Case Note

Family Reunification Directive

Court of Justice of the European Communities

Family Reunification and the Union's Charter of Fundamental Rights, Judgment of 27 June 2006, Case C-540/03, *Parliament* v. *Council*

Rick Lawson*

Beware – Immigration!

You may not have noticed, but 2006 was the European Year of Workers' Mobility. The symbolism was prompted by concerns that a genuine European 'mobility culture' still does not exist. As the Commission has observed, rates of mobility remain extremely low despite initiatives to promote the free movement of workers:

> Many obstacles of a legal or administrative nature, but also of a linguistic or socio-cultural nature, continue to hamper workers' freedom of movement and to discourage them from taking advantage of the opportunities for mobility.[1]

It is cynical that third country nationals wishing to 'take advantage of the opportunities for mobility' find that barriers are created rather than removed; and if, despite all measures, the influx is still growing, many Europeans and observers see this as a problem rather than as an opportunity. Family reunification in particular is generally believed to account for a large proportion of immigration.[2] One might

* Prof. dr. R.A. Lawson, *Europa Instituut,* Faculty of Law, University of Leiden, the Netherlands, r.a.lawson@law.leidenuniv.nl.

[1] *See* Memorandum 05/229 of 30 June 2005, entitled *2006 – European Year of Workers' Mobility, the importance of the mobility of workers to the implementation of the Lisbon strategy*.

[2] The Commission asserted in 2006 that 'Family reunification is very important in many Member States, accounting for 75% of inflows in France and over 50% in Denmark and Sweden' (*Second Annual Report on Migration and Integration*, SEC (2006)892). Dutch statistics indicate a considerable drop in recent years, both in absolute numbers and in the percentage of immigrants in the context of family reunification. Interestingly immigration reached a peak in 2000 and 2001, i.e., when Directive 2003/86 was negotiated. In 2001 there were 97,000 non-Dutch immigrants, 45% of whom came with a view to family formation or reunification. *See* <www.cbs.nl>.

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argue that family reunification is essentially about settling down and developing roots in a new environment. But it is not perceived as such in old Europe, where the very phenomenon of mobility seems to raise feelings of enmity. Hence family reunification is a major political issue.

Family reunification also became a major *legal* issue when the Council adopted a directive that harmonized this policy field. The European Parliament felt that certain aspects of the directive were incompatible with fundamental rights, and brought an annulment action before the European Court of Justice. In June 2006 the European Court of Justice rejected the appeal in a particularly rich judgment. This case note will first sketch the legal background (involving both human rights considerations and Community law), then summarize the judgment, and finally comment on three interesting aspects of the case, of which the emancipation of the European Union's Charter of Fundamental Rights will receive most attention.

Family reunification and human rights: the Strasbourg perspective

Already in the late 1980s, the traditional freedom of the sovereign State to regulate the presence of foreigners on its territory came under pressure. In a series of cases the European Court of Human Rights determined that states continue to be bound by their human rights obligations when deciding on the entry and sojourn of aliens. Thus, in the leading case of *Berrehab* (1988) the Court found that the decision to expel a Moroccan national interfered with his right to respect for family life (Article 8 ECHR): his expulsion would prevent the applicant from having regular contact with his daughter. Considering that the personal interest of Mr Berrehab outweighed the general policy considerations of pursuing a restrictive immigration policy, the Court held that the decision to expel him violated Article 8 ECHR.[3]

Berrehab was the first of a long string of cases challenging individual deportation decisions. The Court set itself the task of ensuring that a fair balance of all interests was struck in each individual case. This was bound to lead to a casuistic approach. 'The majority's case-by-case approach is a lottery for national authorities and a source of embarrassment for the Court', Judge Martens exclaimed in a dissenting opinion.[4] He argued that expulsion of integrated aliens should be allowed only in very exceptional circumstances. That view did not, however, prevail. Instead the Court concentrated on refining the criteria in order to judge individual cases.[5]

[3] ECtHR, 21 June 1988, *Berrehab* v. *the Netherlands* (Appl. No. 10730/84). All judgments to be found at <www.echr.coe.int>.

[4] ECtHR, 24 April 1996, *Boughanemi* v. *France* (Reports 1996, p. 593), at p. 613.

[5] For the most recent authoritative statement of the applicable standards, *see* ECtHR (GC), 18 Oct. 2006, *Üner* v. *the Netherlands* (Appl. No. 46410/99).

