

The Right to Family Reunion vs Integration Conditions for Third-Country Nationals. The CJEU's Approach and the Road Not Taken

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Abstract

The article explores the approach of the Court of Justice of the European Union to the clash between the fundamental right to family reunion and the powers of Member States to protect national identity as a manifestation of sovereignty. The recent case-law pertinent to national measures imposing pre-entry, integration conditions on foreigners and the latter rights under the Directive 2006/83/EC ('FRD') on the right of third-country nationals to family reunion provides a basis for the analysis. The aim of this article is to establish and appraise the Court's approach to the conflict in question. My claim is that the CJEU should have been more restrictive in its reasoning regarding the pre-entry integration measures, and that its interpretation based on individual assessment, proportionality principle and *effet utile* may not be sufficient for a scrutiny of national powers under FRD. I thus argue that the Court should be more proactive to provide a constitutional, contextual and systemic interpretation of the right to family reunion under the FRD, Article 7 and 24 of the EU Charter and the EU migration law system.

Keywords

Family reunification – third-country nationals – integration measures – Directive 2003/86 – EU Charter – right to respect for family life – best interest of child – free movement of persons

'Member states have a legal and moral obligation to ensure family reunification.'
Nils Muižnieks, Council of Europe Commissioner for Human Rights

1 Introduction

A statement that migration issues have recently grown into one of the toughest EU challenges is already a truism.¹ Among many matters, reunification of families of third-

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1 M. González Pascual & A. Torres Pérez (eds), *The right to family life in the European Union*, London/ New York: Routledge 2017.

country nationals ('TCNs') has arisen to one of the most intensely politicalised issues within the sphere of both immigration and integration policies.² Within this *problématique*, the article explores the approach of the Court of Justice of the European Union ('CJEU') to the clash between the fundamental right to family reunion and the powers of Member States to manage migration flows over their borders and protect national identity as a manifestation of sovereignty. The recent CJEU case-law pertinent to national measures imposing pre-entry, integration conditions on TCNs in the EU and the latter rights to reunify with their family members provides a basis for the analysis.

The right to family reunion across borders in the EU belongs to the scope of Article 7 of the EU Charter of Fundamental Rights ('the Charter', CFR) and of the corresponding provision of Article 8 of the European Convention of Human Rights ('ECHR') which both guarantee respect for family life. Additionally, the *exercise* of the right to family reunion is governed by the EU Directive 2003/86/EC ('FRD') harmonising national laws and conditions under which family members of a third-country national (a sponsor) legally residing in the EU can join him.³ The act applies to TCNs holding a minimum one-year residence permit and to recognised refugees.⁴ Pursuant to FRD, Member States retain broad powers to control the implementation of reunification of families on various grounds, for instance, the age of family members (Article 4(5-6)), the public policy, security and health (Article 6), the fulfilment of economic requirements for sufficient resources and sickness insurance (Article 7(1)), and finally, via the so-called 'civic integration requirements' (Article 7(2)). The latter are said, in theory, to facilitate the integration of non-EU migrants in their new states, and therefore, protect social security and national identity.⁵ Yet, in reality, they create a notable tension, or an open conflict, between Member States' powers to control migration and TCNs' individual rights.⁶

In fact, the system established by the Directive on the right to family reunion has been subject of fierce criticism since its adoption on various grounds.⁷ First, it has been claimed that it allows for overly-restrictive national policies by granting too broad powers to national authorities. Those powers, including national implementation of Article 7, FRD, (socio-economic conditions and integration measures) can often impede a successful exercise of the right to family reunion of TCNs. Especially, when the requirements apply before a reunification is granted. Second, it has been argued that the relatively low standards foreseen by FRD do not warrant sufficient protection of fundamental human rights in case of

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- 2 R. Schweitzer, 'A Stratified Right to Family Life? On the Logic(s) and Legitimacy of Granting Differential Access to Family Reunification for Third-country Nationals Living within the EU', 2015 *Journal of Ethnic and Migration Studies*, 41(13): 2130-2148.
 - 3 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12.
 - 4 Art. 3 and 9, Directive 2003/86; see: S. Peers, 'Family Reunion, Chapter 9', in: S. Peers et al (eds), *EU Immigration and Asylum Law*, Vol. 2, Leiden Boston: Martinus Nijhoff Publishers 2012, p. 250-253 and 268-270.
 - 5 See: Communication from the Commission on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final, p.15-16.
 - 6 See: H. Oosterom-Staples, 'The Family Reunification Directive: A Tool Preserving Member State Interest or Conducive to Family Unity?', in: A. Baldaccini, E. Guild & H. Toner, *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, London: Hart 2007.
 - 7 See Peers 2012, n 4 above, p. 272 ('inadequate Directive'); and A. Wiesbrock, *Legal Migration to the European Union*, Leiden/Boston: Martinus Nijhoff Publishers 2010, p. 691-700; D. Chalmers et al., *European Union law*, 2nd ed., Cambridge: Cambridge University Press 2010, p. 516-518 ; G. Ruffer, 'Pushed Beyond Recognition? The Liberality of Family Reunification Policies in the EU', 2011 *Journal of Ethnic and Migration Studies*, 37(6): 935-951; M. Klaassen, *The right to family unification: between migration control and human rights*, Leiden: Brill 2015.

inadequate national implementation and application.⁸ Third, it has been observed that FRD applies to legally resident TCNs and refugees, but neither to asylum seekers and persons with subsidiary protection status nor to EU citizens (although originally it had been proposed to apply equally to all categories of persons) and thus further allows for differentiated treatment of various immigrant categories.⁹

As a consequence of those weaknesses, FRD preserves the differentiated and fragmented legal order for the exercise of the right to family reunion in the EU, and further, it contributes to the ‘objective inequality’ between different categories of persons exercising the right and diverse EU legal regimes applicable to them (e.g. EU citizens, EU citizens in internal situation facing reverse discrimination, TCNs, Turkish citizens, long-term residents, high-skilled migrants, refugees).¹⁰ At the same time, it became a justified basis for restrictive national policies on family reunion in name of protecting integration and national identity. It also paved the way for national laws to develop into tools of selection of migrants and unjustified obstacles in the protection of the right to family reunion.¹¹ There are several undesirable effects of the above trends, as the scholarship and empirical studies indicate.¹² That is, both inequality and overly restrictive migration policies usually lead to disintegration of families, affect primarily vulnerable groups (poor, women, children, uneducated, eldest) and might even increase irregular migration. The latter is linked to the fact that absolute numbers of applications for family reunion have fallen in states with restrictive laws (e.g. Germany) and in the years 2008-2016 the first residence permits granted for family reasons in EU amounted to 20-30% average only in relation to the total of first permits issued.¹³ Thus, the implementation of FRD also calls for an analysis in the shadow of the migration crisis in the EU.

Against this complex background, the aim of this article is two-fold, that is, first, to establish and, second, to appraise the CJEU’s approach to the conflict between the claim for a fundamental human right to family reunion, within the right to family life, and Member States’ powers controlling migration to protect national identity. In order to pursue these goals, the text focuses on two specific research questions: what is the CJEU’s interpretation of the right to family reunion, especially, against national, pre-entry integration conditions under FRD? And, further, what is the interpretation of the scope of national powers? The analysis unfolds while taking as an example the case-law concerning family reunion of TCNs and national integration measures.

It follows from the above, that the right to family reunion in the EU has already been a subject of a scholarly inquiry against various contexts.¹⁴ This piece provides a further

8 See also: C-540/03 *Parliament v Council*, ECR [2006] I-05769, where the Parliament unsuccessfully challenged the Directive on the ground of incompatibility with fundamental rights, see also infra section 2.1.

9 Peers 2012, n 4 above, p. 270 and see: COM (1999) 638.

10 Schweitzer 2015, n 2 above; S. Adam & P. Van Elsuwege, ‘EU citizenship and the European federal challenge through the prism of family reunification’, in: D. Kochenov, *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press 2017, p. 443-467.

11 M. Jesse, ‘The Selection of Migrants through Law – A Closer Look at Regulation Governing Family Reunification in the EU’, in: F. Anthias & M. Pajnik (eds), *Contesting Integration, Engendering Migration*, London: Palgrave Macmillan 2014, p. 86-101.

12 Wiesbrock 2010, n 7 above, p. 697-98, see also: Schweitzer 2015, n 2 above, and empirical studies cited in T. Strik et al., *Family Reunification: A Barrier or Facilitator of Integration: A Comparative Study*, Nijmegen: Wolf Legal Publishers 2013.

13 Eurostat 2018.

14 See also: M. Jesse, *The Civic Citizens of Europe*, Leiden; Boston: Brill 2017; D. Thym, ‘“Citizens” and “Foreigners” in EU Law. Migration Law and its Cosmopolitan Outlook’, 2016 *European Law Journal* 22: 296-316; H. Askola, ‘(No) Migrating for Family Care in Later Life: *Senchishak v Finland*, Older Parents

contribution to this scholarship by looking at the subject-matter from a novel angle thanks to a combination of a thematic focus, scope of the research, and a chosen conceptual framework. That is, it analyses both the respective provisions of FRD in light of the guarantees set out in the EU Charter and ECHR (Section 2) and the EU jurisprudence concerning a particular relation between an individual right to family reunion and Member States' powers to impose pre-entry integration obligations (Section 3). Second, it explores the CJEU's reasoning through the lens of a rights-based approach and a standard of review, and confronts the interpretation with the principles of non-discrimination and equality as well as some of the findings of socio-political studies (Section 4). The conclusions appraise the CJEU's approach and speculate about its further effects for the EU/national migration policy more generally (Section 5). The *ratione materiae* of the jurisprudential analysis encompasses the judgments on national civic integration measures in the broader context of the remaining EU case-law pertinent to FRD with the necessary references to the ECtHR cases.¹⁵ The baseline for comparison of the chosen rulings is founded on: (i) the similarity and equivalence of their factual and normative circumstances (regarding pre-entry civic integration conditions which become an obstacle to the effective exercise of the right to family reunion, interests of children, deny of entry, and disproportionate practice of national administrations); and (ii) the representativeness of relevant national legal systems and geographical range (the cases concern German, Dutch and Danish provisions which belong to three out of four Member States allowing for pre-entry measures/conditions).¹⁶ The article results from an original research into the case-law in the context of the statutory provisions and scholarship review.

My main claim which develops throughout the piece is that the CJEU in its reasoning should have been more restrictive regarding the national implementation of *pre-entry* integration conditions under FRD, and more proactive, systemic and contextual while interpreting the scope and constituent aspects of the right to family reunion, which is enshrined in the FRD and also covered by the right to family life under the EU Charter.¹⁷ Especially, when the respective case-law of the European Court of Human Rights ('ECtHR') has been criticised by its own judges in dissenting opinions to verdicts, and in the literature, as incoherent and offering too wide margin of appreciation to states.¹⁸ I thus argue that the CJEU defers too much to the general discretion of EU Member States in setting integration conditions in light of the wording of FRD, while not giving sufficient weight to the Charter protections and the clarification of the human rights standards applicable in the EU.¹⁹ Moreover, the Court's interpretation of FRD in the context of Article 7 CFR and 8 ECHR demonstrate the blurred legal boundaries of the exercise of the right to family reunion and national powers, where insufficient attention is paid in the case-law to the interests of minor

and Family Reunification', 2016 *European Journal of Migration and Law* 18: 351–372; E. Guild et al. (eds), *The Reconceptualisation of European Union Citizenship*, Leiden/Boston: Brill 2014.

