Case Note

Court of Justice of the European Union

The Right to Family Reunification of Third-Country Nationals under EU Law; Decision of 4 March 2010, Case C-578/08, *Rhimou Chakroun* v. *Minister van Buitenlandse Zaken*

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Introduction

On 4 March 2010 the Court of Justice of the European Union issued its first judgment on the conformity with EU law of national provisions implementing Directive 2003/86/EC on the right to family reunification. In the case *Chakroun* v. *Minister van Buitenlandse Zaken*[1] the Court had to rule on the Dutch implementing measures concerning resource requirements and the concepts of family reunification and family formation.

The case concerned a Moroccan national, Rhimou Chakroun, who wished to join her husband, Mohammed Chakroun, in the Netherlands. Mohammed Chakrou, likewise a Moroccan national, has resided in the Netherlands since 1970 and holds a permanent residence permit. In 1972, two years after his moving to the Netherlands, the couple got married in Morocco, where Rhimou Chakroun continued to reside for the following years. In 2006 she decided to apply for a provisional residence permit (*machtiging tot voorlopig verblijf*, hereinafter called MVV) at the Dutch Embassy in Rabat in order to live with her husband in the Netherlands. At that point of time Mohammed Chakroun was receiving unemployment benefits. The Dutch authorities refused the application for a MVV on the ground that Mr Chakroun's income was below the minimum income applicable to family formation under Dutch law.[2]

After an unsuccessful objection and appeal against the decision, the case came before the Council of State, the highest court of appeal in Dutch immigration

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[1] Case C-578/08 *Chakroun* [2010] *ECR* I-0000.

[2] Mr Chakroun received unemployment benefits of € 1322.73, whereas the Dutch minimum income for cases of family formation was € 1441.44.

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law, which posed two questions to the Court of Justice. It inquired first whether member states are entitled by virtue of Article 7(1)(c) of Directive 2003/86 to deny family reunification to a sponsor who has stable and regular resources to meet general subsistence costs, but who will be entitled to claim special assistance. Secondly, the Council of State asked whether the Directive, and in particular Article 2(d) thereof, precludes national legislation which makes a distinction according to whether a family relationship arose before or after the entry of the resident into the member state.

Apart from the Dutch implementation of the resource requirement and the distinction drawn between cases of family formation and family reunification, the *Chakroun* case has raised questions of a more general nature: What are the limitations to national discretion in imposing restrictions on the exercise of the rights granted to third-country nationals (TCNs)? To what extent can and must the rights of TCNs be interpreted in analogy to the rights of Union citizens? What are the implications of the increasing number of rights of TCNs under EU law for the concept of reverse discrimination? And what is the impact of general principles of EU law on the rights of TCNs?

Background

Directive 2003/86/EC on the right to family reunification provides common European standards and conditions for TCNs residing lawfully in an EU member state to be reunited with their family members.[3] According to Article 1, the Directive is aimed at determining the 'conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.' Recital 4 of the Directive's preamble identifies family reunification as a way of promoting the fundamental Union objectives of facilitating the integration of TCNs and promoting economic and social cohesion.

The relevant provisions for the decision in *Chakroun* were Articles 2(d), 7(1) and 17 of the Directive. Article 2(d) defines the concept of family reunification

[3] Council Directive 2003/86/EC of 22 Sept. 2003 on the right to family reunification, *OJ* {2003] L 251/12. The period for implementation expired on 3 Oct. 2005. The Directive has been discussed widely in the academic literature, *see* for instance, H. Schneider and A. Wiesbrock, 'The Council Directive on Family Reunification: Establishing Proper Rights for Third Country Nationals?', in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe's Future*, Vol. II: The Position of Third Country Nationals in Europe (Maastricht, Forum Maastricht 2005), p. 35-70; H. Oosterom-Staples, 'The Family Reunification Directive: A Tool Preserving Member State Interest or Conducive to Family Reunification Unity?', in A. Baldaccini, E. Guild and H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford, Hart Publishing 2007), p. 451-488; K. Groenendijk et al., *The Family Reunification Directive in EU Member States: The First Year of Implementation* (Nijmegen, Wolf Legal Publishers 2007).

for the purpose of the Directive, referring to the 'entry into and residence in a Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit, *whether the family relationship arose before or after the resident's entry*.' Articles 6-8 contain certain requirements that member states may impose upon TCNs in order to benefit from the right to family reunification. The requirement under scrutiny in Chakroun was that of 'stable and regular resources' which are sufficient to maintain the sponsor and his/her family members, without recourse to the social assistance system of the member state concerned (Article 7(1)(c)).[4] When assessing the nature and regularity of resources, national authorities are allowed to take the national minimum income and the number of family members into account. Article 17 provides that member states shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the member state and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.

In the Netherlands, rules on the entry and residence of third-country nationals are laid down in the Aliens' Act (*Vreemdelingenwet*, hereinafter called Vw 2000)[5] and the Aliens' Decree (*Vreemdelingenbesluit*, hereinafter called Vb 2000).[6] The detailed rules on the granting of residence permits for the purpose of family reunification are contained in Articles 3.13 ff. Vb 2000. The implementing measure for Directive 2003/86 was a Royal Decree of 29 September 2004,[7] amending the Aliens' Decree. Under the same Decree, a distinction was drawn between those cases where the family relationship already existed prior to the sponsor's entry into the Netherlands (family reunification) and cases where the family relationship was created at a time where the sponsor was already living in the Netherlands (family formation).[8]

[4] Other requirements include the absence of any reasons for refusal/withdrawal of the permit on grounds of public policy, public security or public health, adequate accommodation for the entire reunited family, sickness insurance for all family members, compliance with integration measures and a residence requirement of up to two years (*see* Arts. 6, 7 and 8 of the Directive).