Meanwhile the case of *Gül* (1996) featured a distinct problem. Mr Gül, a Turkish immigrant who was lawfully residing in Switzerland, was not threatened with removal. But he had left Turkey when his youngest son was only three months old – a clear example, one would say, of a man who was not deterred by socio-cultural obstacles and took 'advantage of the opportunities for mobility'. Once settled in Switzerland he wanted to be joined by his son, but he was not allowed to. The Strasbourg Court did not find a violation of Article 8 ECHR in this case. Acknowledging that 'the Gül family's situation is very difficult from the human point of view', the Court noted that Mr Gül himself had caused the separation from his son and that there were, strictly speaking, no obstacles preventing them from developing family life in Turkey.[6]

It should be added that the Strasbourg Court was divided in *Gül*. Judge Martens argued that the European Court of Human Rights

> has to ensure, in particular, that State interests do not crush those of an individual, especially in situations where political pressure – such as the growing dislike of immigrants in most member States – may inspire State authorities to harsh decisions. [7]

Be that as it may, *Gül* set the tone. Relatively few applicants were successful in challenging domestic family reunification policies.[8]

From a technical point of view there was a difference between *Berrehab* and *Gül*. In the former case the Dutch authorities interfered with family ties that had developed in their own territory. In the latter case the Swiss authorities were asked to enable the applicant to strengthen the ties with his son, who had never lived in Switzerland before. That element led the Court to analyze the case from the perspective of 'positive obligations': how far should Switzerland go in making the actual enjoyment of family life possible? In deciding *Gül* the Court was prepared to leave a wide 'margin of appreciation' to the Swiss authorities – suggesting that they had more leeway in a case involving family reunification than when interfering with existing family life.

Be that as it may, both branches of case-law have always remained highly casuistic. Given the obvious drawbacks of such a case-by-case approach – a lack of predictability and legal certainty – one may wonder *why* the Strasbourg Court refrained from defining 'bright line rules'. An explanation might be that the Court

[6] ECtHR, 19 Feb. 1996, *Gül* v. *Switzerland* (Appl. No. 23218/94).

[7] ECtHR, 19 Feb. 1996, *Gül* v. *Switzerland* (Reports 1996, p. 159), at p. 184. *See also* his dissent in ECtHR, 28 Nov. 1996, *Ahmut* v. *the Netherlands (Reports* 1996, p. 2017)

[8] For an exception *see* ECtHR, 1 Dec. 2005, *Tuquabo-Tekle* v. *the Netherlands* (Appl. No. 60665/00).

derives its legitimacy, to an extent at least, from the concrete problems that its applicants are confronted with.

Family reunification and community law

What about Community law? An early case involving family reunification was *Demirel* (1987). The applicant, a Turkish wife whom the German authorities had refused permission to join her husband living in Berlin, tried in vain to invoke the Association Agreement with Turkey. The European Court of Justice ruled that the provisions on the gradual realization of the free movement of workers were essentially programmatic in nature and could therefore not be relied upon by Mrs Demirel. Likewise the European Court of Justice considered itself not competent to review her claim under Article 8 ECHR, as her situation was 'outside the scope of Community law'.[9]

This 'scope of Community law', or actually Union law, was broadened when the Treaty of Maastricht entered into force. For a number of years, however, the third pillar remained somewhat of a dead letter and no serious attempts were made to develop European Union immigration policies. It was only after the entry into force of the Treaty of Amsterdam, which introduced Title IV in the EC Treaty, that things started to move. Under the auspices of the energetic Commissioner António Vitorino, a proposal for harmonization of family reunification was tabled in 1999.[10] The initiative met political difficulties, however: to what extent would unmarried couples be eligible for family reunification? What is the position of older children, what about the parents of immigrants? Can one require a certain degree of integration from newcomers, or a certain income from the sponsor, before family reunification is allowed? What about countries that operate an immigration quota?

Finally, in 2003, Council Directive 2003/86/EC was adopted. The legal basis was Article 63(3)(a) of the EC Treaty. Pursuant to Article 67(1) EC Treaty the text was unanimously adopted by the Council; Parliament was only consulted. The 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. But in doing so, the Directive allows for many derogations. Member states *may*, by way of derogation, impose 'conditions for integration' on children aged over 12 years (Article 4, para. 1, final subparagraph); they *may*, by way of derogation, request that applications concerning family reunification of minor children have to be submitted before the age of 15 (Article 4, para. 6); they *may* require a

[9] ECJ, *Demirel (case* 12/86, *ECR* 1987, p. 3754), para. 28. For a critical review, *see* J. Weiler, 'Thou Shalt not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique', 3 *European Journal of International Law* (1992) p. 65-91.

[10] COM(1999) 638final.

two-year 'waiting period' and, by way of derogation, may defer family reunification for three years (Article 8). A remarkable aspect of the derogation contained in Article 4 paragraph 6 (the 15-years age limit) was that the pertinent conditions had to be provided for by 'existing legislation *on the date of the implementation of this Directive*'. This allowed member states to introduce more stringent rules after adoption, but prior to the implementation of the Directive.