15 Similar issues occur in the context of reunification of families between EU citizens and TCNs, but remain beyond the scope of this paper, see e.g.: C-127/08 *Blaise Baheten Metock*, ECLI:EU:C:2008:449; C-34/09 *Gerardo Ruiz Zambrano*, ECLI:EU:C:2011:124; C-40/11 *Yoshikazu Iida*, ECLI:EU:C:2012:691.

16 The fourth state is Austria, see European Migration Network, *Annual Report on Migration and Asylum*, Brussels: European Commission 2017.

17 Opinion of AG Mengozzi in C-138/13 *Naime Dogan*, par. 47; and C-109/01 *Akrich*, EU:C:2003:491, par. 59.

18 N. Blake & R. Husain, *Immigration, Asylum and Human Rights*, Oxford: Oxford University Press 2003, p. 165-210.

19 See also: F. Ippolito, 'Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?', 2015 *European Journal of Migration and Law* 17: 1-38; and Wiesbrock 2010, n 7 above, p. 691-699.

children.²⁰ My final claim is that the reality of migration crisis demands active judges, ready to confront with its challenges, and defend the EU values and fundamental rights within the applicable factual circumstances and EU constitutional framework. The judges often remain the only hope for those seeking human rights' protection against governmental and international politics.

2 The Right to Family Reunion of TCNs in the EU and its Limits

The right to respect for family life, including family reunification, is an individual human right protected in EU law.²¹ Since the Charter of Fundamental Rights became the binding EU law, the key pertinent provision has been Article 7 which constitutes the right, while earlier, CJEU had recognised it as a part of common constitutional traditions of the Member States and the system of European Convention of Human Rights.²² In addition, the provision of Article 7 must often be read in conjunction with the obligations of Article 24 of the Charter on the rights of the child. The latter Article accords the right of children to the adequate protection and care; the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents (unless contrary to their interests); and compels public authorities and private institutions to have regard to the child's best interests as primary consideration in all actions relating to children. According to the CJEU, respect for the right to maintain contacts with parents 'undeniably' merges 'into the best interests of any child'.²³

The right to family reunion is not an absolute one and can be limited only in accordance with the law (Article 52(1) of the Charter). The exercise of the right and its lawful limitations is governed by the respective acts of EU secondary law, depending on the status of a beneficiary of the right. As indicated above, different rules apply to different categories of persons, depending, for example, on the possession of the EU citizenship rights.²⁴

In the present context of TCNs, it is FRD that establishes the common conditions for the limits of the right to family reunification in the EU Member States and the respective national powers, which must be interpreted in light of the Charter.²⁵ FRD is said to have introduced a higher level of protection (standards) generally in comparison to the ECtHR case-law but, its application has actually been contentious since the moment of its adoption. On the one hand, it wasn't welcomed with enthusiasm in the Member States although it had been adopted after long negotiations and under the unanimity voting procedure. Following the expiry of the transposition deadline, the infringement procedure was initiated by the Commission against 19 Member States for non-communication of their transposition

20 See also: S. Carerra, *In Search of a Perfect Citizen?*, Leiden/Boston: Brill 2009, p. 153-159.

21 Charter of Fundamental Rights of the European Union, OJ 2016 C 202/389. See: P. Craig & G. de Burca, *EU Law Text Cases and Materials*, 5th edition, Oxford: Oxford University Press 2011, p. 395-398; K. Groenendijk, 'Family Reunification as a Right under Community Law', 2006 *European Journal of Migration and Law* 8(2): 215-230; C. McGlynn, 'Families and the EU Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?', 2001 *European Law Review* 26(6): 582-598; S. Peers, 'Family Reunion and Community Law', in: N. Walker (ed.), *Europe's Area of Freedom, Security and Justice*, Oxford: Oxford University Press 2014, pp. 143-197.

22 Opinion of AG Mengozzi in case C-138/13 *Naima Dogan*, par. 47.

23 C-403/09 PPU *Detiček* [2009] ECR I-12193, par. 54; and C-498/14 PPU *Bradbrooke*, ECLI:EU:C:2015:3, para. 42 and 52.

24 See e.g. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77.

25 C-540/03 *Parliament v Council* par. 35.

measures.²⁶ On the other hand, as introduced at the beginning of this piece, the act was openly criticised in the literature exactly for the reasons of inadequate protection of human rights and unsuccessfully challenged on those grounds by the Parliament.²⁷ Consequently, both the exercise of the right to family reunion and its limitation vis-à-vis national powers under FRD can prove difficult to apply effectively for individual's rights protection. Those problems are analysed below.

2.1 *The Application of Article 8 ECHR and Article 7 CFR*

The first problem concerns the critique of the ECtHR case-law under Article 8 ECHR, and further, the differences between standards for the effective invoking of the right to family reunion under either the ECHR or the Charter and EU law and the lack of clarity which standard should be followed.

The principles applicable to family reunification, the possible scope and limits of the right, as set out by the ECtHR under Article 8 ECHR are as follows:

- '(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 [of the ECHR] cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.'²⁸

In that context, it should be observed that the threshold of standard of 'respect for family life' set by the ECtHR can be difficult to achieve in individual cases. Its application usually leads to dismissal of applications on the basis of non-violation of Article 8(1) of the Convention instead of an acknowledgement of interference with a right, and the later possibility for adjudicating on its possible justification under Article 8(2) ECHR.²⁹ That is why, it is said that the threshold is set too high and unrealistic in admission cases by the Strasbourg court. In addition, the critics argue that the interests of children are insufficiently and inconsistently addressed in the judgments.³⁰ As a result, the ECtHR jurisprudence on Article 8 ECHR has been criticised as being 'arbitrary and incoherent', both in the scholarship and in the dissenting opinions of judges.³¹

26 Eventually, one procedure led to a judgment C-57/07, *Commission v Luxembourg*, ECR [2007] I-00183.

27 C-540/03 *Parliament v Council* analysed critically in Chalmers et al. 2010, n 7 above, p. 243-246; but cf. A. Arnulf, 'Family reunification and fundamental rights', Editorial, 2006 *European Law Review* 31(5): 611-612; and R. Lawson, 'Family Reunification Directive. Court of Justice of the European Communities. Family Reunification and the Union's Charter of Fundamental Rights', 2007 *European Constitutional Law Review* 3(2): 324-342. See also: Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735 final.

28 C-540/03 *Parliament v. Council*, par. 55 referring to the judgment of 21 December 2001 of the ECHR in *Sen v the Netherlands*, no. 31465/96, § 36. See: I. Roagna, *Protecting the right to respect for private and family life under the European Convention on Human Rights*, Strasbourg: Council of Europe 2012, p. 87-90.

29 Blake & Husain 2003, p. 177-186; see also: Carrera 2009, n 20 above, p. 383-387.

30 Blake & Husain 2003, p. 182-185, and p. 183.

31 Blake & R. Husain 2003, p. 166, quoting the dissenting opinion of Judge Martens in *Boughanemi v France* (1996) 22 EHRR, par 3. See also: dissent by Judge Martens in *Gül v Switzerland*, judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 174 and Judge Valticos in *Ahmut v the Netherlands*, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2030. For a contrary view

Notwithstanding the criticism, CJEU incorporated the ECtHR case-law in its interpretation of Article 7 of the Charter. While the EU Court's wording is slightly different than the ECtHR reasoning, its interpretation of the way in which the right to family reunion should be exercised prompts the same reservations towards its effective enjoyment as that of the ECtHR. That is, according to the CJEU, the content of Article 7 CFR foresees specific obligations of states which correspond to those guaranteed by Article 8(1) of ECHR in the analysed context, but within the states' margin of appreciation.³² The CJEU states:

'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'.
'(...) 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 States a certain margin of appreciation when they examine applications for family reunification.'³³

The above-cited paragraphs indicate that Member States are both 'obliged' and possessing 'certain margin of appreciation' when they decide on the exercise of the right under Article 7 of the Charter. The obligations, however, do not create a corresponding individual right to enter the territory of a state if one so wishes on grounds of family unification and child's interest. The successful claiming of the Article 7 right will thus largely depend on individual circumstances of a case and '*weighing, in each factual situation, the competing interests*' of an individual right against a given national policy.³⁴ It appears to be a result of the fact that the right concerned is a contingent one under Article 7 and thus the obligations of Member States are not indefinite.

Further, in the CJEU's opinion, the interpretation of the exercise of the right, needs to follow the conditions developed by the ECtHR and Article 8 of the Convention, the content of international law as well as the EU law context.³⁵ It means that on the one hand, the CJEU accepts the ECtHR standards which have been criticised. On the other hand, it compels the adherence to the requirements of EU legal framework. The latter assumes that any possibilities of limitations of the right must respect the frames of the Charter (including Article 52(1) and Article 24 on the rights of a child), but also of FRD which in fact sets a '*substantially*' higher level of protection than the one of art. 8 ECHR.³⁶ In effect, it is misleading which standard should be applied, and the CJEU's reasoning provided little clarification to this question. Costello argues in the same vein that CJEU should have articulated a distinct EU standard going beyond the ECtHR minimum. She criticises the Court for giving preference to international standard over 'common constitutional traditions'

cf. D. Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?', 2008 *Intl & Comp. L.Q.* 57: 87-112.

32 C-540/03 *Parliament v Council*, par. 52-54 where the ECHR judgments are referred to: *Gül v Switzerland*, §38, and *Ahmut v the Netherlands*, § 63.

33 C-540/03 *Parliament v Council*, par. 52 and 59.

34 C-540/03 *Parliament v Council*, par. 62.

35 C-540/03 *Parliament v Council*, par. 52-58. See also: *Carpenter*, par. 41, and *Akrich*, par. 58-59.

36 Strik et al. 2012, n 12 above, p. 66.

yardstick; absorbing the ECtHR doctrine of ‘margin of appreciation’ without reflection; and failing to seriously engage in values and principles immanent in EU law.³⁷

The CJEU’s judgment, where the European Parliament unsuccessfully challenged FRD, has remained a key point of reference for the interpretation of Article 7 CFR and the right to family reunion since twelve years now. Paradoxically, that case was also the first occasion when the CJEU considered the place of the EU Charter in the context of ECHR system and where it could have attempted to develop a coherent interpretation of the standards applicable to right to family reunion in EU, but it has not done so.³⁸

2.2 Directive 2003/86 on the Right to Family Reunification and National Powers

The second problem for the successful claiming of the right for family reunion in the EU is the scope of national powers under FRD.