[5] The first Aliens'Act (*Vreemdelingenwet*) adopted in 1965 (Stb. 1965, 40), has been amended several times and has been replaced by a new Aliens' Act on 23 Nov. 2000(Stb. 2000, 495, iwt. 1 April 2001).

[6] Besluit van 23 Nov. 2000 tot uitvoering van de Vreemdelingenwet 2000 (Vreemdelingenbesluit 2000).

[7] Besluit van 29 Sept. 2004 tot wijziging van het Vreemdelingenbesluit 2000 in verband met de implementatie van de Richtlijn 2003/86/EG van de Raad van 22 Sept. 2003 inzake het recht op gezinshereniging (PbEG L 251) en enkele andere onderwerpen betreffende gezinshereniging, gezinsvorming en openbare orde, Stb. 2004, 496.

[8] Family formation was defined in Art. 1.1(r) Vb 2000 as family reunification of the spouses, registered or non-registered partner if the family relationship has been established at a time when the sponsor had his main place of residence in the Netherlands.

Different rules for cases of family reunification and family formation were applied in two respects: the applicable minimum age and the amount of resources required. In the case of family reunification both spouses were required to be at least 18 years of age, whereas in the case of family formation a minimum age requirement of 21 years was applied.[9] As far as resource requirements are concerned, Article 3.22 Vb 2000 obliges the sponsor to demonstrate the availability of reliable and independent income, which is as least as high as the social security standard of a married couple or family. In the case of family reunification the income requirement is equal to the statutory assistance criterion (i.e., the statutory minimum wage, below which income a person becomes entitled to general assistance), including holiday pay, for the relevant category (single people, single parents or married couples).[10] In the case of family formation,[11] the permanent and individual net income had to be at least 120% of the Dutch minimum salary[12] for a worker aged 23 years or older (so the norm for family formation was €1441.44 at the relevant time).[13] This amount applied irrespective of age, i.e., also to sponsors who were younger than 23.[14] According to the explanatory memorandum to the law introducing the 120% rule, an income that is equal to the net minimum salary (100% norm) does not prevent the person concerned from relying on income-related benefits financed with public funds.[15] This is due to the fact that the Law on work and assistance (*Wet werk en bijstand*)[16] provides for the provision of 'general assistance' as well as temporary 'special assistance' by local authorities. Whereas general assistance is intended to cover essential living costs, special assistance may be granted in order to cover essential living costs arising from exceptional circumstances.[17] Thus, even persons who have an income equal or above the national minimum wage may be able to claim special assistance in case they are unable to meet essential costs arising from exceptional circumstances. Individuals lose their entitlement to special assistance as soon as their income rises above 110-130% of

[9] Arts. 3.14(2) and 3.15(2) Vb 2000.

[10] Art. 3.22(1)(a) jo. Art. 3.74(1)(a) Vb.

[11] *See* Kamerstukken II 2006/07, no. 32, p. 2094-2110.

[12] Art. 3.22(1)(a) jo. Art. 3.74(1)(d) Vb.

[13] Art. 8(1)(a) jo. Art. 14 Wet minimumloon en minimumvakantiebijslag.

[14] An exemption from the resource requirement applies only to sponsors over the age of 65 or suffering from total and permanent incapacity for work, *see* Art. 3.22(3) Vb. Also in respect of family members of a refugee submitting an application for family reunification within three months after the sponsor has been granted refugee status, the resource requirement will be waived, *see* Art. 3.22(4) Vb.

[15] Nota van Toelichting bij het Besluit van 29 Sept. 2004 tot wijziging van het Vb 2000.

[16] Wet van 9 Oct. 2003, houdende vaststelling van een wet inzake ondersteuning bij arbeidsinschakeling en verlening van bijstand door gemeenten (Wet werk en bijstand), Stb. 2003, 375.

[17] *See* Arts. 5(b) and 35(1) Wwb.

the minimum wage, depending on their municipality of residence. The income threshold of 120% for the purpose of family formation was chosen as the national average of an income level beyond which individuals no longer have access to special assistance.

The Opinion of Advocate-General Sharpston

Advocate-General Sharpston delivered her Opinion on 10 December 2009. The Advocate-General took the view that Directive 2003/86/EC precludes the drawing of a distinction between family reunification and family formation as far as resource requirements are concerned.[18] In her view there were no objective reasons for applying different income thresholds to the otherwise comparable situations of family reunification and family formation. Therefore, treating one group more favourably than the other was not permissible under EU law.[19] Sharpston relied on the general EU principle of equal treatment or non-discrimination in order to support her claim that the distinction drawn by the Netherlands legislation is precluded. According to her, whilst it would be 'foolhardy' to rule out any possibility to justify a distinction between cases of family reunification and family formation, the amount necessary to maintain a family cannot be affected by whether the family relationship arose before or after the sponsor's entry to the member state.

Furthermore, the Advocate-General considered that the Directive does not authorise a resource requirement leading to systematic rejection of an application for family reunification in cases where the reunited family would merely have a potential entitlement to special assistance in exceptional circumstances.[20] She argued that special assistance was available to a minority of the population under exceptional circumstances only. A systematic rejection of applications for family reunification in such cases is therefore not authorised under Article 7(1)(c) and runs counter to the requirement of an individual assessment of applications under Article 17 of the Directive.

The judgment of the Court

The Court of Justice started off by making a number of general statements concerning the interpretation of Directive 2003/86/EC. The Court held that the

[18] Paras. 35-55 of the Advocate-General's Opinion.

[19] Sharpston distinguished the preferential rules applicable to cases of family reunification from cases where no income requirement is applied to persons above a certain age or refugees. In such cases objective factors for such a difference in treatment exist.