The Directive reflects how the logic of the 'Community method' differs from that of the European Court of Human Rights. If Strasbourg derives its legitimacy from individual cases and, as a result, tends to come up with individualized solutions, then Brussels derives its legitimacy from the involvement of the member states in the adoption of legislation. Pushed by the Commission – an engine that is essentially lacking in Strasbourg – the member states are softly but continuously pressed to agreeing on rules. But the more sensitive the policy area, the more general the compromise will be, and the more freedom to manoeuvre for national authorities. In those circumstances, individual rights may not be at the centre of attention.

And for sure, the initial reaction to the Directive among immigration lawyers was hostile. 'Rédigé de manière détestable car négocié à contre-coeur, le texte est sans doute le contre-exemple de ce qu'une législation communautaire d'harmonisation devrait être', as Henri Labayle put it.[11] It should be added, however, that the mood seemed to change a bit when, in the years following the adoption of the Directive, national policies became even stricter: the Directive was not particularly generous, but at least it provided for a common minimum standard.

Whatever the appreciation of individual lawyers, the European Parliament decided to bring an action for annulment. In doing so, it triggered the first 'Title IV' case so far. Parliament aimed its arrows not at the Directive as such, but rather at the derogation clauses which, according to the Parliament, paved the way for breaches of fundamental rights.

In her Opinion of 8 September 2005, Advocate-General Kokott agreed with Parliament that Article 8 of the Directive (allowing for a waiting period of up to 3 years) amounted to a disproportionate interference with the right to respect for family life. In her view, however, Parliament's action for annulment should be declared inadmissible. The AG noted that the Directive was the result of an overall political compromise, and should be seen as a 'package'. Article 8 was therefore not severable from the rest of the Directive. Since it was not appropriate to annul the Directive in its entirety (which would be a more radical step than Parliament had asked for – and indeed, would be contrary to the very object and purpose of

[11] H. Labayle, 'Architecte ou spectatrice? La Cour de Justice de l'Union dans l'Espace de liberté, sécurité et justice', *Revue Trimestrielle de Droit Européen* (2006) p. 1-46.

the annulment action), the AG concluded that the annulment action had to be rejected.

The Judgment of the European Court of Justice

The European Court of Justice did not follow its AG, although it did reject the action for annulment. In essence it followed the following line of reasoning. The contested provisions do not in themselves infringe the right to respect for family life. It is true that these provisions preserve a limited margin of appreciation for the member states, but this is no different from that accorded to them by the European Court of Human Rights. Moreover, when exercising their residual discretion, the member states will have to have due regard to the best interests of minor children and take into account human rights. Given this conclusion, it is unnecessary for the Court to examine whether the contested provisions could be severed from the remainder of the Directive.

Here we will focus in more detail on three elements of the Court's argumentation: the applicable standards; the Court's understanding of the right to family reunification; and the scope of member states obligations under the Directive.

Sources: the applicable standards

The present judgment is ground-breaking in that the European Court of Justice refers to the Union's Charter of Fundamental Rights. It is the first time that the Court does so (apart from situations where the Court summarized the arguments of parties appearing before it).

In challenging the Directive, the Parliament had relied on a number of human rights instruments, including the Union's Charter of Fundamental Rights. In reply the Council had argued that the Community is not a party to the various treaties invoked by the Parliament. Likewise, the application should not be examined in light of the Charter 'given that the Charter does not constitute a source of Community law'. Against that background the Court developed an innovative approach. After repeating the well-known mantra that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that the ECHR has special significance in that respect, the Court continued:

> 37 The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law (...). That is also true of the Convention on the Rights of the Child referred to above which, like the Covenant, binds each of the Member States.

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> 38 The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court … and of the European Court of Human Rights'.

Virtually all commentators focus extensively on this passage, and it seems safe to assume that the Court itself spent considerable part of its deliberations on paragraph 38 of its judgment. We will return to it in parts 1-3 of the commentary.

The Court's understanding of the right to family reunification

Having identified the relevant sources, the European Court of Justice examined the scope of the right to family reunification. In doing so it cited extensively from the applicable Strasbourg case-law, but it also referred the UN Convention on the Rights of the Child and the EU Charter of Fundamental Rights. It held:

> 52 The right to respect for family life within the meaning of Article 8 of the ECHR is among the fundamental rights which, according to the Court's settled case-law, are protected in Community law (*Carpenter*, paragraph 41, and *Akrich*, paragraphs 58 and 59). This right to live with one's close family results in obligations for the Member States which may be negative, when a Member State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory.
> (...).
> 55 In paragraph 36 of *Sen* v. *the Netherlands*, the European Court of Human Rights set out in the following manner the principles applicable to family reunification (...):
>
> > '(a) 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.
> > (b) As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.
> > (c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of

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> the country of their matrimonial residence and to authorise family reunion in its territory.'
>
> 56 The European Court of Human Rights has stated that, in its analysis, it takes account of the age of the children concerned, their circumstances in the country of origin and the extent to which they are dependent on relatives (*Sen* v. *the Netherlands*, § 37; see also *Rodrigues da Silva and Hoogkamer* v. *the Netherlands*, no. 50435/99, § 39, 31 January 2006).
>
> 57 The Convention on the Rights of the Child also recognises the principle of respect for family life. The Convention is founded on the recognition, expressed in the sixth recital in its preamble, that children, for the full and harmonious development of their personality, should grow up in a family environment. Article 9(1) of the Convention thus provides that States Parties are to ensure that a child shall not be separated from his or her parents against their will and, in accordance with Article 10(1), it follows from that obligation that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification are to be dealt with by States Parties in a positive, humane and expeditious manner.
>
> 58 The Charter recognises, in Article 7, the same right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.
>
> 59 These various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification.
>
> 60 Going beyond those provisions, Article 4(1) of 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.

