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van deskundigen in
internationaal vreemdelingen-,
vluchtelingen- en strafrecht

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To Mr. De Brouwer
Reference CM02-003
Date 15th of March 2002

Dear Mr. De Brouwer,

At the Laeken summit in December 2001, the European Council asked the Commission to draft an alternative for the existing draft Directive on Family Reunification (COM (1999) 638) before April 30, 2002. Thus, the Commission has been confronted with the question whether there is a way to solve or to avoid controversies that the Council appeared not to be able to cope with. At this vital moment of the drafting process, the Dutch Standing Committee of experts on international immigration, refugee and criminal law would like to ask your attention for some considerations that might be helpful in finding a solution.

Basically, there appear to be three possible approaches to the problem:

a. Maintaining the text of the draft directive as it was, and thus refusing to soften the dilemmas for the Council. This does not appear to be an easy way to go, given the subtle and delicate political relationship between Commission and Council.
b. Bringing down the level of protection of family life prescribed by the Directive by removing any provision that might be difficult to accept for any Member State. Such a reduced text would risk lowering the level of protection accorded already in one or more Member States. This even more so, if the Commission would stay true to its initial full harmonisation purpose according to which Member States would not be allowed to maintain or introduce provisions offering a higher level of protection of family life. This risk could be minimised by introducing a standstill-clause and a provision explicitly allowing Member States to grant protection at a higher level, like the European Parliament suggested in its report. Unsolved, however, would remain the problem that it would be more difficult, in the coming decades, for the European Court of Justice to interpret the provisions of such a Directive in an extensive way when the explicit wordings of individual articles of the Directive are clearly of a restrictive character. For instance, when the maximum age for family reunification with children would be fixed at 14 years or less, it would be difficult for the Court to rule that such a maximum age should be ignored. Thus, the level of protection of family life would risk to be fixed at a too low level for a long period.
c. Concentrating on harmonisation of basic principles governing family reunification and leaving the formulation of detailed provisions to a later stage of harmonisation. This is basically the approach advocated by the Dutch Standing Committee in 1999 in its "Proposal for a regulation on minimum standards for family reunification and family formation". For your information, we reproduce the text of this proposal as an annex to this letter. Of course, we do not pretend that this text would be ready for use but we do hope that it might be helpful as an example of a way of thinking that might offer a way out of a difficult situation. At first sight, the text seems to leave law making in the field of family reunification to the Member States. But in two essential respects this is not true. Firstly, while the Member States are explicitly bound by community standards. Secondly, while the European Court of Justice will be enabled to give binding interpretations of those community standards in terms of more detailed conditions with which national immigration law of the Member States must comply. The form of a Regulation was chosen to make clear that its content will be binding immediately after its entry into force. On the long term, this could lead to an *acquis* formed by the case law of the European Court of Justice that could be used as the backbone of a more detailed Directive. In drafting this proposal for a Regulation, the Standing Committee has tried to formulate standards that no reasonable Member State could make objections to.

The choice between option b and option c is essentially a choice between two long term perspectives: either fixing family reunification at an unsatisfactory level for a long period or opening possibilities for a more positive development of family reunification by case law on the long term.

When the Commission would choose for approach b, then the Standing Committee would be of the opinion that the following minimum requirements should be met:

- The Directive should contain a minimum right to family reunification. Therefore it should be established beyond doubt that the Member States remain free to maintain and introduce more favourable provisions in their national legislation for third country nationals.
- A standstill clause. It is important that the Member State having a certain level of protection will maintain this level.
- Article 3(4)(b) should be reformulated thus, that the Directive is without prejudice to more favourable provisions of *all* bilateral and multilateral agreements, binding on one or more Member States, amongst which the European Convention for the protection of Human Rights and Fundamental Freedoms.
- The provision should be maintained, according to which family reunification for EU citizens who did not use their right to free movement, will be governed by the conditions mentioned in Articles 10, 11 and 12 of the Regulation (EEC) 1612/68 and the other relevant provisions of community law. Presently, the Netherlands appears to be the only Member State actually involved in the decision making process, objecting to the ending of "reverse discrimination".

If the Commission would choose for the alternative mentioned under c, then the text of the regulation or directive should enable the European Court of Justice to set EU standards for family reunification deriving from the European Convention for the protection of Human Rights and Fundamental Freedoms and the UN Convention on the Rights of the Child. Possibly it would be necessary to insert a provision stating expressly that those two conventions are applicable to the Community right of family reunification. In that case, the above mentioned first and third point (minimum harmonisation and prevailing of international standards) will follow from the structure of the Regulation (or Directive). The second point (standstill clause) should be mentioned in the text, but even if it would not be inserted, the text would hopefully contain enough minimum standards as to guarantee - in the long term - a satisfactory level of protection of family life. The fourth point (community treatment of EU-citizens not using their right to free movement) has been expressly mentioned in our draft text. However, it might be sufficient to provide that the regulation or directive is applicable both to third country nationals as to EU-citizens. This would mean that article 2 should be amended as

> "Third country nationals residing lawfully within the territory of a Member State and citizens of
> the European Union who do not use their right to free movement are entitled to family reunification according to national legislation of the Member States within the conditions set by
> this Regulation".