[20] *See* paras. 56-71 of the Opinion.

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Directive establishes a clearly defined individual right to family reunification, leaving member states without a margin of appreciation.[21] Even though member states are allowed to make the exercise of the right to family reunification subject to compliance with the conditions contained in Chapter IV of the Directive,[22] the Court stressed that 'authorisation of family reunification is the general rule.'[23] Hence, the possibilities of member states to impose conditions upon third-country nationals wishing to reunify with their family members from abroad have to be interpreted strictly. Member states may not use the room of manoeuvre granted to them in a way which would effectively undermine the objective of promoting family reunification. In addition, the Court relied on the fundamental right to family life enshrined in Article 8 ECHR and Article 7 of the Charter of Fundamental Rights,[24] holding that the provisions of the Directive must be interpreted in the light of this fundamental right.

Concerning the requirement of 'stable and regular resources' of the sponsor as a precondition for family reunification, the Court ruled that Article 7(1)(c) of the Directive precludes the application of a minimum income requirement which amounts to 120% of the national minimum salary. Even though member states are allowed to take into account the level of minimum national wages when evaluating the sponsor's resources, they may not operate a minimum income level below which all applications for family reunification will be refused. This is due to the fact that, by virtue of Article 17 of the Directive, an 'individual examination of applications for family reunification' is required. Moreover, the concept of 'social assistance' in the Directive refers to assistance granted in compensation for a lack of stable, regular and sufficient resources, and not to special assistance which covers exceptional or unforeseen needs. When interpreting the requirement of having 'sufficient resources' so as not to rely on 'social assistance', the Court referred to its previous judgment in *Eind*,[25] which concerned a TCN family member of a Union citizen.[26]

[21] Para. 41 of the judgment.

[22] These are the absence of grounds of public policy, public security or public health that would justify the rejection of an application, adequate accommodation, sickness insurance and stable and regular resources sufficient to maintain the entire reunited family, compliance with integration measures and a residence requirement of up to two years (*see* Arts. 6-8 of the Directive).

[23] Para. 43 of the judgment.

[24] *See also* recital 2 of the Directive's preamble, which states that the obligation under international law to protect family life should be protected when adopting measures concerning family reunification.

[25] Case C-291/05 *Eind* [2007] *ECR* I-10719.

[26] *See* for a discussion of the *Eind* case A. Venekamp, 'Het arrest Eind. Het vrije personen verkeer: een begin zonder einde?' [The Eind judgment. Free movement of persons: a beginning without end?], *Nederlands tijdschrift voor Europees recht* (2008) p. 130-136; J. Bierbach, 'European Citizens' Third-Country Family Members and Community Law', 2 *European Constitutional Law Review*

Regarding the second preliminary question, the Court underlined that Article 2(d) of the Directive precludes member states from making a distinction between family relationships that arose before or after the sponsor entered the territory (with the specific exception of refugees as stipulated in Article 9(2) of the Directive[27]). According to the Court

> having regard to that lack of distinction, intended by the European legislature, based on the time at which the family is constituted, and taking account of the necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness, the Member States did not have discretion to reintroduce that distinction in their national legislation transposing the Directive. (para. 64)

In this respect the Court referred to the Directive's preamble and its *travaux préparatoires*, the right to family life under Article 8 ECHR and Article 7 of the Charter, but also to its judgment in *Metock,*[28] which likewise concerned the situation of third-country national family members of EU citizens. The distinction drawn between family formation and family formation in the Netherlands was held to be inconsistent with the provisions and underlying principles of the Directive.

Comments

The *Chakroun* judgment is the first case decided on national law transposing one of the Directives applicable to legally resident third-country nationals. The Court's approach in dealing with the rights of TCNs in the EU is to be welcomed, constituting a strengthening of migrants' rights and imposing limits to national discre-

(2008) p. 344-362; D. Martin, 'Comments on Gouvernement de la Communauté française and Gouvernement wallon (Case C-212/06 of 1 April 2008) and Eind (Case C-291/05 of 11 December 2007)', 10 *European Journal of Migration and Law* (2008) p. 365-379; S. Coutts, 'La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. "Minister voor Vreemdelingenzaken en Integratie" contre "R.N.G. Eind"', 1 *Revue du droit de l'Union européenne* (2008) p. 167-173.

[27] This provision establishes the possibility for member states to grant more favourable treatment to refugees whose family relationship predates their entry.

[28] Case C-127/08 *Metock and Others* [2008] *ECR* I-6241, para. 93; The case has been discussed widely in the academic literature, *see* for instance, S. Peers, 'Free Movement, Immigration Control and Constitutional Conflict', 5 *European Constitutional Law Review* (2009) p. 173-196; S. Currie, 'Accelerated justice or a step too far? Residence rights of non-EU family members and the Court's ruling in Metock', 34 *European Law Review* (2009) p. 310-326; A. Lansbergen, 'Metock, implementation of the Citizens' Rights Directive and lessons for EU citizenship', 31 *Journal of Social Welfare and Family Law* (2009) p. 285-297.

tion in treating TCNs. Identifying family reunification/formation as the 'general rule' and all derogations from it as limited exceptions has several consequences, all of which follow directly or more implicitly from the judgment:

- The drawing of parallels between the rights of Union citizens and those of third-country nationals.
- The establishment of a unified norm for protection of family life in cases of family formation and family reunification.
- The restrictive interpretation of derogations from the right to family reunification/family formation.
- The necessity of an individual assessment of each application.

