined in order to prevent that family reunification fails already due to the arising costs. Finally, it has to be guaranteed that where social fatherhood exists, family living communities are not being torn apart.

Question 11

Do you have clear evidence of problems of marriages of convenience? Do you have statistics of such marriages (if detected)? Are they related to the rules of the Directive? Could the provisions in the Directive for checks and inspections be more effectively implemented, and if so, how?

There are no statistics available to the djb on the subject of detected marriages of convenience. However, it may legitimately be doubted that there exists valid statistical material, hereby taking into account that the existence of a marriage of convenience may not be confounded with an arranged marriage or with a marriage of purpose. In the judgement of the djb, there are sufficient means of control in accordance with general rules of administrative law in order to detect a marriage of convenience. It is of prominent importance in this respect to recognize the severity of the above mentioned intrusion on the personal rights of the persons concerned, the rule of proportionality as well as the prohibition of exorbitance. In this context, the question of material burden of proof seems problematic. If the spouses must (materially) prove in the course of the visa proceedings that a marriage of convenience is not intended, the problems of burden of proof will often be insurmountable for them. Discriminatory conclusions on account of an age difference in the framework of the inspections undertaken must be prohibited.

Question 12

Should administrative fees payable in the procedure be regulated? If so, should it be in a form of safeguards or should more precise indications be given?

A provision with regard to the costs of procedure seems neither opportune nor necessary. Insofar as in individual Member States problems have arisen with respect to the enacted administrative fees (ECJ Judgement of 29-04-2010 – C-92/07), they may be solved in the individual case without generalizing standards for all Member States. For the rest, a reference to Article 18 of the European Social Charter seems sufficient.

Question 13

Is the administrative deadline laid down by the Directive for examination of the application justified?

The deadlines laid down in Article 5 (4) of the directive seem distinctly too long when taking into account the legally protected interests of Article 8 ECHR as well as Articles 7 and 9 of the Charter of Fundamental Rights, in addition considering the fact that by use of modern means of communication the collaboration between the embassies located in third states and the local immigration authorities may be effected much faster and more efficient. In this context, the lenght of the visa procedures with respect to family reunification time and again proves to be an obstacle.

By utilization of e-mail, telefax or online-request, a processing period of in general three months, in exceptional cases extendable to six months, should be sufficient and adequate.

Question 14

How could the application of these horizontal clauses be facilitated and ensured in practice?

The effective observance and safeguarding of the horizontal clauses of Article 5 (5) and Article 17 of the directive 2003/86/EC, of Article 7 and 24 (2) and (3) of the Charter of Fundamental Rights, of Article 3 (1) of the UN Covenant on the Rights of the Child as well as Articles 17, 18 and 19 of the European Social Charter have repeatedly proven to be problematic in the framework of national implementation. In order to remind and tie Member States more strongly to the observance of the above mentioned horizontal clauses, an article in the directive could prove helpful whereby Member States in the case of subsequent entry of family members, specifically in the case of subsequent entry of children, may have to conduct a mandatory assessment of the individual case in consideration and appreciation of the standards laid down in Article 5 (5) and Article 17 of the directive 2003/86/EC, Articles 7 and 24 (2) and (3) of the Charter of Fundamental Rights, of Articles 17, 18 and 19 of the European Social Charter as well as of Article 3 (1) of the UN-Covenant on the Rights of the Child.

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