The essence of this would be, that the issue of "reverse discrimination" would be brought within the scope of competence of the European Court of Justice. In the decisions of the Court on Morson and Jhanjan (1982[3723]) and Surinder Singh (7 July 1992 C-370/90) the main obstacle was the non-applicability of community law on the situation of citizens of Member States who did not use their right to free movement. By implementing Article 63 TEC in the way as suggested, the situation of EU-citizens residing in their own country would unequivocally be brought under the scope of article 12 TEC.

These were our remarks on this subject. We hope that this letter may contribute to a satisfactory outcome of this first stage of harmonising the legislation on family reunification. Of course we are willing to give you additional information on our proposals, if necessary.

Yours sincerely,

Permanente commissie van deskundigen
in internationaal vreemdelingen-,
vluchtelingen- en strafrecht

On behalf of the Standing Committee of Experts
on international immigration, refugee and criminal law,

Prof. Pieter Boeles

cc. Mrs. France Mochél

(Annex: the proposal for a regulation of June 1999)

(Annex)
Standing Committee of Experts on International Immigration, Refugee and Criminal Law, The Netherlands

Proposal for a Regulation on Minimum Standards for Family Reunification and Family Formation

The Council (etc)

Considering that he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
Considering that the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and the UN Convention on the Rights of the Child (1989), and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
Considering that Article 12 ECHR guarantees that men and women of marriageable age have the right to marry or to found a family in accordance with national law.
Acknowledging that particular protection and assistance should be given to the family, as the fundamental unit of society and the natural environment for growth and well being of the family members and in particular children, to enable the family to take its full responsibilities in society.
Acknowledging, that, as recognised by the UN Convention on the Rights of the Child, children, in order to enjoy the potential for full and harmonious development of their personality, must be brought up in an atmosphere of happiness, love and understanding,

Has established the following regulation:

1. Definitions:
   a) **Family** any durable form of cohabitation of two people complying with the legislation of the state where they reside, and the cohabitation of one or more parents and the children descending from them or adopted by them according to the applicable legislation, recognised by the state either where they reside or wish to reside; and all ascendants and descendants who are dependent on the principal or his or her cohabitee;
   b) **Child** anyone younger than 21 years or dependent;
   c) **Family reunification** the right of a family to live together with a principal (being any of the persons included in the definition of a family) on the territory of a Member State;
   d) **Family formation** the founding of a family by marriage, cohabitation or adoption according to the legislation of the Member State either where the family members reside or wish to reside and the right to reside with a family member on the territory of a Member State.
2. Third country nationals residing lawfully within the territory of a Member State are entitled to family reunification and family formation according to national legislation of the Member States within the conditions set by this Regulation.

3. No other conditions may be attached to the right to family reunification and family formation than those which are necessary in a democratic society in the interest of national security, public safety, the protection of public order and the prevention of crime, the protection of the health or good morals or for the protection of rights and freedoms of others.
4. No conditions may be attached to the right of family reunification and family formation which are impossible to be met by the person concerned or which may not reasonably be asked from him or her to fulfil.
5. The right to family reunification and family formation may not be subject to such waiting periods or other suspensory conditions which would unreasonably damage the education of children of the family or would have the effect of nullifying or impairing the right to family life.
6. Measures to fight and prevent fraud must be proportionate to the goal pursued and must not result in making it impossible for persons to realise their genuine desire to enjoy family life.

7. Family members who are granted residence in a Member State for family reunification or family formation must have free access to the labour market of that Member State after a maximum of one year of legal residence.
8. When deciding whether family members are allowed to remain in the Member State after the reasons for family reunification or family formation have disappeared, the competent authorities of the Member State must take into account all relevant interests in every individual case, including the best interests of any children involved. Further, family members must become entitled to an individual right to economic activity and residence after not more than three years residence on the territory.
9. Applications for residence by other relatives or foster children who do not meet the definition of family members must be considered by the competent authorities in the light of all relevant circumstances of the individual, including the best interests of any children involved.
10. Any individual whose application for family reunification or family formation has been refused, or whose residence permit has been withdrawn, must have a right to appeal against such decision before a competent court with power to consider the merits of the case in the Member State were he she resides or wishes to reside. Member States must ensure that their legislation offers effective and fair proceedings before an independent court and provides the possibility that the court may, if requested, take interim measures to prevent disproportionate injury or irreparable damage.
11. This regulation is not applicable to family reunification and family formation with citizens of the Union, residing in their own country. In those cases, family reunification and family formation will be governed by the conditions mentioned in Articles 10, 11 and 12 of the Regulation (EEC) 1612/68 and the other relevant provisions of community law.

(This text was made in Amsterdam, Leiden, in June 1999, by the Standing Committee of experts on international immigration, refugee and criminal law, P.O. Box 201, 3500 AE Utrecht, The Netherlands)