Converging the rights of Union citizens and TCNs

In *Chakroun* the Court for the first time establishes a direct link between the rights of Union citizens and their family members on the one hand and the rights of TCNs on the other, relying on its previous case-law in respect of Union citizens when interpreting the provisions of Directive 2003/86/EC. Approximating the rights of legally resident TCNs to those of Union citizens has been an objective of the Union since the Tampere European Council in 1999.[29] Yet, the Directives adopted in order to regulate the admission and residence of third-country nationals, including the Directive on Family Reunification, fall short of fulfilling the Tampere objectives.[30] With the *Chakroun* judgment the Court of Justice has made its contribution towards more comparable treatment of Union citizens and TCNs by interpreting their rights analogously.

This deviates from the Court's initial approach in dealing with the rights of TCNs. In the case *Parliament* v. *Council*,[31] which concerned an action of annulment brought by the European Parliament against certain provisions of Directive 2003/86/EC, the Court made a clear distinction between TCNs' right of respect for family life and the right to family reunification on the part of EU citizens, which goes farther than the right of respect for family life of Article 8 ECHR.[32] The Court relied on the case-law of the ECtHR in respect of the right to respect for family life, rather than the much stronger right to family reunification embodied

[29] Tampere European Council, Presidency Conclusions, 15 and 16 Oct. 1999.

[30] K. Groenendijk, 'Family Reunification as a right under Community Law', 8 *European Journal of Migration and Law* (2006) p. 215-230.

[31] Case C-540/03 *Parliament* v. *Council* [2006] *ECR* I-5769.

[32] Case 267/83 *Diatta* [1985] *ECR* 567, paras. 16 and 17, and Case C-413/99 *Baumbast and R* [2002] *ECR* I-7091, para. 74; Case C-291/05 *Eind* [2007] *ECR* I-0000, para. 43; *see also* Case C-60/00 *Carpenter* [2002] *ECR* I-6279, para. 41 and Case C-109/01 *Akrich* [2003] *ECR* I-9607, paras. 58 and 59.

in Union law when interpreting the rights of TCNs under Directive 2003/86/EC.[33] Referring to the case-law of the ECtHR in immigration cases, the Court held that the provisions of the Family Reunification Directive are in compliance with European law, provided that they are interpreted in conformity with Strasbourg case-law. The possible applicability of EU general principles of law and case-law dealing with the family reunification of Union citizens were not discussed. Thus, the *Chakroun* case represents a change in approach of the Court, interpreting the rights of TCNs in line with case-law applicable to moving Union citizens and their family members.

The Court has drawn an analogy between the case-law applicable to TCNs and EU citizens in two respects: the distinction between family formation and family reunification and the imposition of resource requirements. These were the two concrete questions asked by the referring Court and they will both be addressed below. However, there are no reasons as to why the analogous interpretation of case-law applicable to Union citizens could not be extended to other concepts, such as public policy/security grounds justifying the refusal of a residence permit.

It is interesting to note that for the purpose of family reunification rights, the Court draws an analogy between the situation of TCNs and *moving* Union citizens. This is in spite of the fact that neither the sponsor nor the incoming family members have moved between member states. The Family Reunification Directive does not even contain any provision providing for the possibility of movement to another member state, in contrast to the remaining four Directives on regular migration adopted under the previous Title IV EC (now Title V TFEU).[34] Thus, the position of TCNs is approximated to that of moving Union citizens even though their entry and residence rights are restricted to a single member state. This is due to the fact that the very existence and application of Directive 2003/86/EC brings the family reunification of third-country nationals within the scope of EU law, whereas the Treaties apply to Union citizens only if they have moved to another member state.

Contrary to Union citizens who benefit from Union law only if they make use of their free movement rights, TCNs are hardly encourage to move. This is re-

[33] D. Martin, 'Comments on European Parliament v. Council', 9 *European Journal of Migration and Law* (2007) p. 148.

[34] Directive 2003/109/EC of 25 Nov. 2003 concerning the status of third-country nationals who are long-term residents, *OJ* [2004] L 16/44; Directive 2004/114/EC of 13 Dec. 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, *OJ* [2004] L 375/12; Directive 2005/71/EC of 12 Oct. 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, *OJ* [2005] L 289/15; Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ* [2009] L 155/17.

flected in the lack of provisions adequately addressing the situation of family members of TCNs who are moving to another member state. TCNs who are attempting to make use of the mobility provisions contained in the Directives on long-term residents, students, researchers or highly skilled migrations mostly have to rely on the regime of Directive 2003/86/EC in order to bring their family members with them. This means that they are likely to face a 'dual burden' of complying with the conditions of admission, including resource requirements and integration tests in the first as well as the second member state.

Third-country nationals with long-term residence status as well as highly skilled migrants moving to another member state do have the right to be accompanied by their spouse and minor children if the family was already constituted in the first member state.[35] However, in cases where the family was not already constituted in the first member state, Directive 2003/86/EC applies with certain derogations in the case of highly skilled migrants.[36] Thus, both the Directive on long-term residents and the Directive on highly skilled migrants explicitly draw a distinction between cases of family reunification and family formation for the purpose of TCNs moving to a second member state. It is unlikely that these provisions will be affected by the *Chakroun* judgment, since they still allow for the entry of family members with whom a family relationship was established after entry into the first member state in accordance with Directive 2003/86/EC. The family reunification rights of TCNs moving to a second member state under the Directives on students and researchers are even more limited. Directive 2005/71/EC on researchers does not grant a *right* of family reunification to TCN researchers. Member states are merely prohibited from subjecting researchers wishing to be joined by their family members to a minimum period of residence,[37] even though it is not even clear whether this prohibition also applies to researchers moving to a second member state. Apart from that, member states are 'encouraged' to allow family members to join the researcher in another member state but enjoy discretion in determining the conditions for family reunion under national law.[38] Directive 2004/114/EC on students does not contain any reference whatsoever to the right to be accompanied by family members when moving to a second member state.

