

## The main principles of family reunification before the European Court of Human Rights

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### Abstract:

The following article briefly discusses some of the main considerations of the European Court of Human Rights with regard to the issue of family reunification. The author describes the concept of family life as interpreted in the Court's case-law and its approach towards family reunion in immigration cases. He notes that although States have a relatively broad discretion to organise their policy in this area, the Convention imposes clear limits on them within which they have to apply their family life considerations.

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The European Court of Human Rights ("the Court") was established by virtue of the European Convention of Human Rights of 1950 ("the Convention") which was concluded by the (now 47) Member States of the Council of Europe in Strasbourg<sup>2</sup>. In accordance with Article 1 of the Convention, the Member States of the Council of Europe have obliged themselves to respect the human rights mentioned in the Convention with regard to everyone within their jurisdiction. In that regard it is noted that since the Court was established through the Convention, it is also limited in its possibilities to interpret other international treaties or documents. Article 32 of the Convention states that the Court only has jurisdiction with regard to all matters concerning interpretation and application of the Convention and the Protocols attached to the Convention. This is important because it means that when deciding on cases concerning family reunification, the Court cannot base its decision on, for instance, Directives of the European Union that relate to family reunification issues. The Court is limited to its interpretation of the Convention and its own previous case-law.

Apart from limitations to the Court's powers of interpretation, it is also important to note that the Convention is based on the principle of subsidiarity<sup>3</sup>. This means in essence that it is first

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<sup>2</sup> The text of the European Convention of Human Rights, as well as more information on the Convention and the European Court of Human Rights, is available on the Court's website: [www.echr.coe.int](http://www.echr.coe.int)

<sup>3</sup> See among other authorities *Z. and Others v. the United Kingdom*, Grand Chamber judgment of 10 May 2001, § 103, ECHR 2001-V.

of all for each Member State to ensure that all rights laid down in the Convention are respected and accessible on its territory. Only in cases of real interference with human rights should it be up to the Court to intervene. This in turn means that for certain issues, the Member States have considerable freedom to interpret and implement the Convention as they think best. This form of freedom is called the margin of appreciation.

### **The concept of family life**

For the purposes of the discussion of family reunification (or family reunion as it is also frequently called in the Court's judgments), the most important Articles in the Convention are Articles 8 and 12. Article 8 essentially states (insofar as relevant for this publication) that everyone has a right to protection of his family life and Article 12 states that men and women of marriageable age have the right to marry and to found a family in accordance with national laws governing this right.

When it examines whether the refusal by a State of family reunification is in breach of Article 8, the Court will have previously established the existence of family life<sup>4</sup>. There is no complete definition of family life in the case-law of the Court but it is referred to as an autonomous concept<sup>5</sup>. This essentially means that the existence of family life depends on the real existence in practice of close personal ties such as for instance whether two people live together, the length of their relationship and whether they have children together<sup>6</sup>. A child born out of a marriage is automatically part of that relationship and there is thus family life between the child and his parents<sup>7</sup>. But family life also exists for instance between adopted children and their adoptive parents<sup>8</sup>.

### **Family reunification/ family reunion**

When dealing with issues of family life and family reunification, the Court is usually quick to point out first of all the rights of States to regulate some of their own affairs (the margin of appreciation referred to earlier) and the fact that the Convention does not guarantee the *right* of an "alien" to enter or to reside in a particular country. This means basically that a person is not entitled to an absolute right to live wherever he or she wishes, and that the receiving State is allowed to put conditions on the entry and residence of new people to its territory in accordance with its obligations under international law<sup>9</sup>. With regard to Article 12, the Court has stated that this Article does not create an absolute obligation for States to respect a

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<sup>4</sup> See for instance *Arvelo Arponte v. the Netherlands*, judgment of 3 November 2011, § 52.

<sup>5</sup> *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 11, §31.

<sup>6</sup> See for instance *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, p. 19, § 56; and *X, Y and Z v. the United Kingdom*, judgment of 22 April 1997, Reports of Judgments and Decisions 1997 II, p. 630, § 36.

<sup>7</sup> *Ahmut v. the Netherlands*, judgment of 28 November 1996, Reports of Judgments and Decisions 1996 VI, p.2030, § 60.

<sup>8</sup> *X. v. France*, no.9993/82, Commission decision of 5 October 1982, Decisions and Reports (DR) 31, p. 241.

<sup>9</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67.

married couple's choice of the place where they wish to found a family or to accept non-national spouses for settlement so that they can try to found a family. So even if two people are already married, the refusal of entry into the country of one of them does not interfere with the rights of Article 12<sup>10</sup>. The Court has accepted a similar lack of an absolute obligation to respect people's wishes concerning their choice of matrimonial residence with regard to Article 8<sup>11</sup>.

That lack of an absolute obligation does not mean however that a refusal to allow family reunification will never breach the rights guaranteed by Article 8. In cases concerning family life and immigration the Court has said that the obligations of a State to admit to its territory relatives of persons residing there will depend on the particular circumstances of the persons involved as well as the general interest<sup>12</sup>. Moreover, at all times the State must strike a fair balance between the competing interests of the individual and the community as a whole<sup>13</sup>.

For the assessment of the particular circumstances of the persons involved the Court often states that factors to be taken into account 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)"<sup>14</sup>. These are obviously circumstances that will vary greatly from case to case. It is however important to realise that the fact that one person in the family has a residence permit, does not create a certainty that family members are allowed to join him. In fact, the Court might consider that it may be required of the persons concerned to experience their family life in the country of origin of the person trying to join the holder of the residence permit.

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<sup>15</sup>. This is an important point as well as the Court has been very strict on this in the past. Any family life that is started or maintained when the persons involved were still unsure about the possibilities of actually obtaining a residence permit will run a high risk of receiving very little attention from either domestic authorities or from the Court in overall considerations on family reunification.

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<sup>10</sup> See above, note 9, § 68.

<sup>11</sup> *Hode and Abdi v. the United Kingdom*, judgment of 6 November 2012, § 43.

<sup>12</sup> *Gül v. Switzerland*, judgment of 1 February 1996, § 38, Reports of Judgments and Decisions 1996-I.

<sup>13</sup> *Rodrigues da Silva and Hoogkamer v. the Netherlands*, judgment of 31 January 2006, § 39, ECHR 2006-I.

<sup>14</sup> See for instance *Nunez v. Norway*, Judgment of 28 June 2011, § 70.

<sup>15</sup> See above, note 13.

## Concluding remarks

The above examples of the Court's case-law are a small indication of some of the main principles used by the Court in cases concerning family reunification. A detailed study would be much more elaborate, and too expansive for the purpose of this article. For those involved in a process of attempted family reunification it is nonetheless essential to remember that under the Convention, States have some freedom to set their own rules. Compliance with domestic (immigration) regulations is therefore of great importance.

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