The purpose of FRD is to determine the common conditions for the exercise of the right to family reunification by TNCs including in that context lawful residents with a reasonable prospects for permanent residence and refugees.³⁹ On the one hand, the act emphasises generously in many recitals of its preamble that its key objective is the protection of family life.⁴⁰ It recalls that measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life as enshrined in the instruments protecting fundamental rights in EU and international law.⁴¹ It further highlights that:

‘Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, (...)’.⁴²

Member States are obliged to authorise family members of the lawful residents (a sponsor holds a residence permit for at least one year or more and has prospects for a permanent residence permit) and refugees. It applies to members of a narrowly-defined, nuclear family only (spouse and minor, unmarried children). The authorisation of other family members as well as unmarried partners is optional, but it does not matter when the marriage starts before or after the sponsor enters the EU and FRD precludes national laws which would draw such distinctions.⁴³ The family reunification should cover both family formation and preservation of the family unit.⁴⁴

On the other hand, FRD provides for exemptions from the right to family reunion and for several derogation conditions, some of which can be contested from the human rights’ standpoint. It grants various powers to the Member States which can control the entry of TCNs to their territories through some requirements for the exercise of the right in accordance with national laws (chapter IV and V of FRD).⁴⁵ First, Member States may

37 C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press 2016, at 4.IV.3.

38 See criticism of Chalmers et al. 2010, n 7 above, p. 243-246, and authors cited in n 7 above.

39 Art. 1, Directive 2003/86. See, also: Carerra 2009, n 20 above, for an excellent analysis of FRD and the literature cited therein, footnote 23, pp. 153-171.

40 See, also: Communication from the Commission on guidance for application of Directive 2003/86/EC, p. 15.

41 Recital 2 of the Preamble, Directive 2003/86.

42 Recital 4 of the Preamble, Directive 2003/86.

43 Art. 3 and 9-12, Directive 2003/86; C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* ECR [2010] I-01839, para. 64-65.

44 C-578/08 *Rhimou Chakroun*, par. 62.

45 See also: Carerra 2009, n 20 above, p. 164-166.

reject, withdraw or refuse to renew an entry and residence of family members on grounds of public policy, public security or public health.⁴⁶ The notion of public policy may apply to a conviction for committing a serious crime or to terrorists and terrorist suspects.⁴⁷ This preventive approach to public policy is *a priori* more restraining than the one applicable to EU citizens and their family members (including TCNs).⁴⁸ FRD also provides for the possibility of penalties in case of providing of false information and false marriages (Article 16).

Second, the act includes several derogative clauses. Article 4 allows Member States to require a minimum age of spouses to prevent forced marriages.⁴⁹ Further, Member States could have also introduced special rules either requiring that applications for family reunification of minor children are submitted before they reach the age of 15 (Article 4(6): only Austria had such laws) or making the admission of children aged over 12 conditional upon the verification of conditions for integration (but none state had done so within the standstill clause period: 3 October 2005). In consequence, FRD serves now as an explicit prohibition on the introduction of the latter requirements.⁵⁰

Third, there is another controversial derogation possibility in FRD: Member States may require the sponsor to have lawfully resided for two years in a given territory before the family can join him/her (it is three years if national laws had existed before FRD entered into force).⁵¹ Chalmers calls these provisions as ‘draconian’, and he also condemns the CJEU’s interpretation of them as ‘nonsense’.⁵² Indeed, it follows from the Court’s argumentation that a sufficiently long period of residence of a TCN sponsor in the EU and of family separation allows for the favourable conditions and settling down well of the family when they arrive.⁵³ CJEU argued that it preserves a limited margin of appreciation of the Member States what is consistent with the ECtHR case-law.

Finally, Member States may require the person who has submitted the application for family reunion to provide evidence that the sponsor has appropriate accommodation conditions in the host state, a sickness insurance in respect of all risks normally covered and stable and regular resources sufficient to maintain the family without recourse to a national social assistance system (art. 7(1)).⁵⁴ In parallel, Member States may require TCNs to comply with ‘integration measures, in accordance with national law’, before they arrive in a host state (Article 7(2)).⁵⁵ It is argued in the scholarship, that the latter paragraph envisaging the so-called ‘civic integration measures’, is a *lex specialis*, to the general principle of the EU protection of national identity enshrined in Article 4(2) TFEU.⁵⁶ The regulation is left to

46 Art. 6, Directive 2003/86.

47 Recital 14 of the Preamble, Directive 2003/86.

48 Cf. Art. 27-29, Directive 2004/38 and Art. 6, Directive 2003/86; and compare in this context, C-554/13 Zh. and O.I., ECLI:EU:C:2015:377 and C-100/01 *Ministre de l'Intérieur v Aitor Oteiza Olazabal* ECR [2002] I-10981, see further Opinion of AG Sharpston in case C-82/16 *K.A. and Others*, ECLI:EU:C: 2017:821.

49 Art 4(5), Directive 2003/86. See: K. Groenendijk et al, *The Family Reunification Directive in EU Member States; the First Year of Implementation*, Nijmegen: Wolf Legal Publishers 2007, p. 17-18 and C-338/13 *Marjan Noorzia*, ECLI:EU:C:2014:2092.

50 Art. 4(1) the last intend and recital 12, Directive 2003/86. See: Carerra 2009, n 20 above, p. 166-169.

51 E.g. in Austria, see European Migration Network 2017, n 16 above, p. 27-28 for details of national laws.

52 Chalmers et al. 2010, n 7 above, p. 517.

53 C-540/03 *Parliament v Council*, par. 98. See also: Groenendijk et al. 2007, n 49 above, p. 23.

54 Art. 7.1, Directive 2003/86. See also : C-578/08 *Chakroun*; C-558/14 *Mimoun Khachab v Subdelegación del Gobierno en Álava*, ECLI:EU:C:2016:285.

55 Art. 7.2, Directive 2003/86. See: Chalmers et al. 2010, n 7 above, p. 517-518 ; Carerra 2009, n 20 above, p. 169-170.

56 M. Jesse, ‘Integration measures, integration exams, and immigration control: P and S and K and A’, 2016 *Common Market Law Review* 53(4): 1065–1087, at 1078.

national law under an explicit exclusion of harmonisation in this field under Article 79(4) TFEU. Finally, the situation of refugees is more favourable: Article 9 and 12 of FRD sets out a derogation under which Member States should not require persons under the refugee status to comply with the requirements of Article 7.⁵⁷ The conditions set out in art. 7(1) can apply though if the application for family reunion is not submitted within a 3-months after the granting of the refugee status.⁵⁸ The conditions set in Article 7(2) FRD can apply, but only after family reunification has been granted.⁵⁹ It should also be remembered that FRD does not apply to asylum seekers and persons under the subsidiary protection status, so restrictive national requirements are often targeted towards those groups.

To sum up this section, the effective application of the right to family reunification clearly depends on the interpretation of and the actual use of national powers and permitted derogations under FRD. As a matter of principle, national authorities must take account of the respective guarantees both in FRD (interests of minor children and promoting family life) and in the Charter when examining particular conditions and exceptions.⁶⁰ FRD cannot also be interpreted as allowing Member States to use their discretionary powers and apply the margin of appreciation to infringe fundamental rights.⁶¹ This is the good part.

Yet, at the same time, the CJEU's interpretation of the standards to successfully claim the right to family reunion of Article 7 of the Charter in connection with Article 8 ECHR is ambiguous, and it can affect the understanding of the relationship between national powers and individual rights under FRD. That is, CJEU states that FRD imposes precise positive obligations on the Member States, '*with corresponding clearly defined individual rights*', to authorise family reunion of certain members of the family of a TCN residing in the EU, in cases prescribed by its provisions, '*without being left a margin of appreciation*'.⁶² This Member States' limited discretion exists as long as the permitted derogations do not apply. But, when derogations (e.g. pre-admission conditions of Article 7(2) of FRD) apply, Member States are granted a margin of appreciation, '*which is sufficiently wide to enable them to apply FRD's rules in a manner consistent with the requirements flowing from the protection of fundamental rights*'.⁶³

There are two problems with this interpretation. First, it is surprising that the EU Court assumed that national authorities would always be compliant and obedient while implementing FRD. Second, the wording of the derogations to FRD, in particular of the conditions and requirements of its Article 7(1-2), already leaves much leeway to the Member States and national implementing laws, which the Court limits to various degrees.⁶⁴ The acknowledgement of a wide scope of the Member States' margin of appreciation, even if applicable in light of the standards of the Charter Article 7 and the principle of *effet utile*, can

57 S. Peers, 'EU Migration Law and the EU/Turkey Association Agreement', in: D. Thym & M. Zoetewij-Turhan, *Rights of Third-Country Nationals under EU Association Agreements*, Leiden/Boston: Brill 2015, p. 202-222, at 209.

58 See a pending case regarding the character of this provision, C-380/17 *K. and B.*, OJ 2017 C 300/18.

59 Art. 7 with conjunction with art. 12, Directive 2003/86. But see: A. Triandafyllidou & R. Mantanika, *Irregular Migration and Asylum-Seeking to Europe: Assessing Evidence and Developing New Policy Responses*, documenting that Germany, Denmark, the Netherlands, and Austria have adopted laws restricting family reunion for asylum seekers and refugees, as the refugee emergency unfolded, unpublished paper, on file with the Authors; and further, Issue paper published by the Council of Europe Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, Strasbourg: Council of Europe 2017.

60 Recital 2 of the Preamble, Art. 5.5, 17, Directive 2003/86.

61 Carerra 2009, n 20 above, p. 392.

62 Art. 4(1), Directive 2003/86; C-540/03 *Parliament v Council*, par. 60; C-578/08 *Chakroun*, par. 41.

63 C-540/03 *Parliament v Council*, par. 104.

64 E.g. judgments interpreting Art. 7.1(c) in C-578/08 *Chakroun* in 2010 (quite restrictive), para. 44-52, and in C-558/14 *Mimoun Khachab*, in 2016 (much more deferential to national powers), para. 43-48.

easily result in Member States applying measures protecting their societies from ‘undesired foreigners’, promoting unequal treatment and creating obstacles to the exercise of the right to family reunion through their administrative control of conditions for admission.⁶⁵ In other words, in light of the current CJEU’s interpretation, FRD sets a higher standard of individuals’ rights protection than the one resulting solely from Article 7 of the Charter and Article 8 ECHR, but the national margin of appreciation applicable to the derogations to FRD is again interpreted in light of Article 7 of the Charter and Article 8 ECHR. All in all, it can substantially affect the exercise of the right of family reunion. The specific cases regarding pre-entry integration requirements which are analysed in the next section confirm that those doubts are not purely theoretical. The examination below will also shed more light on the actual scope of manoeuvre for the Member States.

3 Civic Integration Requirements for TCNs versus the Right to Family Reunion – A Comparative Analysis of the CJEU’s Case-law

EU Member States are allowed (Article 7(2), FRD) to establish pre-entry, civic integration requirements for third-country nationals before the right to family reunion is granted. National laws provide for such measures which are often contested by TCNs wishing to join their families.⁶⁶ The sections below analyse a chosen number of recent judgments concerning those matters. The judgments are closely related both factually and normatively.⁶⁷ First, regarding factual similarities, all three cases concerned: pre-entry conditions referring to the criterion of ‘integration’ or ‘integration test’, the interests of minor children, and the exercise of the right to family reunification by third-country nationals in EU. Second, regarding normative frames, both cases in *Dogan* and *K and A* concerned the application of art. 7.2, FRD (although the Court, unfortunately, chose not to respond to the preliminary question of the Dutch court regarding the latter act in *Dogan*). The case of *Genc* was closely linked to *Dogan* by facts and legal provisions: they both regarded the pre-entry requirements for TCNs who were, at the same time, citizens of Turkey. Their status in EU is additionally governed by the EU-Turkey the Association Agreement (‘EU-TAA’). Further, FRD was not a matter of interpretation in *Genc* due to the Danish opt-out from the provisions governing the EU Area of Freedom, Security and Justice.⁶⁸ More details follow below.