Thus, whereas Union citizens benefit greatly when moving to another member state by becoming subject to the regime of EU law, the same does not hold true for TCNs. As to the contrary, in the case of family formation even highly skilled migrants and long-term residents, whose mobility is supposed to be encouraged,

[35] Art. 16 of Directive 2003/109/EC and Art. 19(1) of Directive 2009/50/EC.
[36] Art. 16(5) of Directive 2003/86/EC and Art. 19(6) jo. 15 of Directive 2009/50/EC.
[37] Art. 9(2) of Directive 2005/71/EC.
[38] Recital 19 of the preamble to Directive 2005/71/EC.

have to rely on the regime of Directive 2003/86/EC to be accompanied by their family members when moving to a second member state. Upon movement within the EU they might even face stricter entry conditions than for initial entry, depending on the national implementation of Directive 2003/86/EC by the second member state. Hence, far from stimulating movement, as in the case of Union citizens, the regulatory framework applicable to the family reunification of third-country nationals tends to discourage and limit mobility. This stands in contrast to the stated objective of all four Directives containing mobility provisions to enhance the movement and circulation of TCNs in the Union.[39]

Family reunification and family formation

In *Chakroun,* the Court establishes a unified norm for protection of family life of TCNs in the EU, ruling out any distinction made at the national level according to the place and/or period of time that the marriage was concluded. This principle follows from Article 2(d) of Directive 2003/86/EC but has been clarified and strengthened by the Court's reference to case-law applicable to Union citizens in this respect. In the landmark *Metock* ruling of 2008 the Court ruled on the entry and residence rights of TCN spouses of EU citizens. Relying on the fundamental principle of the free movement of persons,[40] the Court overruled the 'first point of entry' principle established in *Akrich,*[41] according to which member states were permitted to require third-country national spouses to have previously been lawfully resident in another member state in order to benefit from the rights conferred by the Treaty.[42] It underlined that TCN spouses of moving EU citizens cannot be required to have been lawfully resident in a member state in order to rely on the provisions of Directive 2004/38/EC. Moreover, the Court established that it makes no difference when and where the marriage was concluded, and whether the third-country national entered the host member state before or after the Union citizen. In *Chakroun* the Court extends this reasoning to third-country nationals. It indicates that 'by way of analogy' the *Metock* ruling should be applied, preventing member states from distinguishing between third-country nationals

[39] Recital 18 of Directive 2003/109/EC, recital 16 of Directive 2004/114/EC, recital 5 to Directive 2005/71/EC and recital 15 to Directive 2009/50/EC. *See* A. Wiesbrock, 'Free movement of third-country nationals in the European Union: the illusion of inclusion', 35 *European Law Review* 4 (2010) p. 455-475.

[40] E. Fahey, 'Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in Metock', 36 *Legal Issues of Economic Integration* (2009) p. 83-89.

[41] Case C-109/01 *Akrich* [2003] *ECR* I-9607.

[42] For criticism on this ruling, *see* for instance, A. Arnull, *The European Union and its Court of Justice* (Oxford, Oxford University Press 2006), p.460; R. White, 'Conflicting Competences: Free movement rules and immigration laws', 29 *European Law Review* (2004) p. 385.

based on the time at which the family was constituted. This means that the prohibition of the 'first point of entry' principle as established in *Metock* also applies to TCNs relying on Directive 2003/86/EC. For the purpose of benefiting from the provisions of the Directive it is irrelevant when and where the marriage of two TCNs was concluded.

The Court's approach in *Chakroun* is notable, as it deviates from the approach taken by the ECtHR, which used to be the main point of reference for the Court when dealing with the rights of third-country nationals. According to the established case-law of the ECtHR, Article 8 ECHR does not grant a right to family reunification.[43] In family reunification cases, the ECtHR has found a violation of Article 8 ECHR only in exceptional circumstances, considering the far-reaching consequences of a rejected application for the family life of the applicant.[44] In its case-law, the ECtHR considers the particular circumstances of each case, including the difficulties of the individual in establishing family life in another State, in order to find out whether the State has failed to strike a fair balance between the interests of the applicant and those of the State.[45] The Strasbourg Court has demonstrated a particularly restrictive approach in respect of cases of family formation. Already in *Abdulaziz*, the Court underlined that the case did not relate to family members of immigrants who had established family bonds before the sponsor's movement to the country of residence, but that it concerned the creation of new family ties after the sponsor had settled in the UK.[46] Also in *Sen*, the Court mentioned that a distinction has to be made between cases where applicants created family ties after they had established themselves in the host state and cases where family bonds existed prior to migration.[47]

By extending the *Metock* reasoning to cases of family reunification of third-country nationals, the Court establishes a unified norm for the protection of family life in the EU. Even though differences granted to moving Union citizens and third-country nationals under Directives 2004/38/EC and 2003/86/EC still exist, both categories of applicants enjoy a right to family reunification as well as to

[43] *Abdulaziz, Cabales and Balkandali* v. *United-Kingdom,* Appl. Nos. 9214/80, 9473/81, 9474/81, 28 May 1985, *Gül* v. *Switzerland,* Appl. No. 23218/94, 19 Feb. 1996; *Ahmut* v. *the Netherlands*, Appl. No. 21702/93, 28 Nov. 1996.

[44] *Sen* v. *the Netherlands,* Appl. No. 31465/96, 21 Dec. 2001, para. 41 and *Rodrigues da Silva and Hoogkamer* v. *The Netherlands*, Appl. No. 50435/99, 31 Jan. 2006, para. 44.

