Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right*

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1. Introduction

The disjunction between the international commitments states enter into to safeguard human rights and compliance with such rights is most vivid when fundamental human rights conflict with state interests in the field of immigration. This tension is particularly acute in the context of family reunification:

[F]amily reunification [can] be seen, on the one hand, as a humanitarian or human rights issue, and, on the other, as an immigration matter which might place a strain on the labour market and social facilities, such as housing, education and medical facilities.¹

There is no general right for non-nationals to enter a country other than the country of their nationality and also perhaps with the exception of those non-nationals returning to a country where they hold long-term or permanent residence status.² Indeed, if “rights” terminology is used, it is usually done so in the context of a sovereign right of states to determine the composition

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² E.g. see Art. 12(4) of the International Covenant on Civil and Political Rights (ICCPR; 16 December 1966; 999 UNTS 171): “No one shall be arbitrarily deprived of the right to enter his [her] own country”. The Human Rights Committee understands the terms “return to his [her] country” as applying to long-term or permanent residents who have established “close and enduring connections” to the country concerned. Human Rights Committee, 67th Session, 1999, General Comment No. 27 on Article 12 (Freedom of Movement), para. 20. See UN, International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.5 (26 April 2001) [hereinafter Compilation of General Comments and General Recommendations]
of the national community within defined territorial boundaries. As Michael Walzer has cogently argued, however, governments cannot be permitted to act as tyrannies towards those non-members lawfully permitted to work and reside within their territories by exploiting their labour and marginalizing their status in the host community, while at the same time preventing them from living as ordinary human beings and depriving them of the opportunity to integrate into the host society.\(^3\) Clearly, family life is considered by migrants themselves to be of utmost importance and hence the need to ensure the family unit is kept together, if necessary by means of family reunification or reunion if the family is separated.\(^4\)

When primary migration for employment decreased in importance after the oil crisis of 1973 and when many western European countries announced an official stop on labour migration, it was family reunification that became the focus of immigration policies. Indeed, as recently as 1999, the independent Committee of Experts on the Application of International Labour Organization (ILO) Conventions and Recommendations, expressed the prevailing view that “[i]n many countries today family reunification remains almost the only legal means of immigration for prospective migrants”.\(^5\) However, this understanding of family reunification, as the direct consequence of the presence of a fixed permanently resident population of non-nationals within host states, is set to change now that primary labour migration has returned to the agenda of policy-makers in EU Member States as well as EU institutions. Member States have therefore been presented with another opportunity to devise a common equitable policy on family reunification in response to the emerging new reality, particularly in respect of those third-country nationals entering the Union for the first time to take up both highly skilled and low-skilled employment, and which also conforms to the international human rights obligations that they have entered into.

This article is set in the context of one such attempt to devise a common policy, namely the Commission’s proposal for a Council Directive on the right to family reunification (as amended)\(^6\) advanced under Article 63(3)(a)


\(^4\) The terms “family reunification” and “family reunion” are synonymous for the purpose of this article and are used interchangeably.