3.1 A Requirement of ‘Basic Linguistic Knowledge’ – Naime Dogan v. Germany

Mrs Naime Dogan, a Turkish national, applied for a visa for her and two of her children at the German embassy in Ankara in 2011 for the purpose of family reunification with her husband.⁶⁹ Mr Dogan, also a Turkish national, holds a permanent residence permit (issued in

65 See: Report from the Commission on the Application of Directive 2003/86/EC on the Right to Family Reunification, COM(2008) 610 final, pp. XX; and further section 4 *infra*.

66 See European Migration Network 2017.

67 See also: N.F. Idriz/ Tezcan, ‘Family Reunification under the Standstill Clauses of EU-Turkey Association Law’, Annotation of Case C-561/14, *Caner Genc v Integrationsministeriet*, 2017 *Common Market Law Review* 54(1): 263-280, at 278-279; Ippolito 2015, n 19 above, p. 14-15; and Milios 2015, n 69 below, where the judgments are also considered together.

68 Protocols No. 19 on the Schengen *Acquis* integrated into the framework of the European Union and No. 22 on the Position of Denmark, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2016 C 202/201.

69 Judgment of 10 July 2014 in case C-138/13 *Naime Dogan v Germany*, ECLI:EU:C:2014:2066. See also: G. Milios, ‘Family Reunification for Third-Country Nationals: Minimum Age for Spouses, Integration

2002) in Germany where he has been living and carrying out business activities since 1998.⁷⁰ Together with her application Mrs Dogan submitted a language certificate of the Goethe Institute evidencing that she had passed an A1 level test with the mark 'satisfactory'.⁷¹ However, her application was dismissed on the ground that she could not possess the necessary knowledge of the language due to her illiteracy. The embassy argued that Mrs Dogan passed the exam by answering the multiple-choice test at random and learning the standard sentences by heart.⁷²

The requirement of the basic linguistic knowledge of German (A1 per the Common European Framework of Reference for Language) is a pre-condition of granting a fixed-term residence permit of a spouse under the procedure for family reunion pursuant to the German Law on residence of foreigners, which implements FRD.⁷³ The requirement can be waived in several enumerated cases to grant a residence permit, inter alia, when the spouse cannot demonstrate the basic knowledge of German '*due to a physical, mental or psychological illness or disability*'.⁷⁴

Mrs Dogan challenged the refusal for family reunification on the basis that she had the necessary knowledge of German, and that the requirement in question infringes the EU-TAA and art. 41(1) of its Additional Protocol (prohibition of introducing new restrictions on the freedom of establishment and freedom to provide services). The *Verwaltungsgericht* in Berlin decided to refer the questions for preliminary ruling to CJEU which concerned the interpretation of the above-mentioned requirement as a condition of entry for a family member of a lawful Turkish resident in light of the Additional Protocol of the EU-TAA and article 7(2) of FRD on national integration measures.⁷⁵

Before moving to the CJEU's reasoning, a similar Danish case of Mr Genc will be described where CJEU transposed its reasoning in the Dogan case directly. The Court's interpretation in both judgments will be considered together below. FRD

3.1 A Requirement of 'Sufficient Ties for Successful Integration' – *Caner Genc v. Danish Ministry of Integration*

In January 2005, Mr Caner Genc (14 years old) applied for a residence permit in Denmark where his father held a permanent residence permit since April 2001.⁷⁶ Mr Genc's parents divorced in 1997 and until 2005 he lived in Turkey with his grandparents (although his father had been granted a legal custody of him).⁷⁷ Mr Genc's brothers joined the father in May 2003.

The Danish authorities refused Mr Genc's application on the ground that '*he did not or could not have sufficient ties to Denmark*' allowing him successfully to integrate in that Member State as required by the respective provisions of the Danish Law on Aliens.⁷⁸ The requirement would not apply when a request was submitted within two-year period after the parent obtained a permanent residence permit in Denmark (as it did not apply to his

Measures and the Application of the Individual Assessment. Comments on Noorzia and Dogan', 2015 *European Journal of Migration and Law* 17: 127–146.

70 C-138/13 *Naime Dogan*, par. 17-18. See also: C-513/12, *Aslihan Nazli Ayalti v Germany*, which was withdrawn by the Berliner *Verwaltungsgericht*.

71 C-138/13 *Naime Dogan*, par. 19.

72 C-138/13 *Naime Dogan*, par. 20-22.

73 C-138/13 *Naime Dogan*, par. 9-15.

74 C-138/13 *Naime Dogan*, par. 15.

75 C-138/13 *Naime Dogan*, par. 23-24. See also Opinion of the Advocate General Mengozzi, par. 46.

76 Judgment of 10 April 2016 in case C-561/14 *Caner Genc v Integrationsministeriet*, ECLI:EU:C:2016: 247.

77 C-561/14 *Caner Genc*, par. 15-18.

78 C-561/14 *Caner Genc*, par. 9-13.

brothers).⁷⁹ In other words, had Caner Genc, applied for residence until April 2003 like his brothers did, he would have not been required to prove his ties to Denmark. Since he had not, the Danish Ministry of Integration decided that neither Mr Genc nor his father could be regarded as either well-integrated or having sufficient, extensive ties with Danish society to justify granting the residence permit to Mr Genc.⁸⁰ It was also argued that there were no major obstacles for his father returning to Turkey to carry on a family life with his son. Interestingly, the Danish authorities in 2007 did not really consider the situation of Mr Genc's father living in Denmark since 1997 and his two older brothers since 2003 in the case-context.⁸¹

Mr Genc challenged the subsequent, negative decisions refusing his application. Eventually, the *Østre Landsret* asked CJEU for a reply to several preliminary questions. In essence, they all concerned the issue whether this case should be interpreted similarly to the ruling in *Dogan*. The *Østre Landsret* also inquired whether the Danish law in question could be justified by 'an overriding reason in the public interest' and which standard should be applied for the proportionality assessment of the act (the CJEU case-law on EU citizenship, the case-law of ECHR under Article 8 ECHR, or other).⁸²

3.3 *The CJEU's Interpretation of Dogan and Genc*

The status of Turkish citizens under EU law is often governed by two sources of law, that is, EU immigration laws and EU-Turkey Association Agreement (1963).⁸³ Article 41 of the Additional Protocol to the EU-TAA (1970) bans any new restrictions between contracting parties on establishment or the provision of services and is directly effective for Turkish individuals.⁸⁴ Article 13 of the Decision of the Association Council (No. 1/80) contains a similar norm regarding access to employment for workers and their family members. These provisions are known as 'standstill clauses' under EU-TAA and their interpretation was requested by national courts in both cases of *Dogan* and *Genc*.⁸⁵ In addition, the German court in *Dogan* sought the understanding of Article 7(2), FRD.

Advocate General Mengozzi in *Dogan* considered both sources of applicable law and concluded that the German law concerned breached both FRD and the standstill clause.⁸⁶ Unfortunately, CJEU deemed it unnecessary to answer the question of the national court regarding FRD. It interpreted the situation of Mrs Dogan solely in the framework of the prohibition of the imposition of new restrictions on the freedom of establishment and provide services under the EU-Turkey AA and the standstill clause of its Additional Protocol.⁸⁷

That is, CJEU ruled that conditioning the first admission of spouses of Turkish nationals lawfully residing in Member States upon their demonstration of a basic knowledge of the official language of a state makes family reunification difficult or impossible, and creates a new restriction incompatible with the standstill clause. It can also result in obliging a Turkish

79 C-561/14 *Caner Genc*, par. 9-10 and 32.

80 C-561/14 *Caner Genc*, par. 20, see also the criticism of AG Mengozzi in this case, Opinion, para. 48-51.

81 See the critical analysis by Blake and Husain of similar aspects related to child's interests in the ECHR judgment in *Sen*, n 29 above.

82 C-561/14 *Caner Genc*, par. 28-30.

83 Peers 2015, n 57 above, p. 202-205.

84 Art. 41 of the 1970 Protocol, see eg recently C-221/11 *Demirkan*.

85 Idriz 2017, n 67 above.

86 Opinion of AG Mengozzi in case C-138/13 *Naime Dogan*, par. 62.

87 C-138/13 *Naime Dogan*, par. 25-36 and 39-40. See Peers 2014, n 57 above, p. 206, and further: A. Schrauwen & T. Vandamme, 'Towards a Citizenship of the Association? On the future of Non-Discrimination, Preferential Treatments and the Standstill Clauses in the EU-Turkey Association Regime', in: E. Guild et al. (eds), *The Reconceptualisation of European Union Citizenship*, Leiden/Boston: Brill 2014, p. 89-101.

resident (a sponsor) to choose between his activity in the EU or his family life in Turkey as family reunification constitutes:

‘an essential way of making possible the family life of Turkish workers who belong to the labour force of the Member States, and contributes both to improving the quality of their stay and to their integration in those Member States.’⁸⁸

Further, the reasoning proceeded to the verification whether the requirement in question could be justified by an overriding reason of the public interest, which ‘is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it’.⁸⁹ In view of the Court, the arguments of the German government that those conditions prevent forced marriages and promote integration were not convincing. It was found out that the provisions in question break the proportionality principle as far as ‘the absence of evidence of sufficient linguistic knowledge’ automatically leads to a refusal of family reunification and it does not take into account of ‘specific circumstances of each case’.⁹⁰ Regrettably, CJEU did not proceed to the interpretation of FRD which would provide a helpful clarification for the right to family reunion in that context.⁹¹ Peers claims that it is not yet clear in light of this public policy exception, precisely how the application of the standstill rule may result in a better treatment of Turkish nationals that others covered by FRD.⁹²

The Court’s interpretation in *Dogan* has been transposed to *Genc* and applied to the freedom of workers for Turkish nationals.⁹³ The Court offered a similar way of reasoning to state that the Danish requirement of having sufficient ties to Denmark constitutes a new restriction on the economic freedom which – under the circumstances – cannot be justified. CJEU agreed, again, that the objective of ensuring the successful integration of TCNs in a given state can in principle constitute public interest reason supporting such requirements. Yet, the Court noticed that the Danish provisions fail the proportionality test because they do not aim at achieving the legitimate objective pursued.⁹⁴ The careful examination of the Danish law proved that the requirement of possessing sufficient ties to Denmark becomes applicable as a function of a time criterion: a period between granting a permanent residence to a sponsor and a moment of application for reunification of a family member. In view of CJEU, it was irrelevant, entirely unconnected to the likelihood of achieving any societal integration in Denmark by a child and implying that a period longer than two years places the child in a situation ‘less conducive to his integration in Denmark’.⁹⁵ The Court followed widely the opinion of AG Mengozzi to repeat that the application of that criterion to select children leads to: ‘incoherent results as regards the assessment of their ability to achieve

88 C-138/13 *Naime Dogan*, par. 34.

89 See also C-225/12 *Demir*, EU:C:2013:725, par. 40.

90 C-138/13 *Naime Dogan*, par. 38.

91 See the broader scope of the opinion of AG Mengozzi in case C-138/13 *Naime Dogan*, par. 44-61 and the criticism of Milios 2015, n 69 above, p. 136-137.