[45] *See* for instance *Ahmut* v. *The Netherlands*, Appl. No. 21702/93, 28 Nov. 1996, para. 73; *Sen* v. *The Netherlands,* Appl. No. 31465/96, 21 Dec. 2001, para. 41. In recent cases the ECJ seems to be more willing to find a violation of Art. 8 ECHR in cases involving family reunification. *See* the cases of *Rodrigues da Silva and Hoogkamer* v. *The Netherlands*, Appl. No. 50435/99, 31 Jan. 2006, and *Tuquabo Tekle and others* v. *The Netherlands*, Appl. No. 60665/00, 1 Dec. 2005.

[46] *Abdulaziz, Cabales and Balkandali* v. *United-Kingdom,* Appl. Nos. 9214/80, 9473/81, 9474/81, 28 May 1985, para. 68.

[47] *Sen* v. *The Netherlands,* Appl. No. 31465/96, 21 Dec. 2001, para. 37.

family formation under Union law. This comprehensive approach deviates from the Strasbourg case-law, where a distinction between family formation and family reunification is permissible. It has been argued that the adoption of immigration law measures at the Union level is likely to have an influence on the jurisprudence of the ECtHR, which might be encouraged to 'tighten its control intensity and pay less attention to the Contracting Parties' margin of appreciation',[48] for the reason of dealing with a common normative framework of EU immigration law, rather than national legislation with its structural specificities.

Restrictive interpretation of derogations from the right to family reunification/formation

It follows directly from the *Chakroun* judgment that derogations from the right to family reunification or family formation must be interpreted restrictively. The Court has made this explicit in respect of resource requirements, underlining that the concept of 'stable and regular resources' must be regarded as an autonomous provision of Union law and be interpreted uniformly throughout the Union. Neither Article 7(1)(c), nor any other provision of Directive 2003/86/EC, determines how to interpret this requirement. It appears from the legislative history of Directive 2003/86/EC,[49] that during discussions in the Council, different proposals with regard to how to apply the resource requirement were made, none of which were eventually included in the final text. In *Chakroun* the Court gave a first indication on how to interpret the concept of stable and regular resources, but many questions remain still to be answered.

When discussing the resource requirements of Article 7(1)(c) of Directive 2003/86/EC, the Court referred to *Eind*,[50] a case relating to third-country national family members of Union citizens. The question arises as to whether the analogy with case-law regarding EU citizen implies that the resource requirement under the Directive on Family Reunification ('stable and regular resources') must be interpreted in the same way as the resource requirement in Directive 2004/38/EC ('sufficient resources').

The Court's case-law on the requirement of 'sufficient resources' in Directive 2004/38/EC indicates that it is sufficient for the nationals of member states to have the necessary resources, with no requirement regarding their origin.[51] Add-

[48] D. Thym, 'Respect for private and family life under Article 8 ECHR in immigration cases: a hum right to regularize illegal stay?', 57 *International and Comparative Law Quarterly* (2008) p. 87-112 at p. 111.

[49] *See* Council of Europe Docs. 5682/01 of 31 Jan. 2001, p. 17; 7144/01 of 23 March 2001, p. 12; 7612/01 of 11 April 2001, p. 11; 8491/01 of 10 May 2001, p. 13 en 11330/01 of 2 Aug. 2001, p. 5.

[50] Case C-291/05 *Eind* [2007] *ECR* I-10719.

[51] Case C-200/02 *Zhu and Chen* [2004] *ECR* I-9925, para. 30. For a discussion of the resource requirement, *see* E. Hilbrink, 'Het middelenvereiste in EU-rechtelijk perspectief' [The resource requirement from an EU-law perspective], 9 *Journaal Vreemdelingenrecht* (2010) p. 13-22.

ing a requirement as to the origin of the resources which is not necessary for the attainment of the objective of protecting public finances would according to the Court constitute a disproportionate interference with the exercise of the *fundamental right of freedom of movement and residence* enshrined in the Treaties.[52] Accepting reliance not only on personal resources but also on the resources of a third person, the Court has acknowledged the possibility of relying on the resources of a partner with whom the Union citizen concerned has no legal link.[53] The analogy with *Eind* in the *Chakroun* case seems to imply that also in the case of third-country nationals, identical requirements apply: the resource requirements are restricted to the purpose of avoiding reliance on the social security system of the host member state and must be proportionate to that end. If the same standards were to be applied to Union citizens and third-country nationals as far as resource requirements are concerned, the resources of the incoming spouse/partner would have to be taken into account when calculating the relevant resources and the requirement would have to be strictly necessary and proportionate to the objective of protecting public finances. It is still unclear whether by referring to *Eind* in the *Chakroun* judgment, the Court did away with the difference between 'sufficient' and 'stable and regular resources' and has equated the situation of Union citizens and TCNs in spite of the absence of a 'fundamental right of freedom of movement'.

Were that to be the case, a number of additional national requirements attached to the available income of the sponsor would have to be abolished. For instance, in the Netherlands, the income of a sponsor is only considered to be reliable if it is going to be paid for the next twelve months within the framework of an employment contract. The requirement to demonstrate the availability of sufficient resources for one year at the moment of application was ruled to be in violation of the concept of 'stable and regular resources' contained in Article 7(1)(c) of the Directive by a Dutch district court in October 2008.[54] This decision was, however, overruled by the Council of State in November 2009, holding the Dutch legislation to be in compliance with Directive 2003/86/EC. Yet, the way the Court deals with the concept of stable and regular resources in *Chakroun* seems to confirm the view of the district court. The Court essentially limits national discretion in interpreting the resource requirement, emphasising its nature as a Community concept and drawing an analogy with the resource requirement imposed upon Union citizens.

