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The Right to Family Life vs. Immigration Control: Current Trends in Family Reunification in the Czech Republic in the Context of the European Union

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Abstract:

In this introductory article on the [debate on family reunification](#), which will take place at the European House on 12 June 2013 at 3 pm, the author presents trends in family migration at the European level and then evaluates developments in the Czech Republic. In the concluding section, questions are proposed for the debate.

In the 1970s, Western European countries sought to significantly reduce the inflow of migrant workers at the time of economic crisis. These foreign workers were the workhorses of post-war economic growth. Politics, however, failed to stop immigration and the number of immigrants not only did not decrease, but continued to increase. This was because these European countries were forced to respect fundamental human rights and thus could not deny the immigrants who settled in these countries their right to family life. An important role was played by the courts, which were not forced to respect changes in the directions of migration policy and stood aside from the politicised debate on this topic (Hollifield 1992). To the surprise of those who created the temporary labour migration policies, many foreign workers, who were expected to quickly return to their countries of origin when job opportunities disappeared, put down roots in the country. Not only did they want to stay, but they also wanted their families to come and join them. Forty years after the Federal Republic of Germany, along with other Western European countries, stopped their labour recruitment programs, the tension between the effort to control/restrict immigration in the context of an adverse economic situation and the obligation to respect fundamental human rights is still very much with us. A significant change is the major role of the European Union (EU) in the field of migration policies. The aim of this paper is first to present current trends in family migration at the European level, and then to evaluate developments in the Czech Republic.

In general, according to international law, every person has the right to a private life and family life. In the current framework of EU legislation which regulates family migration, this right however does not always mean the right to be admitted to a foreign country and be granted a residence permit for the purpose of family reunification. This is so only in the context of the free movement of EU citizens and their family members. This migration is regulated by the [Council Directive 2004/38/EC](#) on the right of EU citizens and their family members to move and reside freely in the Member States. This concerns the migration of EU citizens and their family members who reside within the EU, but outside their country of origin. Even though their relatives may come from third countries (outside of the EU), it will be much easier for them to enter and stay in the EU than for the families of immigrants from third countries without family ties to an EU citizen.

The second form of family migration is regulated by the [Council Directive 2003/86/EC](#) on the right to family reunification (hereinafter "Directive").¹ Although the title of the Directive suggests that migrants have the right to family reunification, it allows individual States to set different levels of conditions which may restrict or prevent their access to this right. Critics of the Directive say that Member States are given too much scope in setting these conditions. Just as in the 1970s and the 1980s, an important role is still played by the courts,² which can mitigate excessively restrictive interpretations and implementations of the Directive by the Member States.

The third type of family migration is that of citizens of third countries who are family members of EU citizens residing in their own countries. Their conditions are governed by national legislations. According to the interpretation of certain Member States, the right to free movement of these "non-migrant" EU citizens does not apply. This creates a paradoxical situation where these people may have in their home country less access to the right to family life with a third country national than if they travelled to another EU country, where their right to family life is regulated by Council Directive 2004/38/EC on the right of Union citizens to move freely.³ This leads to the phenomenon of short-term marriage migration of EU citizens. For example, it is a common occurrence that Dutch citizens, whose partners do not meet Dutch regulations for granting residence, will temporarily reside in Belgium, where entering into such a marriage and legalising the partner's residence is easier for them (Schrover 2013). As of 2011, Belgium has also tightened the regulations for its citizens. This leads to the fact that while the Dutch continue to go to Belgium in order to marry, Belgians on the other hand, travel to the Netherlands or other neighbouring countries for the purpose of marrying a foreigner (Striano 2011). The current Czech legislation puts the rights of family members of EU and Czech citizens on an equal footing.⁴

¹ Denmark, Ireland and the United Kingdom are not subject to this Directive.

² European Court of Human Rights and the Court of Justice of the EU are particularly relevant in this matter.

³ This is called reverse discrimination and is extensively discussed in the literature on EU legislation (Walter 2008) and the case law of the Court of Justice of the EU (Wray 2011).

⁴ § 15a paragraph 4 of the Aliens Act: "The provisions of this Act relating to family members of EU nationals apply to an alien who is a family member of a citizen of the Czech Republic".

The share of family migrants in the total number of immigrants in the EU has been decreasing. While this group constituted up to half of all newcomers to the EU in the early 2000s, its share has currently dropped to one third. In the case of family migrants from third countries, they make up approximately 21 percent of the total immigrant population in the EU (European Commission, 2011, 10). Among permanently settled persons, the proportion of family migrants is higher and in recent years, due to the unfavourable economic situation in the EU and stricter regulations of labour migration, has actually increased. This is also because family and humanitarian migration does not react so strongly to changes in economic conditions in the destination countries (OECD 2011, 43).