92 Peers 2015, n 57 above, p. 206.

93 C-561/14 *Caner Genc*, par. 42. Cf. also joined cases C-7/10 and C-9/10, *Tayfun Kahveci and Osman Inan* ECLI:EU:C:2012:180; C-221/11 *Leyla Ecem Demirkan v Bundesrepublik Deutschland*, ECLI:EU:C:2013:583; and an extensive analysis of the CJEU’s case-law on the rights of Turkish immigrants: K. Groenendijk, ‘The Court of Justice and the Development of EEC-Turkey Association Law’, in: D. Thym & M. Zoetewij-Turhan, *Rights of Third-Country Nationals under EU Association Agreements*, Leiden; Boston: Brill 2015, p. 39-64.

94 C-561/14 *Caner Genc*, par. 54-61.

95 C-561/14 *Caner Genc*, par. 62 and 63.

integration'. It also '*runs the risk of leading to discrimination, based on the date on which the application for family reunification was made*' between children in entirely similar personal situations (regarding their age, their ties with Denmark and their relationship with the parent residing there). Finally, the Court indicated that national authorities assessing a personal situation of a child, must take into account '*sufficiently precise, objective and non-discriminatory*' criteria, tailored to the examination on a case-by-case basis and being subject to effective judicial remedies preventing '*systemic administrative practice of refusal*'.⁹⁶

In sum, in light of *Dogan* and *Genc* rulings, the standstills in the EU-Turkey free movement rules prevent Member States from making family reunion rules more restrictive for most Turkish citizens. Not only do they apply to the family members who themselves are seeking for the status of worker or self-employed person, but also to situations where family members merely seek to join a Turkish citizen with either status.⁹⁷ Regrettably, however, CJEU missed the opportunity to rule on the interaction and interconnection between the EU immigration law (Article 7, FRD) and the EU-TAA. It is argued rightly, that even in cases, where only one of these sources of law applies (because the Member State in question opted out from EU immigration legislation, like Denmark in *Genc*), both sources can be relevant systemically because they '*must be interpreted in light of each other*'.⁹⁸ The ruling on Article 7(2) was especially awaited and the silence of the Court particularly meaningful under the political circumstances: the questions in an earlier *Imran* case had been withdrawn by national court after the Dutch state granted a temporary residence to Ms Imran in view of a very restrictive view on pre-entry integration measures presented by the Commission in that latter case.⁹⁹ Further, in May 2013, the Commission also sent a Letter of Formal Notice to Germany about its pre-departure language requirements.¹⁰⁰ Later, the infringement proceedings was discontinued, and it is unclear whether in 2018, after CJEU's judgements, the Commission would still uphold its strict position taken in *Imran*.¹⁰¹

The analysis of those issues will return in section 4 after the Court's ruling in *K. and A.* is examined where CJEU has finally provided the interpretation to the questions of national court regarding Article 7(2), FRD.

3.4 A Condition of an 'Integration Exam' – The Dutch Minister for Foreign Affairs v. K and A

Under the Dutch law, family members wishing to join their TCN sponsor legally residing in the Netherlands had to pass an automated civic integration exam.¹⁰² It comprised of 3 components: a spoken Dutch test, a test of knowledge of the Netherlands society and a reading comprehension test. The basic examination costed 350 Euro and had to be taken at a

96 C-561/14 *Caner Genc*, par. 57 and 63-66 and see strong words of AG Mengozzi in his opinion condemning the Danish legislation, par. 48-54.

97 See Peers 2015, n 57 above, p. 206 and Idriz 2017, n 67 above, p. 270-272.

98 Peers 2015, n 57 above, p. 222.

99 C-155/11 PPU *Imran v Minister van Buitenlandse Zaken*, Order of the Court (First Chamber) of 10 June 2011 [2011] I-05095 – case was terminated.

100 European Commission (2011). Written Declaration submitted on 4 May 2011 to the EU Court of Justice in the case C-155/11. Document nr. Sj.g.(2011)540657; cited after S. Bonjour, 'The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union', 2014 *Comparative Migration Studies* 2(2): 214-215.

101 C. Carlitz, 'Language skills as a requirement for family reunification of spouses in Germany: respecting respect for family life?', in: S. Morano-Foadi & M. Malena, *Integration of Third Country Nationals in the European Union. The Equality Challenge*, Cheltenham: Edward Elgar 2012, p. 314. See also *Green paper*, n 27 above.

102 Judgment of 9 July 2015 Case C-153/14 *Minister van Buitenlandse Zaken v K and A*, ECLI:EU:C:2015:453.

Dutch consulate in a country of origin or residence of a family member who applies for entry in the Netherlands.¹⁰³ The preparation to the exam needed to be based on the self-study pack which costed 110 Euro.¹⁰⁴ An applicant could only be exempted from the exam ‘*if a combination of very special individual circumstances were to result in a TCN being permanently unable to pass*’ it.¹⁰⁵ Neither unsuccessful attempts to pass the exam nor insufficient financial or technical means nor travel-related problems could justify the invocation of the exemption.¹⁰⁶

Mrs K, an Azerbaijani, applied for a residence permit at the Dutch embassy in Ankara in 2011 on the ground of family reunification with her husband, a resident in the Netherlands. Mrs A, a national of Nigeria, applied for a temporary residence permit at the Dutch mission in Abuja in 2008, under circumstances similar to K’s. Both applicants in case claimed that they were unable to undertake the exam outside the Dutch territory and supported those statements with the medical documentation.¹⁰⁷ The Dutch administration dismissed both applications refusing to recognise their documentation as sufficient evidence to rely on the exceptions from the obligation to pass the civic integration examination.¹⁰⁸ In the course of appeal, Mrs A’s three children were granted the permits to join their father, but her application was consistently rejected because she did not pass the exam and was not exempted. Further, the court in Hague, following the position of the Commission in the above-mentioned *Imran* case, decided that both K and A should have been granted temporary residence permits.¹⁰⁹ The Minister appealed against the Hague court’s decisions to the *Raad van State* which referred the preliminary questions to CJEU regarding the interpretation of the concept of ‘integration measures’ under art. 7(2), FRD and the principle of proportionality.¹¹⁰

3.5 *The Interpretation of CJEU in the Case of K and A*

While interpreting the notion of ‘integration measures’ (Article 7(2), FRD), the EU Court followed its judgment in *Chakroun*, which regarded the economic conditions for integration under Article 7(1) of FRD, and two judgments on the status of long-term residents in the EU under FRD 2003/109 in two other cases.¹¹¹

In principle, CJEU repeated its earlier, well-known logic and reasoning related to the national obligations and individual rights under FRD (see section 2.2. above). It confirmed that Member States are left without margin of appreciation to authorise the family reunification of enumerated family members provided FRD’s conditions are fulfilled, and that clearly defined individual rights correspond with specific positive obligations of states.¹¹² But the Court did not engage in evaluating whether the *ratio* of pre-departure integration measures and their theoretical underpinnings are compatible with the substance of the right to family reunion under FRD and the EU Charter. And the assessment of the

103 C-153/14 *K and A*, par. 21 and 25. See: Jesse 2016, n 56 above, p. 1065-1087, 1070.

104 C-153/14 *K and A*, par. 22 and 25-26.

105 C-153/14 *K and A*, par. 23 describing the Dutch laws.

106 C-153/14 *K and A*, par. 23 and 27.

107 C-153/14 *K and A*, par. 8-20, 28 and 33.

108 C-153/14 *K and A*, par. 29-30 and 35.

109 C-153/14 *K and A*, par. 31 and 36-37; see also Bonjour, n 100 above.

110 C-153/14 *K and A*, par. 38, 42 and 43.

111 See: C-578/08 *Rhimou Chakroun*, ECLI:EU:C:2010:117; C-579/13 *P and S*, ECLI:EU:C:2015:369; and C-508/10 *Commission v Netherlands*, ECLI:EU:C:2012:243. Cf. D. Thym, ‘Towards a Contextual Conception of Social Integration in EU Immigration Law. Comments on P & S and K & A’, 2016 *European Journal of Migration and Law* 18(1): p. 89-111.

112 C-153/14 *K and A*, par. 46.

measures in question as exceptions to the right was undertaken on the basis of the principles of proportionality and effectiveness. Only the latter allowed the Court to find the Dutch laws incompatible with the EU legal system.

Thus, in light of the ruling, the obligation to pass a pre-departure integration exam prior to be granted family reunion is compatible with FRD as such and thus the concept of integration measures *per se* remains very broad: they can encompass integration conditions and integration exams.¹¹³ It means that the requirements for TCNs of both paragraphs of Article 7, FRD, which relate to either economic independence (Article 7.1) and societal integration (Article 7.2) were equalised.

It is interesting to note, that the CJEU did not lend an ear to the opinions of Advocates General in two earlier cases: Mengozzi in *Dogan* and Szpunar in *P and S* who both argued for the differentiation between economic conditions under Article 7.1 (which can apply pre-entry) and integration measures under Article 7.2 (which Member States were then to impose on migrants after admission only).¹¹⁴ Their suggestion was to apply the functional and systemic interpretation of Article 7 in conjunction with Article 12(1), FRD which would allow for the above distinction, and consequently a different treatment of national powers regarding the requirements for TCNs under both paragraphs of Article 7 (economic conditions vs integration measures).

Further in its interpretation, the Court emphasised that the authorisation of family reunion is a general rule of FRD and therefore its exceptions must be interpreted strictly. As a result, the respective national powers cannot be misused to impede '*the objective and effectiveness*' (*effet utile*) of FRD which is '*to promote family reunification*'.¹¹⁵ In order to judge the national measures CJEU applied the two-tier proportionality test. It requires that those national laws further FRD's objectives, and therefore, facilitate the integration of the sponsor's family members in a host state. The Court appraised that such measures suit the aims pursued. In its opinion, it is beyond doubt that pre-entry, civic integration exams as ones in question foster both integration of TCNs in the host societies and their access to the labour market and vocational training.¹¹⁶

Next, CJEU ruled that the Dutch provisions fail to pass the next part of the proportionality test because they exceed what is necessary to achieve the legislative aims. That is, their application proved to systematically prevent family reunion of persons who for example made efforts to take exams but failed it.¹¹⁷ In other words, the hardship clause in the Dutch law was found too narrow to grant exemptions from passing the exam in all possible cases '*where maintaining that requirement would make family reunification impossible or excessively difficult*' (*effet utile* principle). Moreover, CJEU clarified what measures must be excluded from the scope of Article 7(2), FRD. That is, national laws which 1) would aim at filtering mechanism for persons wishing to enter the host territory and 2) would form objectively a difficult obstacle in making the right to family reunion exercisable because of not taking into account specific, individual circumstances of personal situations.¹¹⁸ In light of

113 C-153/14 *K and A*, par. 49; see also Jesse 2016, n 56 above, p. 1077-1078.

114 Opinion of AG Mengozzi in case C-138/13 *Naime Dogan*, par. 44-61 and Opinion of AG Szpunar in case C-579/13 *P and S*, par. 87-97 who further argued that integration measures could not include obligations to achieve a result, par. 97. The case of *P and S* concerned the situation of TCNs already resident in the Netherlands and not the right to family reunion.