It is notable, however, that by referring to paragraph 29 of the *Eind* case the Court is comparing TCNs to not just any Union citizens, but *economically inactive*

[52] Case C-200/02 *Zhu and Chen* [2004] *ECR* I-9925, para. 33.

[53] Case C-408/03 *Commission* v. *Belgium* [2006] *ECR* I-2647, para. 38-51.

[54] Judgment of the immigration chamber of the District Court of Maastricht, 23 Oct. 2008, case number AWB 07/36627.

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Union citizens. This can be explained on the basis of the fact that a limitation on the free movement rights of Union citizens by requiring them to demonstrate the availability of sufficient resources to avoid becoming a burden on the social assistance system of the host member state can only be imposed upon non-economically active Union citizens. Articles 7 and 12 of Directive 2004/38/EC clearly distinguish between the residence right of workers/self-employed persons and their family members and all other Union citizens who may be required to demonstrate that they have sufficient resources not to become a burden on the social assistance system of the host member state. Hence, on the one hand the Court's reference to economically inactive Union citizens when discussing the resource requirement in the Family Reunification Directive is not surprising. On the other hand, one might wonder about the implications of referring to the rights of economically inactive Union citizens when interpreting the family reunification rights of economically active TCNs. Such an approach is likely to limit the rights of family members of employed and self-employed TCNs. Apart from the right to social assistance, maintenance aid for studies[55] and study benefits to the workers' children, which can in any case not be extended to TCNs under the regime of Directive 2003/86/EC, the comparison with non-economically active Union citizens bears consequence for the residence rights of TCNs and their family members, allowing for a loss of the right of residence as soon as they show a lack of resources, even if the sponsor is still employed in the host member state.[56]

In more general terms it follows from the judgment that, being derogations from an EU right, any national provisions that limit the exercise of the right to family reunification or formation of TCNs must be interpreted strictly and in compliance with general principles of EU law, including the principle of proportionality. An identical reasoning as discussed for resource requirements must apply to all other possible requirements to be imposed upon third-country nationals to enjoy their right to family reunification/formation, such as housing requirements, integration conditions, residence requirements. All of these will have to be strictly necessary and proportionate in light of the objective pursued and must be interpreted strictly. It is not entirely clear whether the Court will pursue the same approach within the context of other Directives granting rights to TCNs, such as Directive 2003/109/EC on long-term residence status. A difference might spring from the fundamental status of the right to family life which finds no equivalence in the context of the acquisition of long-term residence status.

[55] Art. 24(2) of Directive 2004/38/EC.
[56] Art. 12(2) of Directive 2004/38/EC.

The obligation of an individual examination

Just as significant as the restrictive interpretation of derogations from the right to family reunification and the analogies drawn with EU citizens is the clarification of the requirement of an individual assessment of each application. The Directive states in Article 17 that member states must take a number of personal factors of the applicant into account when rejecting an application for family reunification. The Court already indicated in the *EP* v. *Parliament* case that Article 17 constitutes a crucial provision in guaranteeing the fundamental rights of third-country nationals and their family members.[57]

However, it was only in *Chakroun* that the Court made crystal clear the implications of this provision for requirements to be imposed upon third-country nationals entering for the purpose of family reunification: Article 17 'requires individual examination of applications for family reunification.' This means that all member states will have to introduce a mechanism that provides for an individual assessment of each case, rather than relying on a number of blanket requirements.[58] This again applies not only to resource requirements, but also to integration measures, residence requirements, housing requirements and so forth. A system such as the one operating in the Netherlands, which allows for deviation from the general rule only in exceptional circumstances at the Minister's discretion does not seem to fulfil the requirement of a consistent individual assessment of applications for family reunification.[59]

It is also noteworthy that the Court has considered an individual examination of each case unnecessary in respect of Union citizens within the context of access to study benefits. In such cases a blanket residence requirement, without any consideration of the individual circumstances of the case may be operated by the member states.[60] Even though access to study benefits is clearly a different matter than exercising the right to family reunification, which is closely connected to the fundamental right to family life, it is still remarkable that the Court so clearly requires an individual assessment of each case, disallowing any generally applicable rules.

Reverse discrimination

Another interesting implication of the *Chakroun* judgment is the way in which EU law creeps into the realm of national immigration law and how the extension of

[57] Case C-540/03 *Parliament* v. *Council* [2006] *ECR* I-5769, para. 64.

[58] *See* for this opinion, K. Groenendijk, 'Family Reunification as a Right under Community Law', 8 *European Journal of Migration and Law* (2006) p. 224.

[59] *See* Arts. 3:4 lid 2 and 4:84 Awb; A. Wiesbrock, 'Noot Chakroun', 5 *European Human Rights Cases* (2010) p. 520-529.

[60] Case C-158/07 *Förster* [2008] *ECR* I-8507, para. 58 and the AG opinion, paras. 128-133.

rights to TCNs affects the issue of 'reverse discrimination'. The Court has consistently held that in so-called 'purely internal situations', EU rights and principles of law do not apply.[61] Union citizens who do not move across the inter-state borders are subject to national law and do not benefit from the provisions of the Treaties. Member state nationals residing in their own state may therefore end up being treated less favourably than Union citizens who have made use of their free movement rights. It has been argued that in light of the notion of Union citizenship as a 'fundamental status'[62] of each national of a member state, the Court should abandon its restrictive approach and reverse its case-law in respect of internal situations.[63] Yet more arguably, the issue of reverse discrimination should be resolved by the national or European legislator rather than the Court.[64]

The jurisprudence of the Court that is to be expected in the light of *Chakroun* is likely to have a significant impact on instances of reverse discrimination. The rights contained in Directive 2003/86/EC are explicitly not applicable to non-moving nationals of a member state and even the application to dual EU/non-EU nationals has been excluded by many member states.[65] Where it was previously already controversial in the national arena to treat European citizens who have come from another member state more favourably than nationals, it appears unacceptable in the light of public opinion to maintain non-mobile nationals as the least favourably treated group, if benefits in terms of family reunification are extended to third-country nationals. Thus, in cases where rights of third-country nationals are involved, national legislators are likely to immediately align the rights of non-moving nationals with those of third-country nationals, if not with those of EU citizens.