Family Migration of Third Country Nationals: Current Trends in the EU

This section focuses primarily on family migration of third country nationals. It is a highly relevant topic for several reasons. It clearly reveals a general characteristic of European migration policy, which is the already mentioned tension between the effort of States to control migration on the one hand and liberal European values, which proclaim respect for basic human rights, on the other. At the same time it represents the mainstream of family migration and its legislative regulation is one of the most changing fields of migration policies of Member States (Pascouau and Labayle 2011). The EU Directive regulating this migration is currently under negotiation. In the period between November 2011 and March 2012 the European Commission initiated a public consultation on the Green Paper on the right to family reunification of third country nationals. In this way, the Commission invited the Member States, European and national institutions and non-governmental organisations to express their views and provide additional information on the implementation of the Directive in the Member States (Association for Integration and Migration, 2012b).

Although there are considerable differences in the implementation of the Directive in the Member States, in general it can be said that in recent years, the EU Member States have been moving towards stricter regulation of family migration (OECD 2011, 109). But exceptions also exist. There is a long-term trend in the introduction of measures the purpose of which is other than the fulfilment of the rights of migrants to family life. First of all, there is a restriction in the number of immigrants who enter the country in this way. This comes about by setting conditions which must be met by the sponsor⁵ and his/her relatives in order to be able to achieve the right to family life. In some countries, these differ significantly from the conditions for family life of ordinary citizens in the destination country. This could be for example, the age of the partners or the children who can apply for family reunification. In some States, the age of the partners who may seek reunification is set at 21, which is the maximum limit permitted by the Directive (the Netherlands, Belgium, Austria). Another form of restriction is the amount of income that is considered necessary in order to provide for the

⁵ The sponsor is a migrant residing in the EU, who asks for permission for his/her family members to enter from a third country.

family. For example, as of 2010, migrants seeking reunification in the Netherlands must have an income of at least 120 percent of the Dutch minimum wage (OECD 2012, 109).

Secondly, the conditions in the area of family migration are indirectly adjusted so as to prefer certain groups of migrants. This trend follows the spirit of migration management, which privileges selected groups of economically active migrants. According to this logic, family migrants are perceived as a somewhat inconvenient group because they claim the right to family life, regardless of their potential economic benefits to the host country. This selection takes place mainly through the integration tests. The original wording of the Directive refers only to "integration measures". During the process of its approval, this was a hotly debated topic (European Commission, 2011, 4). However, the way they are interpreted in some countries, it is rather a question of "conditions" that family members must meet before they are granted residency. Such tests have already been used by some countries such as the Netherlands, France and Germany.⁶ Poland, Great Britain and Italy have also recently joined in, introducing language tests as a condition for a residence permit for family members (OECD 2012, 109). Research shows that, in the Netherlands for example, this has led to an increase in the educational levels among reunited family members, as less-educated candidates were excluded who did not pass the test or did not even attempt it (Kofman, 2011, 6). At the same time, the positive effects of these tests on the support of effective integration of migrants have not been clearly demonstrated (Kofman, 2011, 6). Furthermore, there is a clear distinction between the different types of family migrants. Highly skilled foreign workers have an easier path to family reunification. In some countries, they may even arrive together, completely avoiding the separation and the tedious reunification procedures. Here again the influence of the logic of migrants' economic contributions, which is the implicit condition of the improved access to common family life, is obvious (Boswell and Geddes, 2011, 114).

Among the countries which have recently introduced positive changes in the regulation of family migration Spain ranks high. As of 2011, even unmarried couples may qualify for reunification, provided they can prove the existence of a relationship (OECD, 2012, 109). Spain is one of the countries whose policy in this area is based on the assumption that family reunification is a means to improve immigrants' integration. On the contrary, migration policies in those countries where integration tests were introduced treat family reunification of immigrants with caution. The implicit concern prevails that family reunification supports the persistence of different family norms, potentially preventing assimilation (Boswell and Geddes 2011, 104).

Who are family migrants who come to the EU through reunification? There is a widespread belief that the typical family migrants are economically inactive women who follow their

⁶ While Germany requires a language exam to be taken for family reunification, France and the Netherlands also examine applicants on other topics in addition to language, namely life and institutions of the country and acceptance of its values such as gender equality, secularism and non-discrimination. These exams must be taken by applicants aged 16 to 64 or 65 (Boswell and Geddes 2011, 119–120).

husbands. This is only partially true. Family migration indeed represents the most important means of migration for women and this applies particularly to women from third countries (ENoMW and EWL 2012, 5). The main group of family migrants in the EU, however, are not partners of settled migrants, but their children (European Commission, 2011, 11). This is also the reason why an increasing emphasis on immediate economic contribution of migrants as a condition for joint family life is problematic. In addition, there is evidence that expectations of lower economic productivity of family migrants are not always justified. A recent study in the USA for example, shows that the income of family migrants and migrants with other types of visas are not significantly different (Hyde 2014).⁷

Family Migration in the Czech Republic in a European Context

Within Europe, the Czech Republic ranks among the countries with more accommodating conditions for family reunification. According to the Migrant Integration Policy Index (MIPEX), which assesses the situation in 31 countries (27 in the EU plus Norway, Switzerland, Canada and the USA), the Czech Republic stood at thirteenth place in 2010. Compared with its neighbours, it scored slightly worse than Poland, but significantly better than Germany, Austria and Slovakia (MIPEX 2010).