115 C-153/14 *K and A*, par. 50.

116 C-153/14 *K and A*, par. 52-53.

117 C-153/14 *K and A*, par. 56-63.

118 C-153/14 *K and A*, par. 58. See also: C-155/11 *PPU Imran v Minister van Buitenlandse Zaken*; and C-527/14 *Ukamaka Mary Jecinta Oruche and Nzubechukwu Emmanuel Oruche v Germany* – the case was re-

this interpretation, it appeared that in both national joined cases, the special circumstances of applicants were not duly considered to ensure the respect for the effectiveness of FRD. Finally, the Court found out that also the costs of exams were too high to pass the *effet utile* test of the exercise of the right.¹¹⁹

4. The CJEU's Approach to the Conflict between the Individual Right to Family Reunification and National Civic Integration Conditions for TCNs

The cases in *Dogan*, *Genc* and *K and A* exemplify the conflict between the exercise of the individual right to family reunion and national powers to control migration and protect national identity through the application of civic integration conditions for TCNs under EU and national law. In all three judgements which regarded the right to family reunion of TCNs and national, pre-entry integration requirements, CJEU stroke down the Member States' measures and administrative practices, what should generally be welcomed from the perspective of the protection of individual rights.¹²⁰ However, CJEU's approach to the conflict has been traditional and cautious in all the three rulings, with an presumably limited effect for the national migration policy and the EU fundamental rights protection. These issues are explored below.

4.1 The Standard of Review, Proportionality and Effet Utile

In the analysed judgments, the Court followed a quite restrictive standard of review of national measures concerned. The CJEU' approach was based on the strong reliance on the principle of proportionality and on the principle of effectiveness of FRD (*effet utile*).¹²¹

The proportionality test allowed for an appraisal of national measures and a clear command in the respective reasoning that Member States authorities ought to apply a case-by-case approach to individual situations. In this sense, the Court emphasised the need for national authorities to implement the individual assessment approach extensively as a core obligation under FRD.¹²² It follows from the fact that individual assessment is required by Article 17, FRD with a view to take into account all circumstances of a case and interests involved in order to protect the persons concerned against an automatic rejection of their application if the requirements are not fulfilled. The decision needs to be motivated and there is the right to an effective remedy. It is thus a clear indication of the CJEU's tactic ensuring the scrutiny of the legitimacy and proportionality *stricto sensu* of the 'integration' objectives pursued by national laws.

CJEU mandated:

'specific individual circumstances, such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members must be taken into

moved after the Berliner court received the judgment in case C-153/14 *K and A*, and withdrew the application.

119 C-153/14 *K and A*, par. 64-71.

120 It did so similarly with regard to Art.7(2) of the Directive, see e.g. C-578/08 *Rhimou Chakroun*.

121 See K. Hailbronner & D. Thym, 'Introduction, Constitutional Framework and Principles for Interpretation', in: K. Hailbronner & D. Thym (eds), *EU Immigration and Asylum Law A Commentary*, 2nd edition, München: C.H. Beck/Hart/Nomos 2016, p. 13-14.

122 Art. 17, Directive 2003/86 and Milios 2015, n 69 above, p. 138-140.

consideration in order to dispense those family members from the requirement to pass an examination such as the one at issue in the main proceedings when, due to those circumstances, they are unable to take or pass that examination.’¹²³

The application of the *effet utile* approach in this context permitted CJEU to exclude those measures which would make family reunification difficult or impossible.¹²⁴ It also led to the conclusion that only those national, integration measures which really foster integration can be accepted with the exclusion of both filtering mechanisms for migrants and the automatic mechanisms of refusal of entry, based on, for example, non-passing an exam.

Finally, the EU Court took a strict approach to financial conditions and decided that they were too high in view of the proportionality of measures and the effectiveness of the right to family reunion.¹²⁵

So far so good. The consequences of the CJEU’s interpretation is a demarcation of a line for the Member States’ discretion to use inexplicably civic integration measures as direct tools for selection of migrants hidden behind a positive narration of high goals of integration. In the politically sensitive field of immigration in the EU nowadays, the Court mitigated national powers, and simultaneously, showed respect to the principle of protection of national identity. It is said it should discourage Member States to apply policies of immigration control instead of societal cohesion and integration through the back door of those measures.¹²⁶ Yet, it cannot be excluded, that the CJEU’s cautious approach may likewise encourage the application of selection practices in the present difficult times of migration crisis.

The CJEU’s straightforward acceptance of *pre-entry* integration measures causes doubts. To repeat, CJEU accepted an all-encompassing interpretation of integration measures without differentiating between integration conditions and integration measures. It can be said the Court chose a purpose-based approach to integration measures altogether instead of attempting to differentiate normatively their various types. Further, CJEU agreed without reflection that pre-departure integration requirements for family members as such can facilitate integration, and moreover, prove ‘undeniably useful’ for the establishment of connections with a hosting state.¹²⁷ The Court assumed that without any reference to empirical data, the established scholarship and the systemic and functional interpretation of FRD.¹²⁸

On the contrary, several empirical projects have already convincingly established that such pre-departure measures are *per se* selective for migrants, and moreover, affecting largely woman, elderly, minors, low-educated people and other minority groups, and in effect, leading to their discrimination.¹²⁹ Already in 2006, Peers and Rogers claimed that non-resident family cannot logically be required to comply with the requirement of Article 7(2) integration measures pre-departure,¹³⁰ because it causes delays, or even exclusion, in

123 C-153/14 *K and A*, par. 58.

124 Cf. *Dogan*, par. 35; *Genc*, par. 40; C-153/14 *K and A*, par. 59 and 69.

125 See also *Chakroun* and Hailbronner & Thym 2016, n 121 above, p. 9, point 16.

126 Jesse 2016, n 56 above, p. 1081 and 1087. Cf. G. Baldi & S.W. Goodman, ‘Migrants into Members: Social Rights, Civic Requirements, and Citizenship in Western Europe’, 2015 *West European Politics* 38(6): 1152-1173

127 C-153/14 *K and A*, par. 54. See also the reference to the literature in AG Szpunar Opinion, par. 96.

128 See: Jesse 2016, n 56 above, p. 1078 and works cited therein; S. Goodman, ‘Controlling Immigration through Language and Country Knowledge Requirements’, 2011 *West European Politics* 34(2): 235-255

129 Strik et al. 2012, n 12 above, p. 104-105; see also projects enumerated in fn 168.

130 S. Peers & N. Rogers, (eds), *EU Immigration and Asylum Law: Text and Commentary*, Leiden: Brill 2006, p. 573-613, cited after. Carrera 2009, n 20 above, footnote 77, p. 169.

reunification procedures. Access to justice and remedies of persons within the vulnerable groups is usually difficult and limited. In that sense, the effectiveness principle of FRD and 7(2) do not seem to be applied accurately.

Nevertheless, in view of the Court's judgments, it is clear that those national measures can be applied before or after entry to the Member States' territory on the conditions that the 'objective of the measure' is to 'foster the integration' of family members in a receiving society (host state) and that they do not undermine the effectiveness of the right to family reunion under FRD (its *effet utile*).¹³¹

Yet, there are further weaknesses in this interpretation. First and foremost, the logic of maintaining the facilitation of integration by pre-entry measures and *effet utile* of FRD is self-contradictory. Second, the decision whether or not a certain measure 'facilitated' integration was a relatively arbitrary matter for the Member States' powers and their legislatures which transposed FRD. Furthermore, the application of those measures remains casuistic and relies on the discretion of national administration in their assessment. There is no guarantee that they will respect the position of CJEU and apply adequately the principles of proportionality and effectiveness to the right to family reunion even though they are also obliged to an individual assessment under Article 17, FRD. Especially, in view of the fact that the clear delineating of the content of FRD's objectives might be problematic.¹³² That is, the very purpose of Article 7(1), FRD is to select those immigrants who will not be a burden to the social assistance systems of Member States, while Article 7(2) aims at helping in their integration. So why should an integration measure (e.g. a linguistic exam under Article 7(2), FRD) happen *before* an actual family reunion which in itself facilitates integration and helps sociocultural stability takes place? It goes simply against the logic of FRD and contradicts its objectives.¹³³ That is why, the future application of national integration measures can remain very problematic in individual cases.

Finally, the CJEU's upholding of legality of pre-entry civic integration measures (Article 7(2), FRD) will arguably have an effect on the construction of an individual right to family reunion and the further developments of the national powers under EU immigration policy more generally (see Conclusions below).

4.2 Economic Integration and No Reference to the EU Charter

The next striking aspect of the CJEU's approach to the matters in question is no reference to the provisions of the Charter of Fundamental Rights in neither of the analysed judgments (*Dogan*, *Genc* and *K and A*). The scholars had hoped that the Court would have ruled about the Charter standards in *K and A* after its silence regarding fundamental rights in *Dogan*, but it did not do so.¹³⁴

First, it is not clear – from the systemic standpoint – why the CJEU did not see the need to refer to the Charter in any of those cases.¹³⁵ On the contrary, in several other judgments either concerning Article 7(1), FRD (economic conditions for family reunion: *Chakroun*, *Khachab*)¹³⁶ or Article 20 TFEU (right of residence in the context of Article 20 TFEU and either a TCN who is a parent of a EU citizen: *Chavez-Vilchez and others*; or is married to a

131 See also: Communication from the Commission on guidance for application of Directive 2003/86/EC, p. 15-16; and the Opinion of AG Mengozzi in case C-138/13 *Naime Dogan*, par. 48.

132 Cf. Jesse 2016, n 56 above, p. 1084 and 1086. See also: Hailbronner & Thym 2016, n 121 above, p. 10.

133 See recital 4 of the Preamble, Directive 2003/86 and section 2.2. above.

134 E.g. Ippolito 2015, n 19 above, p. 15; Milios 2015, n 69 above, p. 145.

135 *Ibidem*, cf. also Jesse 2016, n 56 above, p. 1085.

136 C-578/08 *Chakroun*, par. 63 and C-558/14 *Mimoun Khachab*, par. 27.

TCN being a parent of an EU citizen: *O and S*)¹³⁷ Article 7 CFR and/ or Article 8 ECHR were considered in the interpretation. The CJEU's decision to interpret or not the provisions of the EU Charter in the context of similar cases regarding family reunion does not seem to be systemically coherent.

Second, there would have been clearly an added value of the inclusion of the Charter provisions in the reasoning in the analysed cases. By not doing so, the CJEU missed an important opportunity of providing its interpretation on crucial normative issues.