This passage shows that the decision to also take into account the Union's Charter of Fundamental Rights (and the UN the Convention on the Rights of the Child) was not just a symbolic step: these instruments clearly influence the Court's understanding of the right to family reunification.

The scope of member states' obligations under the Directive

In its judgment the Court dealt with each of the three contested provisions (Article 4, para. 1, final subparagraph; Article 4, para. 6; Article 8) in turn, but its approach to each of the three was essentially the same. I will take the Court's treatment of Article 8 as an example.

Under this provision, member states are free to impose a 'waiting period' of two or even three years before they will allow family reunification. The Parliament had argued that these periods significantly restrict the right to family reunification. This article, which does not require applications to be considered on a case-by-case basis, authorizes the member states to retain measures which are disproportionate in relation to the balance that should exist between the competing interests. The Parliament further submitted that the derogation could well give rise to different treatment in similar cases, depending on whether or not the member state concerned has legislation providing for a three year period. The Council rebutted that Article 8 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 submitted that a waiting period is a classical element of immigration policy which exists in most member states and has not been held unlawful by the competent courts.

The European Court of Justice essentially agreed with the Council. But that is not the whole story. When exercising their discretion, national authorities cannot simply apply a 'bright line rule' to the detriment of individual applicants. They will have to have due regard to the best interests of minor children and take into account human rights.

> 97 Like the other provisions contested in the present action, Article 8 of the Directive authorises the Member States to derogate from the rules governing family reunification laid down by the Directive. The first paragraph of Article 8 authorises the Member States to require a maximum of two years' lawful residence before the sponsor may be joined by his/her family members. The second paragraph of Article 8 authorises Member States whose legislation takes their reception capacity into account to provide for a waiting period of no more than three years between the application for reunification and the issue of a residence permit to the family members.
>
> 98 That provision does not therefore have the effect of precluding any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family rights set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.
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> 99 It should, however, be remembered that, as is apparent from Article 17 of the Directive, duration of residence in the Member State is only one of the factors which must be taken into account by the Member State when considering an ap-

plication and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors.

100 The same is true of the criterion of the Member State's reception capacity, which may be one of the factors taken into account when considering an application, but cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases. Analysis of all the factors, as prescribed in Article 17 of the Directive, does not allow just this one factor to be taken into account and requires genuine examination of reception capacity at the time of the application.

101 When carrying out that analysis, the Member States must, as is pointed out in paragraph 63 of the present judgment, also have due regard to the best interests of minor children.

102 The coexistence of different situations, according to whether or not Member States choose to make use of the possibility of imposing a waiting period of two years, or of three years where their legislation in force on the date of adoption of the Directive takes their reception capacity into account, merely reflects the difficulty of harmonising laws in a field which hitherto fell within the competence of the Member States alone. As the Parliament itself acknowledges, the Directive is important for applying the right to family reunification in a harmonised fashion. In the present instance, it does not appear that the Community legislature exceeded the limits imposed by fundamental rights in permitting Member States which had, or wished to adopt, specific legislation to adjust certain aspects of the right to reunification.

103 Consequently, Article 8 of the Directive cannot be regarded as running counter to the fundamental right to respect for family life or to the obligation to have regard to the best interests of children, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

104 In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights (see, to this effect, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 22).

105 It should be remembered that, in accordance with settled case-law, the requirements flowing from the protection of general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements (see Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 65; and, to this effect, *ERT*, paragraph 43).

106 Implementation of the Directive is subject to review by the national courts since, as provided in Article 18 thereof, 'the Member States shall ensure that the sponsor and/or the members of his/her family have 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'. If those courts encounter difficulties relating to the interpretation or validity of the Directive, it is incumbent upon them to refer a question to the Court for a preliminary ruling in the circumstances set out in Articles 68 EC and 234 EC.

These considerations lead to the conclusion that the contested provisions are not in themselves incompatible with human rights standards; it is therefore not necessary for the Court to examine if these provisions can be severed from the remainder of the Directive.

Comments

The present comments will largely focus on the Court's treatment of the European Union's Charter, as one of the most striking elements of the case. We will then turn briefly to consequences of the judgment for the substantive right to family reunification and finally make some remarks about the scope of the obligations under the Directive.