Compared to the neighbouring countries, residence permits for family reunification in the Czech Republic constitute a significantly higher proportion of the total number of permits issued to third country nationals.⁸ Since 2008, this ratio has almost doubled (European Commission, 2011, 10). This is due to significant restrictions on issuing permits for employment and entrepreneurship (Multicultural Centre Prague 2011). This confirms the pattern that family migration reacts less strongly to fluctuations in the economic situation of the destination country. This trend continued in 2011, when the biggest share of long-term residence permits were issued for the purpose of family reunification (2,564 permits, i.e., 43 per cent). The second highest number of visas were study permits (1,555 permits, or 26 per cent), the third was employment (1,122 permits, or 19 per cent) and the fourth business (480 permits, i.e., 8 percent) (Ministry of the Interior 2012a, 46). Residence permits for family reunification were issued most commonly to citizens of Ukraine, Vietnam and Russia (Ministry of Interior 2012a, 45).

In assessing Czech legislation regarding family reunion, non-governmental organisations agree that transposing the Directive into the Czech legislation has significantly improved the status of family migrants (Association for Integration and Migration, 2012). Let us now take a look at what non-governmental organisations regard as the most controversial points of regulating family reunification and at the attitudes and legislative proposals of the Ministry of

⁷ A preliminary version of the article is available at
http://lawprofessors.typepad.com/immigration/2013/04/immigration-article-of-the-day--2.html?utm_source=feedly

⁸ In the Czech Republic, this ratio was 39 percent in 2010; in Germany it was 24 percent, in Austria, 25 percent, in Poland, 0.6 percent and 16 percent in Slovakia (European Commission 2011, 10).

the Interior, which indicate the direction that migration policies may take in the future. In the next section, I will draw on contributions of the Ministry of the Interior (hereinafter referred to as the "Ministry") and the Association for Integration and Migration (AIM)⁹ to the consultation on the Green Paper on the Directive of 2012 (Ministry of Interior 2012b; Association for Integration and Migration, 2012). I will also consider the proposal for a new law on the residence of foreigners in the Czech Republic. This bill is currently being debated.¹⁰ At this point, it is not clear which of the proposals mentioned below will eventually make its way into the law.

➤ **Waiting Period for Reunification**

According to the current legislation, resident foreigners with long-term or permanent residence permits must reside in the Czech Republic for at least 15 months before they can apply for reunification. In the context of the Directive, which allows a period of up to three years, this is a rather liberal treatment. AIM, however, points out that in practice, the waiting period for processing applications for family reunification may take up to two years. From the position of the Ministry outlined in the draft of the new immigration law, it is apparent that in the future reunification may be possible after four months of residence. Highly qualified employees or Blue Card holders could seek reunification without the prior residence (Ministry of Interior 2013, 28).

➤ **Access of Family Members to Public Health Insurance**

One of the most pressing problems according to AIM is that family members with long-term residents are excluded from the system of public health insurance. Non-governmental organisations have long brought attention to the difficulties of foreigners dependent on commercial health insurance.¹¹ Even in the new draft of the Aliens Act, the Ministry does not consider the inclusion of family members in the public health insurance system.

➤ **Minimum Age of the Spouse**

The current legislation states that spouses who apply for family reunification must have reached the age of 20 years. As mentioned above, the maximum age limit permitted by the Directive is 21. Increasing the minimum age of spouses compared to the normal conditions of marriage in the majority of society is justified by some Member States by the need to fight against forced marriages. Critics, however, point out that the impact this action has on all family migrants, is not balanced in terms of this objective (Kofman, 2011, 3). The Ministry recognises that at present, the Czech Republic does not face the problem of frequent occurrences of such marriages, yet in its response to the Green Paper, it supports increasing

⁹ For the Czech Republic, the only NGO to participate in these consultations was the Association for Integration and Migration (AIM).