To begin with, the Court could have become a frontrunner (also as compared with ECtHR) in developing/explaining standards of protection applicable to the right of family reunion in EU under provisions of FRD in the context of the right to family life under Article 7 CFR in connection with the rights of the child under Article 24 CFR. Given the fact that the ECtHR has also been criticised for not paying sufficient attention to minors' interests in its case-law (see above section 2.1.) and that there has been some ambiguity regarding the standard of protection set by FRD against Article 7 of the Charter and Article 8 ECHR, the normative interpretation vis-à-vis the consideration of children interests and the respective obligations of national authorities in the analysed judgments would be highly desirable. It had been both argued and awaited by the scholarship.¹³⁸

Especially, it would have enabled the Court to deal with the criticism of its earlier standpoint (judgment *Parliament v Council*) by establishing a specific and progressive EU standard of human rights protection regarding the interpretation of both interconnected Articles: 7 and 24 of the EU Charter.¹³⁹ That standard could arguably be higher for the EU than the one developed by ECtHR for the Council of Europe (which is not excluded under Article 52.3 CFR). It would have further allowed the CJEU to develop both its own line of reasoning regarding Article 7 CFR, for example, following its progressive interpretation proposed by AG Mengozzi in *Dogan*, and the doctrine of protection of the best interests of children in the EU (when the ECHR does not contain a provision equivalent to Article 24 CFR and ECtHR jurisprudence has been criticised in that context).

The lack of interpretation of the right to family reunion vis-à-vis the best interests of the child in the context of FRD and the EU Charter is also surprising in view of the fact that all the considered cases of *Dogan*, *Genc*, and *A* (within *K and A*), concerned the interest of minor children. Although in other judgments¹⁴⁰ the Court has remained convinced that FRD obliges Member States 'to have due regard to the best interests of minor children' and that those interests are well-safeguarded by this act, it has surprisingly not mentioned those interests in the present context. For example, in case of *A*, her children were granted a permit to join the father while the mother was not. It resulted in their separation from the mother (between 2012 and 2015). Further, Mr *Genc* waited for 11 years, since he had applied for a residence permit in 2005, to join his father and his two brothers in Denmark, when finally, the CJEU's judgment in his case was rendered in the preliminary ruling procedure by the Grand Chamber on 12 April 2016. Especially in case of Mr *Genc*, who waited for 11 years for a favourable judgment, the CJEU's silence regarding the best interests of the child looks

137 Joined cases C-356-357/11 *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L*, ECLI:EU:C:2012:776, par. 75-80; C-133/15 *Chavez-Vilchez and Others*, ECLI:EU:C:2017:354, par. 70. See also: H. van Eijken, *EU Citizenship & the Constitutionalisation of the European Union*, Groningen: Europa Law Publishing 2015, p. 115-127.

138 Cf. C-356-357/11 *O and S*, par. 80-81; Ippolito 2015, n 19 above, p. 13-16.

139 Ippolito 2015, n 19 above, p. 14; and also G. Milios 2015, n 69 above, p. 140-141; M. Klassen & P. Rodriguez, 'The Best Interests of the Child in EU Family Reunification Law: A Plea for More Guidance on the Role of Article 24(2) Charter', 2017 *European Journal of Migration and Law* (19): 201-202.

140 C-540/03 *Parliament v Council*, par. 101ff; C-356-357/11 *O and S*, par. 80.

worrying and unconvincing. The interpretation in *Genc* of both Article 7 and 24 of the EU Charter in relation to the Danish opt-out from the Family Reunification Directive would bring more clarification concerning the application of human rights standards by Danish authorities in that particular context in the future. It could have also strengthened the rights-based approach.¹⁴¹

Interpretation of integration conditionality in light of the Charter's rights to family life and the best interest of the child (Article 7 and 24 CFR) in the analysed cases could have also played 'the progressive indirect role of criteria to be considered when evaluating the admissibility' of such national integration measures and national powers.¹⁴² Ippolito further argues that it would strengthen the proportionality assessment of the civic integration exams and their mandatory derogations for persons who are permanently incapable of taking an exam. So, it can be assumed that it might also have led the Court to the conclusion that any pre-entry integration conditions which result in a separation of children from their parents is not compatible with the CFR (and the very objectives of FRD).

Finally, an engagement of the CJEU in the interpretation of the Charter standards vis-à-vis Article 7(2) FRD would also be helpful for the overall coherence of EU primary law and EU secondary immigration laws with the respective provisions of the European Social Charter. In the present context, the latter's Article 19§6 offers a higher level of protection of the right to family reunion and the conclusions of the European Committee of Social Rights indicate openly that any pre-entry integration requirements imposed by FRD are contrary to ESC.¹⁴³ The ESC is formally not a part of the EU fundamental rights regime, but all Member States are also members of the ESC yet bound by its provisions to various extent. It often leads to a double-standard setting systems and situations where the FRD allows EU Members States to adopt provisions which infringe Article 19§6 of the ESC, although FRD (Article 3.4(b)) states *expressis verbis*, that it is without prejudice to more favourable provisions of the ESC.¹⁴⁴ Again, the CJEU's interpretation of those complex interconnections between legal sources would help both the clarification regarding the applicable human rights standards and the scope of national powers.

Instead, the CJEU's reasoning within the narrow frames of economic integration and the individual provisions of FRD seems reductionists to the interpretation of secondary legislation *in casu*, while not giving any explanation of the applicable human rights standards and the Charter protections. Especially, in the two cases regarding the Turkish nationals, CJEU followed the internal market framing of 'new restrictions' on market freedoms within the EU-TAA (freedom of establishment of Mr Dogan and paid employment of Mr Genc).¹⁴⁵ The Court emphasised that the provisions of the EU-TAA '*in no way imply recognition of a right to family reunification or to a right of establishment and residence for*

141 In *Dülger* which concerned the rights of non-Turkish family members of the Turkish worker, the Court held that '(...) Article 7 of Decision No 1/80 forms an integral part of the law of the European Union, the Member States are bound to observe the obligations resulting from Article 7 of that Charter which, under Article 6(1) TEU, has the same legal value as the Treaties.'; C-451/11 *Natthaya Dülger v Wetteraukreis*, ECLI:EU:C:2012:504, par. 52-53. Decision 1/80 EU-TAA was also subject of interpretation in the *Genc* case.

142 Ippolito 2015, n 19 above, p. 15-16.

143 European Union Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, Luxembourg: FRA 2014, p. 139-140.

144 Article 19 §6 of the European Social Charter, the right of migrant workers and their families to protection and assistance, see European Committee of Social Rights, *The relationship between European Union law and the European Social Charter*, Working document, 15 July 2014, Strasbourg: Council of Europe 2014, p. 27ff and 120-123.

145 C-138/13 *Naime Dogan*, par. 37.

family members of Turkish workers'.¹⁴⁶ Family reunification is thus interpreted solely as either a right associated with an economic freedom or a function of an exercise of the right to economic freedom under EU-TAA, as long as there is 'a link between the exercise by a Turkish national of economic freedoms in a Member State and family reunification' (see also Section 3.3. *infra*).¹⁴⁷

Problematically, that reasoning was also criticised from many sides, above all, that it has construed too wide interpretation of standstill clauses under the EU-TAA provisions interfering with Member States' competences to decide on the first admission on Turkish nationals and that it ignored the common rules of interpretation of international treaties.¹⁴⁸ The applied understanding of the Court, however, indicates clearly its position: the area of non-EU migration and the trans-border mobility is governed either by the market freedoms principles under the respective Association Agreements; and it does not yet aspire to the application of the EU Charter rights-based approach. Any attempt to clarify and define the right to family reunification in light of the Charter and its Article 7 and 24 in this context was not made. And this applies likewise to the judgment in *K and A*.

4.3 No Discrimination, But also No Equality

The approach of CJEU to the conflict between the right to family reunion and the protection of national identity through civic integration measures also reveals the will of the Court to fight any discriminatory effects of the measures assessed. In all analysed judgments, CJEU emphasised the importance of the careful consideration of each individual case and in *Genc* it was stressed that national authorities must assess the personal situation of a child on the basis of objective and non-discriminatory criteria (individual assessment).

Moreover, both cases concerning the Turkish nationals (*Dogan* and *Genc*) prove that CJEU continued to develop a consistent case-law on the status and rights of the Turkish population in the EU. The judgments advanced the rights of lawfully resident Turkish citizens who have been awarded with 'family unity benefits' for their belonging to the Member States' labour forces,¹⁴⁹ and whose status should be as close as possible to that of EU citizens as regards market freedoms.¹⁵⁰ In that sense, the CJEU's reasoning can positively catalyse the process of equalising of rights of Turkish citizens among various Member States and thus it produces an EU-wide anti-discriminatory effect in this sense.¹⁵¹

At the same time, the situation of Turkish citizens was considered in view of the provisions of the EU-TAA and the status of all TCNs was interpreted without any reference to the Charter or the FRD provisions in this context. In other words, by interpreting the cases solely under the EU-TAA, the Court lost an opportunity to rule on family reunification of all TCNs as well as, again, on the applicable human right standard in light of the EU Charter.¹⁵² CJEU obviously maintained the differentiation between various categories of persons who can exercise mobility under EU law and the various types of rights they are granted.¹⁵³ The

146 See: C-561/14 *Caner Genc*, par. 45.

147 C-561/14 *Caner Genc*, par. 43; C-138/13 *Naime Dogan*, par. 34-36.

148 Groenendijk 2015, n 93 above, p. 46-47. See also the criticism from the stance of public international law: K. Hailbronner, 'The Stand Still Clauses in the EU-Turkey Association Agreement and Their Impact upon Immigration Law in the EU Member States', in: D. Thym & M. Zoetewij-Turhan, *Rights of Third-Country Nationals*, Leiden/Boston: Brill 2015, p. 193-197.

149 C-561/14 *Caner Genc*, par. 49. See also Strik et al. 2012, n 12 above, p. 77-80.

150 See: C-561/14 *Caner Genc*, par. 52.

151 See: Strik et al. 2012, n 12 above, p. 78-79; Groenendijk 2015, n 93 above, p. 60-61.

152 Milios 2015, n 69 above, p. 137 and 141-143.

153 See: the judgment in C-371/08 *Ziebell* where the Court explains the objective grounds for difference in application of two different legal schemes to EU citizens and Turkish nationals, par. 69-74.

long-term effects for the Turkish nationals and overall cohesion of EU migration law are also difficult to predict (see also Section 3.3 *in fine* above).¹⁵⁴

Further, for the time being, the EU migration regime complex is highly fragmented, and the resulting objective inequality of various persons and their right to family unity will likely continue to exist in the EU.¹⁵⁵ As introduced in the beginning of the text, in light of FRD and the remaining EU laws, including EU-TAA and EU Citizenship Directive (2004/38), there are numerous legal regimes, and resulting different conditions, applicable to family reunification of third-country nationals depending on their status. This is so, notwithstanding the 1999 Tampere Conclusions of the European Council claiming that ‘A more vigorous integration policy should aim at granting’ TCNs ‘rights and obligations comparable to those of EU citizens’.¹⁵⁶ The CJEU has undertaken various interpretive efforts to overcome those differences, but it has not always been successful.¹⁵⁷ The analysed cases offered yet another the chance to the CJEU to move a small step forward in aligning differentiating conditions for the exercise of the right to family reunion and to rule on the (un)lawfulness of national, pre-entry civic integration measures, but the Court has not done so. Further, by linking the interpretation of EU immigration law (FRD) with EU-TAA and EU human rights regime, the Court might have achieved much more systemic and constitutional coherence of the EU legal system, and arguably a closer treatment of TCNs’ rights to family reunion to those of EU citizens to whom pre-departure integration measures would never apply. As a result, after the CJEU’s rulings, the mandatory civic integration measures will continue to be one of those – objectively – differentiating criteria because the normative assessment of integration measures depends on whether they apply to Turkish citizens (*Genc, Dogan* under EU-TAA) or other TCNs (*K and A* under FRD), and in any case, they apply differently to TCNs and refugees.