Taking preambles seriously

So finally: welcome to the European Union's Charter of Fundamental Rights! As is well-known, the Charter – 'solemnly proclaimed' in Nice (2000) – was ignored by the Court of Justice in the first five years of its existence. Presumably because of its ambiguous legal status the Court has refrained from applying it, although the Court of First Instance and most Advocates-General did not hesitate to use the Charter as an authoritative source of rights.

Paragraph 38 therefore features nothing less than a small revolution. The European Court of Justice notes that the Charter 'is not a legally binding instrument' but observes that the Community legislature did acknowledge its 'importance' by referring to the Charter in the preamble to the Directive in question.

The passage provides fresh ammunition for soft law theorists. How should we assess the legal status of an instrument that is 'not legally binding' but at the same time is considered 'important' by a court – the task of which is, after all, to ensure that 'the law' is observed? Is there a tangible distinction between a 'legally binding' text and an 'important' one? I would argue that in practice there is none. It is difficult to conceive of a situation where the Court finds that a Community act is in breach of a right protected by the Charter, but refuses to attach any consequences to this finding because the Charter is *only* 'important'. The same applies, after all, to the ECHR: technically speaking it is not legally binding on the Com-

munities, but it is of 'special significance' to the Court. That is apparently enough to have very real legal consequences in practice.[12]

At first sight the decisive factor appears to be that the Directive, in its preamble, referred to the Charter. At the same time it should be recalled that in several recent cases the European Court of Justice did not mention the Charter, although it examined instruments that did contain similar references to the Charter.[13] So why is the *Family Reunification Directive* case different? Is the Court responding to the failure to approve the Constitutional Treaty? Or is it a change in the composition of the Court? Indeed it is tempting to note that the Grand Chamber in this case included Judges Koen Lenaerts and Alan Rosas, who in their academic writings did not hide their enthusiasm for the Charter.

Be that as it may, the significance attached in the present case to the preamble may have come as a surprise to the legislature. Politicians who are tempted to pay lip service to lofty ideals may think twice before including such references again. But they are already too late: following the Commission's announcement[14] that the Charter would systematically be taken into account when drafting legislation, many measures have been adopted with a reference to the Charter. Regulation 1047/2001, on public access to documents, is just one example; Directive 2003/54 on the internal market in electricity another – somewhat unlikely – one.[15] Following the judgment in the *Family Reunification Directive* case it may be expected that the European Court of Justice will take the Charter into account when interpreting these measures, or when reviewing their validity.

And indeed: whilst this case note was written, the European Court of Justice delivered judgment in *Advocaten voor de Wereld*. This case concerns the validity of Council Framework Decision 2002/584/JHA on the European Arrest Warrant. Its preamble (but not its substantive content!) states that the Framework Decision respects the fundamental rights and observes the principles recognized by Article

[12] *See*, e.g., ECJ, Case C-117/01, *K.B.* [2004] *ECR* I-541, para. 34: '*Legislation*, such as that at issue in the main proceedings, *which, in breach of the ECHR,* prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other *must be regarded as being, in principle, incompatible with the requirements of Article 141 EC*' (emphasis added).

[13] *See*, e.g., ECJ, 1 Feb. 2007, Case C-266/05 P, *Sison* (n.y.r.), involving Reg. 1049/2001.

[14] *See* SEC (2001) 380/3 of 13 Jan. 2001: 'any proposal for legislation and any draft instrument to be adopted by the Commission will therefore, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter.'

[15] Reg. 1047/2001, preamble, second recital: 'Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union', *OJ* [2001] L 144/43, 31.05.2001. Directive 2003/54, preamble, 34th recital: 'This Directive respects the fundamental rights, and observes the principles, recognised in particular by the Charter of Fundamental Rights of the European Union', *OJ* [2003] L 176/37, 15.07.2003.

6 EU and 'reflected' in the Charter. Against that background the Court of Justice (again in Grand Chamber composition) apparently felt confident to observe:

> It is common ground that [the general principles of law] include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed respectively in Articles 49, 20 and 21 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1). It is accordingly a matter for the Court to examine the validity of the Framework Decision in the light of those principles. [16]

So we now have another reference to the Charter by the European Court of Justice, and it is interesting to note that on this occasion the Court apparently did not feel the need to justify this reference the way it did in the *Family Reunification Directive* case.

Taking the Charter seriously

What about the next step – is it conceivable that the Court of Justice will also apply the Charter in situations where no express reference to the Charter is at hands? An affirmative answer would have the advantage that one could avoid the application of different standards. Why distinguish between acts that refer to the Charter in their preamble, and acts that happen not to do so, for instance because they date from the pre-Charter period?