¹⁰ The basic ideas and visions of a new Aliens Act are outlined in the publication for the European Migration Network, Czech National Focal Point (Ministry of the Interior 2013). Complete documentation of the bill is available on the website Library of Draft Legislation

<http://eklep.vlada.cz/eklep/page.jsf?pid=RACK97JH9S6X>

¹¹ For more information on the Campaign for health insurance for migrants and links to some relevant documents on this topic, see <http://www.konsorcium-nno.cz/zdravotni-pojisteni-migrantu.html>.

the minimum age of spouses who may seek reunification, raising it to as much as 24 years. This leans towards the Danish model, which is one of the most restrictive in the EU. The new legislation, however, leaves the minimum age unchanged.

➤ **Obtaining Independent Residence by a Family Member**

The Czech Aliens Act gives immigrants the opportunity to change the purpose of their stay and receive a permit independent of the duration of a family tie after 3 years. Research points out that such a long time period may aggravate the situation of a dangerous dependency between partners. This increases the threat of an environment in which the dependent partner (in most cases it is a woman) is forced to choose between tolerating an environment of domestic violence and losing the residence permit. In its statement, AIM confirms the existence of this problem in the Czech Republic. It also proposes that a resident foreigner should be allowed to change his/her purpose of stay after 12 months with a view to taking into account the situation of domestic violence. Shortening the period to one year is also in line with the recommendations of the Council of Europe from 2009.¹² The attitude of the Ministry however, can hardly be expected to shift towards the reduction of the period, unless forced to do so by the EU legislation. The national legislation currently proposed does not give any indication of acknowledging the situation of domestic violence as a reason for granting an independent residence permit.

➤ **Integration Measures**

The Ministry demonstrates a clear tendency towards the use of integration measures in a form that would probably serve more as a tool for limiting family migration than as a way of promoting immigrants' integration. Although Czech legislation has not yet established any integration measures, the Ministry supports the introduction of options for revoking residence permits if the prescribed integration conditions are not met by the immigrant, including a language test, determination of minimum income or disqualify applicants dependent on social benefits. Such conditions have also found their way into the current version of the proposal of the new law. AIM prefers the existing legislation and warns that implementing such integration measures would lead to a disproportionate burden on applicants from less developed countries with lower education and larger families.

➤ **Verification of Declared Family Ties**

The abuse of family reunification for other purposes is not recognised by the Ministry as being a serious problem. Marriages of convenience and other forms of abuse are in most cases related to family ties with EU/Czech citizens. However, the Ministry expresses its support for the introduction of DNA testing to authenticate a claimed biological family tie. It refers to the fact that the authenticity of documents proving a family tie often cannot be reliably proven, as in some countries such documents may be obtained for a fee regardless of whether they accurately reflect the real situation or not. Support for DNA testing reflects the general

¹² Parliamentary Assembly, Council of Europe:
<http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12272&Language=EN>

attitude of mistrust towards the declared family ties of immigrants by the Ministry.¹³ AIM presents a clearly negative view on this subject and convincingly argues that family reunification should be based on actual rather than biological parenthood.

Conclusion

Current legislation on family reunification in the Czech Republic is quite liberal in the context of the EU. In this respect, the impact of the Directive may be seen as being progressive. While the attitudes expressed by the Ministry in the consultation of the Green Paper suggest rather restrictive tendencies, the current draft of the new Aliens Act does not introduce all of the suggested restrictions.

NGOs and other advocates of migrants' rights should be more involved in influencing public debates on family migration in order to make future restrictive changes less enforceable. I consider particularly relevant the presentation of examples of the positive impact of reunification on the integration of immigrants, and the criticism of double standards for migrant families compared with those of ordinary Czech families and exposing the impact of family migration regulations on reinforcing social pathologies such as domestic violence.

Regarding the initial process of amending the Directive, I cannot but agree with the view of European umbrella organisations such as the European Network Against Racism and the European Women's Lobby. These organisations warn that given the current political climate in Europe, reopening negotiations on the Directive could result in a lengthy process with an uncertain outcome. Amendment to the Directive could lead to excessive tightening of conditions in the area of family migration. The examples given above describing the views of the Ministry of the Interior confirm the legitimacy of this concern. Along with other organisations, the Czech non-governmental sector and AIM appeal to the European Commission to be more focused on ensuring proper implementation and enforcement of the existing Directive by the Member States (Multicultural Centre Prague 2011).

Proposed Questions for Debate

- In today's Europe, how can one defend or challenge setting stricter conditions for family reunification of third country nationals?
- What direction should the activities of non-governmental organisations and other actors take in enhancing migrants' access to family life?
- What role can migrant organisations play?

¹³ The new citizenship law, which is currently being discussed in the Czech Senate, introduces the subject of DNA testing for some illegitimate children of a Czech father and a foreign mother. The intention of this measure is to prevent fake/intentional misidentification of paternity. The introduction of genetic tests also affects the family concerned in that they must pay for the test themselves. According to statements by 24 non-governmental organisations, it is a disproportionate invasion of privacy and unlawful discrimination against illegitimate children as opposed to legitimate children (Čižinský 2013).

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