It follows from the above, that in light of the applicable normative framework, and the political reality, it would require a much greater interpretive effort and a courageous political stance of the Court to reason for the EU wide, pro-equality effect among various categories of groups of peoples to enjoy an equal right to family reunification.¹⁵⁸ The Court simply sanctioned the hierarchy (an unavoidable diverse treatment) of various groups of persons regarding the exercise of the right to family reunion which already exists in the EU secondary law.¹⁵⁹

5 Conclusions: The *Constitutional* Road Not Taken

There is an empirical evidence proving that the case law of the CJEU has a significant impact on the national legislation and policy regarding family reunification of TCNs and the rights of third country family members after admission.¹⁶⁰ Without doubt, the judgments

154 Cf. different assessment of Peers 2015, n 57 above, p. 206 and Groenendijk 2015, n 93 above, p. 52-57.

155 Adam & Van Elsuwege 2017, n 10 above.

156 Tampere European Council 15 and 16 October 1999, Presidency Conclusions, A.III. Fair treatment of third country nationals.

157 Adam & Van Elsuwege 2017, n 10 above; Groenendijk 2015, n 93 above.

158 Cf. D. Kochenov, *The Citizenship of Personal Circumstances in Europe*, EUI Working Papers Law No. 7, Florence: European University Institute 2017, p. 1-25.

159 See: Hailbronner & Thym 2016, n 121 above, p. 11. Cf. Jesse, *The civic citizens of Europe The Legal Potential for Immigrant Integration in the EU, Belgium, Germany and the United Kingdom*, Leiden, Boston, 2017, 224-290, 288.

160 Strik et al. 2012, n 12 above, p. 84.

discussed in the present article will also influence national policies regarding the family reunification of TCNs. It is to be seen, however, how much will the rulings contribute to the effective protection of the right to family reunion in view of the approach employed by the EU Court to the conflict between the claim for a fundamental human right to family reunion and Member States' powers controlling migration via pre-entry integration measures.

The CJEU's approach in the analysed cases reveals a restrictive standard of review of national powers based on the proportionality principle and the obligation for national authorities to ensure the *effet utile* of FRD and individual assessment of each case. This approach allowed for the favourable decisions for individuals concerned *in casu*, but the Court also accepted the pre-entry integration measures as *per se* not hindering integration of TCNs in the EU Member States even though under the facts of the cases it often causes long delays in family reunification and additional separation of children from their parents. The Court's strict, narrow and statutory (literal) interpretation of the applicable laws did not proceed to the rights-based approach and broader contextual reasoning within the whole EU law system. Generally, it implies acknowledgement of the continuation of the 'wide margin of appreciation' approach to national powers which was first established in the Parliament vs Council judgment.¹⁶¹ By employing this view, the CJEU did not pay attention to the broad scholarly criticism of the structural weaknesses inherent in FRD, the Commission's position in *Imran* case and the empirical studies documenting discriminatory effects of pre-entry integration measures for vulnerable groups.

The wide-ranging effect of such restrictive standard of review against national measures *in casu* via the *effet utile* and the proportionality principles can be limited, and its effects on Member States powers and policies likely superficial. For example, after the ruling in *K and A*, the Dutch authorities reduced the applicable fees (for a civic exam and an application for family reunion) from 685 Euro to 400 Euro (when an exam is taken once). But will the cost of 400 Euro be proportional and low-enough as not to impinge the effectiveness of the right to family reunion under FRD in view of limited financial resources of TCNs and their access to effective remedies to claim the measures are not proportional?¹⁶²

Regrettably, the CJEU did not engage neither into the systemic interpretation of the FRD in the context of EU-TAA), nor the constitutional one in the context of the EU Charter and the ESC standards nor the contextual one against the empirical evidence on the application of the FRD and the political reality. That interpretation would be definitely more demanding, but it could strengthen the Court's reasoning and made it more convincing regarding the limitation of national powers. It would moreover place the Court in the centre of developing human rights standards in the EU with a capacity of a meaningful jurisprudential dialogue with other institutional and international actors, notably ECtHR and ESC Committee.¹⁶³

There are also doubts about the effective protection of the right to family reunion in EU under the CJEU's approach. First, it is argued that the *effet utile* principle can be problematic as a method of advancing constitutional/ human rights of individuals instead of interpreting the rights within the EU Charter framing. Especially, as the CJEU '*can be superfluous when identifying the aims pursued by the EU legislature in the adoption of immigration and*

161 C-540/03 *Parliament v. Council*, cf. also Milios 2015, n 69 above, p. 145-146.

162 Jesse 2016, n 56 above, p. 1083. See also judgment in case C-309/14 *CGIL and INCA v Presidenza del Consiglio dei Ministri and Others*, ECLI:EU:C:2015:523, where the Court for the first time mentioned the limits for fees *in concreto*.

163 See on the recent developments of the ECtHR: Sergio Carrera Nuñez, 'The ECtHR's Judgment in *Biao V. Denmark*: Non-Discrimination Among Nationals And Family Reunification As Converging European Standards', 2016 *MJ* 23(5): 865-889; and the judgment in case *Jeunesse v The Netherlands*, 12738/10, ECLI:CE:ECHR:2014:1003JUD001273810.

*asylum rules*¹⁶⁴ and also because those rules often pursue diverse and potentially conflicting objectives. Second, CJEU construed the nature of pre-entry integration requirements in isolation of significant policy studies on their effects in practice.¹⁶⁵ Already in 2011, Goodman argued that FRD ‘*reveals strategic thinking by policy-makers to use positive, politically acceptable language of integration and inclusion to achieve potentially objectionable and discriminatory outcomes of exclusion*’.¹⁶⁶ Third, the avoidance of any reference to the EU Charter plays down the significance of the right to family reunification when it is in conflict with national powers and the protection of national identity. The Court could have construed a more coherent and consolidated interpretation of the exercise of the EU right to family reunion on the basis of the Article 7 and 24 of the Charter and it would improve the desired consistency between the EU vis-à-vis the ECtHR jurisprudence in the field of immigration and rights, and allow the EU to become a frontrunner in the protection of human rights. It would additionally be welcomed in view of the slowing down of the process of EU accession to the ECHR. Wouldn’t in view of the above the interpretation of pre-departure, civic integration measures as *per se* disproportionate and not facilitating societal integration be more adequate?

There is no easy answer to this question, especially given the fact that the CJEU most probably did not want to confront with Member States on this sensitive political issue. Yet by not offering a more interventionist interpretation the Court also gave a political signal to the Member States who have been recently tightening their family reunification laws. It is thus regrettable that the EU Court did not take the constitutional road of interpretation which would prove its openness to arguments which have been raised in the literature for a long time and supported by empirical evidence.¹⁶⁷ CJEU did not decide for the move that the *pre-entry* integration measures are contrary to fundamental rights. Even though, the assumption that those measures facilitate integration of family members *before* they are permitted to enter the Member States’ territory and *in isolation* of a sponsor who resides in that state is reasonably doubtful, costly, and also contrary to reality findings by the scholarship and NGOs.¹⁶⁸ Such an interpretation would have reflected a much broader societal context and had an exemplary effect from the ethical and justice standpoint.¹⁶⁹ CJEU also did not take the route to clarify the application and interpretation of a notion of ‘integration’ as a condition of admission of TCNs to the EU. It would also be desirable in the present context of migration crisis and for the realisation of the equality ideals and EU values. Especially, as it is rightly claimed that the conditionality of integration has only first appeared in the secondary law together with FRD, and that earlier, the EU approaches to integration were

164 Cf. Hailbronner & Thym 2016, n 121 above, p. 9-10.

165 See e.g. works cited in fn 168.

166 Goodman 2011, n 128 above, p. 235.

167 Cf. a claim for a constitutional reasoning in the context of the EU Dublin system of asylum law made by D. Thym, ‘Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: Jafari, A.S., Mengesteab and Shiri’, 2018 *Common Market Law Review* 55: 561-563.

168 S.W. Goodman & M. Wright, ‘Does Mandatory Integration Matter? Effects of Civic Requirements on Immigrant Socio-economic and Political Outcomes’, 2015 *Journal of Ethnic and Migration Studies* 41(12): 1885-1908; Strik et al. 2012, n 12 above; and projects IFCAP (<http://www.ru.nl/law/cmr/research/projects/ifcap/>), INTEC (<http://www.ru.nl/law/cmr/research/projects/intec/>) and PROSINT (<http://research.icmpd.org/projects/integration-non-discrimination/prosint/>) cited therein, p. 111.

169 Cf. G. de Búrca, ‘Conclusion’, in: D. Kochenov, G. de Búrca & A. Williams (eds), *Europe’s Justice Deficit?*, Oxford: Hart Publishing 2015, p. 459-464. See also: D. Kochenov, ‘Equality Across the Legal Orders; Or Voiding EU Citizenship of Content’, in: E. Guild et al. (eds), *The Reconceptualisation of European Union Citizenship*, Leiden/Boston: Brill 2014, p. 301-320.

traditionally rooted in the principles of near-equality, security of residence, and non-discrimination.¹⁷⁰

Instead, the approach of CJEU visible in the analysed judgments is based on narrowly construed interpretation of FRD, non-rights based approach and pragmatic towards national powers in light of the current political climate towards the migration crisis. In consequence, and as a matter of principle, CJEU accepted the broad protection of national identity and of national powers over immigration control as combined with the proportionality/effectiveness assessment.

Finally, as a result of the present approach of the EU Court, 'integration' has remained the normative condition in the EU immigration law. The CJEU's interpretation confirmed a reversed order in which rights of migrants are applied, that is, rights, security and equality become a reward for success in formal integration courses/exams undertaken by TCNs; instead of a process where rights, residence, security and equality with the receiving population would become tools for integration in host societies. Needless to say, that approach of CJEU maintains the objective inequality of various persons under EU legal order and a worse position of minority migrant groups. Again, it is cautious and rational in the current EU reality, and the migration crisis, but can it be sustained against the consensus that judges are well-placed to stand up to government, and to majorities who may disregard the interests of individuals and minorities?

¹⁷⁰ Jesse 2016, n 56 above, p. 1074; Carerra 2009, n 20 above, p. 392.