A clear pointer can be found in the by-now famous paragraph 38 of *Family Reunification Directive*. Here the Court mentions what appears to be *a second reason* ('Furthermore...') to apply the Charter: the preamble to the Charter itself indicates that its principal aim is to 'reaffirm' existing rights. This is of course an element that exists independently from the specific formulation of the preamble to a given directive. Indeed, in the recent *Unibet* case (which raised questions of general constitutional law) the Court of Justice's Grand Chamber referred *again* to the Charter:

> It is to be noted at the outset that, according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Case 222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19 ...) and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).[17]

[16] ECJ, 3 May 2007, *Advocaten voor de Wereld,* Case C-303/05 (n.y.r.), paras. 46-47.
[17] ECJ, 13 March 2007, *Unibet,* Case C-432/05 (n.y.r.), para. 37.

And in similar vein the *Advocaten* case introduced a new formula to summarize the ECJ's well-known approach to fundamental rights:

> It must be noted at the outset that, by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional provisions common to the Member States, as general principles of Community law. *It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union* (...).[18]

So the institutions and member states, when implementing European Union (not Community!) law, are bound *in general* by general principles of law. To the extent the Charter reflects these general principles of law, the conclusion must be that the Charter can be applied *in general,* i.e., without there being a need for a specific reference to the Charter. Arguably the recent *Salzgitter Mannesmann* judgment provides support, albeit it implicit, for this approach.[19]

One question remains. Is the Charter an independent source of rights? In *Unibet* (as in *Family Reunification Directive)* the Charter acted as a free rider: it merely served to confirm the existence of rights which are already recognized in the more established sources. Modesty is perhaps the biggest strength of this approach: few would argue against the application of the Charter in this ancillary mode. But at the same time it is a bit difficult to grasp the purpose of all this. Are we really saying that the Court of Justice should take into account the Charter because it reaffirms rights that the Court should take into account anyhow? Then what is the point of the whole exercise? Personally I am not thrilled by the prospect of a Charter than can be applied only if has no added value. For the Court too it must be an unattractive prospect that it would have to distinguish between codifications and innovative provisions, and consider the latter category as inapplicable.[20]

[18] ECJ, 3 May 2007, *Advocaten voor de Wereld,* Case C-303/05 (n.y.r.), para. 45, emphasis added. The ECJ refers to Case C-354/04 P *Gestoras Pro Amnistía*, para. 51, and Case C-355/04 P *Segi,* para. 51.

[19] ECJ, 25 Jan. 2007, *Salzgitter Mannesmann GmbH,* Case C-411/04 P (n.y.r.), para. 50: 'In the light of all of the foregoing, the first plea must be rejected, without its being necessary to adjudicate on the question whether Mannesmann ... could rely in the present case on the Charter, which was proclaimed after the adoption of the contested decision.' Apparently it is not *a priori* excluded that one relies on the Charter in the context of competition law.

[20] An attempt along these lines was made by the Commission (which in the process somewhat damaged its credibility as proponent of the Charter): ECJ, 22 Feb. 2005, *max.mobil,* Case C-141/02 P (n.y.r.), para. 59: 'the Commission expresses the view that the principle of the proper administration of individual situations [as laid down in Article 41(1) of the Charter of Fundamental Rights,

In a recent Opinion, AG Maduro proposed an interesting interpretation of the legal significance of the Charter. Referring to paragraph 38 of *Family Reunification Directive*, he submitted:

> It is clear from that passage that, although the charter in question cannot in itself constitute a sufficient legal basis for the creation of rights capable of being directly invoked by individuals, it is nevertheless not without effect as a criterion for the interpretation of the instruments protecting the rights mentioned in Article 6(2) EU. From that perspective, that charter may have a dual function. In the first place, it may create the presumption of the existence of a right which will then require confirmation of its existence either in the constitutional traditions common to the Member States or in the provisions of the ECHR. In the second place, where a right is identified as a fundamental right protected by the Community legal order, the Charter provides a particularly useful instrument for determining the content, scope and meaning to be given to that right. It should be pointed out, moreover, that the provisions of the Charter, the drafting of which is based on a wide process of discussion at European level, correspond in large part to a codification of the Court's case-law. [21]

Sophisticated as it may seem, this approach has its drawbacks. The Charter's first function – to identify 'candidate rights', the validity of which can be determined by involving other sources – essentially means that the ECJ should re-do the job of the Convention that drafted the Charter. Why would the Court be better qualified to do so than the representatives of the member states, national parliaments and institutions who were part of the Convention (and of the second, that decided to incorporate the Charter into the Constitutional Treaty)? Likewise one may question the usefulness of the Charter's second function – to further define the rights that feature in other sources. Is the Charter really 'particularly useful'? Its provisions are not particularly specific of detailed – indeed, its drafters preferred 'readability' above legal precision.

I am therefore in favor of a somewhat more radical approach. Neither a specific reference to the Charter in the Community act concerned, nor an examination whether the right concerned happens to reflect pre-existing rights, is necessary to allow the Court of Justice to apply a 'Charter right'. This interpretation is in line with the fifth recital of the Charter's preamble, which does not distinguish between codification and progressive developments, but simply asserts that the Charter reaffirms 'the' rights as they result from the constitutional traditions and so on.