[61] *See* Joined Cases C-64/96 and C 65/96 *Uecker and Jacquet* [1997] *ECR* I-3171, para. 23; Case C-148/02 *Garcia Avello* [2003] *ECR* I-11613, para. 26; Case C-403/03 *Schempp* [2005] *ECR* I-6421, para. 20; Case C-192/05 *Tas-Hagen and Tas* [2006] *ECR* I-10451, para. 23; Case C-212/06 *Government of the French Community and Walloon Government* [2008] *ECR* I-1683, para. 39; and Case C-499/06 *Nerkowska* [2008] *ECR* I-3993, para. 25.

[62] The Court has used the concept of Union citizenship as a 'fundamental status of nationals of the Member States' in cases such as Case C-184/99 *Grzelczyk* [2001] *ECR* I-6193, para. 31; Case C-413/99 *Baumbast and R* [2002] *ECR* I-7091, para. 82 and Case C-148/02 *Garcia Avello* [2003] *ECR* I-11613, para. 22. For a discussion of the concept of the 'fundamental status' of Union citizenship and the relevant case-law, *see* for instance, K. Hailbronner, 'Free Movement of EU Nationals and Union Citizenship', in R. Cholewinski, R. Perruchoud and E. MacDonald, *International Migration Law. Developing Paradigms and Key Challenges* (Cambridge, Cambridge University Press 2007), p. 317-320; H. de Waele, 'EU Citizenship: Revisiting its Meaning, Place and Potential', 12 *European Journal of Migration and Law* (2010) p. 319-336; R. White, 'Free Movement, Equal Treatment and Citizenship of the Union', 54 *International and Comparative Law Quarterly* (2005) p. 885-905.

[63] A. Tryfonidou, *Reverse Discrimination in EC Law* (The Hague, Kluwer 2009), p. 154-172.

[64] A.P. Van der Mei, 'Editorial: Combating Reverse Discrimination: Who Should do the Job?', 16 *Maastricht Journal of European and Comparative Law* 4 (2009) p. 379-382.

[65] *See* the judgment of the immigration chamber of the District Court of Utrecht, 1 April 2008, case number AWB 07/33161.

This is exactly what happened in the aftermath of the Court's ruling in *Chakroun*. The caretaker Minister of Justice, Hirsch Ballin, immediately implemented the necessary regulatory changes not only for TCNs but also for Dutch citizens, even though the latter was not obligatory under Union law. Consequently, the distinction between cases of family reunification and family formation was abolished not only in respect of TCNs but also in respect of Dutch citizens who have not moved. Previously, Dutch citizens frequently fell under the rules on family formation, applying for entry and residence of a TCN spouse whom they entered into a relationship with in the Netherlands.[66] The reduction of the income requirement to 100% of the minimum income triggered by the *Chakroun* judgment also applies to such non-moving Dutch nationals. At the same time, Dutch citizens who previously fell under the rules on family reunification are equally affected by the decision to rise the overall minimum age to 21 years.[67] The relevant changes were presented as a mandate from Luxembourg, without even mentioning the fact that their implementation in respect of Dutch citizens was purely discretionary.[68]

Conclusion

In the *Chakroun* judgment, the Court has strengthened the right to family reunification and family formation of third-country nationals under EU law. The Court clearly establishes family reunification/family formation as a right of legally resident third-country nationals in the EU. All derogations from this right must be interpreted restrictively. Thus, member states are considerably limited in their possibilities to restrict entry and residence rights of third-country nationals' family members falling within the scope of the Directive, even if certain provisions thereof provide for the imposition of additional requirements in accordance with national law. Rather than focusing on the scope of discretion granted to member states in the Directive, the Court has emphasised the existence of a right of third-country nationals to family reunification and formation and restricted the possibilities for derogation from that right. By narrowing the room of manoeuvre of member states in implementing Directive 2003/86/EC the Court has mitigated the adverse and effect of the limited number of binding provisions contained in the

[66] It is interesting to note that prior to the 2004 amendments to the Aliens Law, family members of Dutch citizens enjoyed preferential conditions of access and residence to the Netherlands in comparison with family members of third-country nationals. *See* B. de Hart, *Onbezonnen vrouwen. Gemengde relaties in het nationaliteitsrecht en het vreemdelingenrecht* [Rash women. Mixed relationships in nationality law and aliens law] (Askant 2003), p. 99-119.

[67] *See* Arts. 3.14 and 3.15 Vb.

[68] *See* for instance, *NRC Handelsblad*, 'Inkomenseis bij hereniging met huwelijkspartner vervalt' [Income requirement for spousal reunification is void], 10 March 2010, available at <http://www.nrc.nl/binnenland/article2500853.ece/Inkomenseis_bij_hereniging_met_huwelijkspartner_vervalt>.

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Directive.[69] The Court's approach in *Chakroun* is likely to have implications not only for TCNs but also for non-moving Union citizens and their family members, as member states try to avoid situations where TCNs are treated more favourably than their own nationals. Thus, the legislation applicable to TCNs as interpreted by the Court can be expected to have an overall effect of causing rights within the Union to converge, between non-moving Union citizens, moving Union citizens and non-moving TCNs.

[69] *See* in this respect, the Commission Report on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610/3.

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