RL], hitherto unknown in the case-law of the Court but on which the Court of First Instance bases its reasoning, is too general to constitute a basis to support procedural rights for the benefit of individuals, *a fortiori* as the Charter of Fundamental Rights invoked in support of that principle is not applicable.'

[21] Opinion of 14 Dec. 2006, *Ordre des barreaux,* C-305/05 (n.y.r.), para. 48.

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Further support, albeit it implicit, can be found in the *Family Reunification Directive* case itself. It may go unnoticed amidst all other developments, but the Court of Justice actually reviews the Directive also from the perspective of age discrimination (*see* paras. 74 and 89, not reproduced above). The application of this norm in the previous case of *Mangold* caused quite a stir, but in the present case the Court does not seem to question its validity.[22] This is all the more interesting if one realizes that the prohibition of age discrimination in the field of employment and profession (as was at stake in *Mangold*) was at least covered by Directive 2000/78. In the instant case the same prohibition is now also applied to the very different area of immigration law. The Court of Justice is silent on the source of this rule; my guess would be Article 21 of the Union's Charter of Fundamental Rights.

Taking 'rights and principles' seriously (?)

A last remark on the issue of human rights protection generally is related to the Byzantine use of the terms 'rights' and 'principles'. First one step back. When during the negotiations on the Constitutional Treaty the decision was taken to incorporate the Charter, a new clause was inserted. Article II-112(5) of the Constitutional Treaty was apparently designed to keep the courts out of the area of policy decisions in cases concerning socio-economic rights:

> The provisions of this Charter which contain principles may be implemented by legislative and executive acts [...]. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

The official explanation asserted:

> Principles may be implemented through legislative and executive acts [...], accordingly, they become significant for the Courts only where such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or by the Member States.

But of course the difference between 'rights' and 'principles' is not clear-cut. It has been noted before that neither the Charter itself nor legal practice is consistent in its terminology.[23] The *Family Reunification Directive* case confirms that the semantic confusion continues. In paragraph 38 the Court notes that the Community legislature stated 'in the second recital in the preamble to the Directive, that the Directive observes *the principles* recognised not only by Article 8 of the ECHR

[22] ECJ, Case C-144/04, *Mangold, ECR* 2005 I-9981. On this aspect of the *Family Reunification Directive* case, *see* the 'Anmerkung' by Bouchouaf et al. in *Juristenzeitung* (2007) p. 44-45.

[23] *See* R. Lawson, 'Human Rights: The Best is Yet to Come', 1 *EuConst* (2005) p. 29-30.

but also in the Charter.' But that does not do justice – at least not if we take the distinction between rights and principles seriously – to reality. In actual fact the relevant passage is as follows: 'This Directive *respects the fundamental rights and observes the principles* recognised in particular in Article 8 of the [ECHR] and in the Charter of Fundamental Rights of the European Union.'

The question remains: should we take the distinction between rights and principles seriously at all? In the context of family reunification I find it difficult to believe that the distinction serves any useful purpose.

Taking the right to family reunification seriously

High time to leave these theoretical considerations behind. What does the judgment tell us about the right to family reunification? For one thing, the Court affirms that there exists a subjective *right* to family reunification – *see*, e.g., paragraph 102. This is more significant than one might expect: the European Court of Human Rights has until this very day always refrained from recognizing this right. In his case note on this judgment,[24] Boeles notes that the Court of Justice's formulation of the 'right to live with one's close family' (para. 52) is similarly progressive. He also, and rightly, observes that the Court lends weight to the Convention on the Rights of the Child and the related Article 24 of the Union's Charter of Fundamental Rights when interpreting the scope of the right to family reunification. This results in a clear emphasis on the need for national authorities to take the interests of children into account when deciding individual cases.

From a substantive point of view, the Court had essentially three options. In the first place it could have accepted the legislator's choice to leave the member states a certain margin of appreciation. It could have limited its own position to the observation that in doing so the Directive did not violate fundamental rights directly. This was the solution proposed by the Council.

The other 'extreme' was advocated by Parliament. In essence it adopted the position that Judge Martens defended in the 1990s: 'Europe' should actively prevent that 'the growing dislike of immigrants' induces domestic authorities to take harsh decisions. No margin of appreciation should be left if that would enable national authorities to violate fundamental rights. Indeed the Court seemed to hint at that approach when it allowed, in paragraph 23 of the judgment, for the possibility that 'a provision of a Community act could, in itself, not respect fundamental rights [and thereby be liable for annulment, RL] if it required, or expressly or impliedly authorised, the member states to adopt or retain national legislation not respecting those rights.'

[24] *See* the case note by P. Boeles, *Jurisprudentie Vreemdelingenrecht* [Case-law on Immigration law] (2006) p. 1343.

But the Court found an elegant middle way. Recognizing, in paragraph 102, the 'difficulty of harmonising laws in a field which hitherto fell within the competence of the member states alone', the Court accepts that the member states were left a certain margin of appreciation when regulating the right to family reunification. But they do not have a *carte blanche* when exercising their residual discretion. This follows from the way in which the Court constructs the Directive. It provides for certain 'basic rules' (para. 22) and then 'allows' the member states in certain circumstances to apply national legislation. As a result, the Court is in a position to state that the member states should (a) take into account, in specific cases, all the relevant factors (paras. 99-100); (b) have due regard to the best interests of minor children (para. 101) and (c) apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights (paras. 104-105).

It remains to be seen, of course, if the Union will be in a position to ensure that member states actually comply with these requirements in practice (*see also* below). As Den Heijer rightly observes in his case note,[25] this may explain why the Court underlines the importance of effective judicial review in paragraph 106. On the other hand, if an individual believes that the domestic courts have failed to do justice to his right to family reunification, he can lodge a complaint against the State concerned with the European Court of Human Rights. The fact that the subject-matter has been addressed in a Directive will not affect the State's general obligation to comply with the ECHR.[26] In his case note on this judgment,[27] Mok agrees that this scenario may materialize in practice, even if in his estimation the chances are small that the Strasbourg Court will actually find a violation.

Taking European Union citizens seriously

A final remark relates to the fact that the Directive does not seek to regulate family reunification by Union citizens. Article 2(a) specifies that 'third country national' means any person 'who is not a citizen of the Union'. This may mean that, depending on national legislation, European Union citizens (including nationals) may actually be worse off than third country nationals. It also raises the question how persons with dual nationality should be treated – a question that, according

[25] *See* the case note by M. den Heijer, *NJCM-Bulletin* [Dutch section of the International Commission of Jurists] (2006) p. 1040.

[26] *See* most recently ECtHR, 30 June 2005, *Bosphorus Airlines* v. *Ireland* (Appl. No. 45036/98), para. 157: 'It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases cited by the applicant ... confirm this. Each case (in particular, the *Cantoni* judgment, at § 26) concerned a review by this Court of the exercise of State discretion for which EC law provided.'

[27] *See* the case note by M. Mok, *Nederlandse Jurisprudentie* [Netherlands Court Reports] (2006) p. 4596.

to Woltjer, concerns some 980,000 individuals in the Netherlands alone.[28] Can a Moroccan national, who also holds a Dutch passport, invoke the rights granted by the Directive? In her annotation of this judgment,[29] Bulterman refers to case-law of the Dutch *Raad van State* (Council of State) which has answered that question in the negative, thereby overruling judgments of lower immigration courts.

The current situation is all the more problematic if we recall that under Article 68 EC, only the highest court in a jurisdiction is entitled to ask for a preliminary ruling. The disadvantage of this limitation is immediately clear: lower courts may believe that the Dutch/Moroccan nation can rely on the Directive, but they cannot seek confirmation (or rejection) of their view by the European Court of Justice; the highest court may have an opposite opinion, but it does not perceive a need to ask the European Court of Justice whether it is right or not.

In this connection it is useful to underline what is said in paragraph 106 of the *Family Reunification Directive* case. The European Court of Justice saw it fit to remind national courts that it is 'incumbent upon them' to refer questions for a preliminary ruling whenever they encounter difficulties relating to the interpretation or validity of the Directive.

Concluding remarks

This is a good judgment. The Court has finally embraced the European Union's Charter of Fundamental Rights and has thereby started work on the next chapter in the Luxembourg human rights jurisprudence. The judgment allows for flexibility in the regulation of family reunification but at the same time puts pressure on the member states to act in accordance with human rights standards. The Court of Justice makes a visible effort to align its position with the case-law of the European Court of Human Rights. In pragmatic terms the Court has avoided the annulment of the Directive, which would have benefited no-one. Of course the last word has not been said: as Thym remarked, European immigration law has now moved from the stage of abstract legislation into the stage of practical interpretation and application.[30] In other words: there is more litigation ahead. But this first 'Title IV judgment' gives rise to optimism, albeit cautious: perhaps a humane European 'mobility culture' is not beyond our reach.

[28] *See* the case note by A. Woltjer, *European Human Rights Cases* (2006) p. 869.

[29] M. Bulterman, 'Gezinsherenigingsrichtlijn houdt stand voor Hof van Justitie: Hof bindt gezinnen én de lidstaten' [Family Reunification Directive stands firm before Court of Justice: Court binds families and the member states], *Nederlands Tijdschrift voor Europees Recht* [Netherlands Journal of European Law] (2006) p. 210.

[30] D. Thym, 'Europäischer Grundrechtsschutz und Familienzusammenführung', *Neue Juristiche Wochenschrift* (2006) p. 3252.