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A Shared EU Fixation on Third Country National Family Members?

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1. Introduction

This working paper is based on the analysis of 28 national replies to a questionnaire addressing the implementation of the provisions on family reunification in the context of Directive 2004/38 over the time frame 2014-2016.[1] It presents the main findings and is concerned with how the EU28 are implementing the provisions on family reunification and what issues are relevant for the effective exercise of EU citizenship rights in this specific area of law. This monitoring effort is part of the 2015-2018 work programme of the Jean Monnet Centre of Excellence implemented by the Centre for Migration Law (Radboud University Nijmegen). The questionnaire was sent out to 28 national experts and focused on 3 main themes: social rights, family reunification and permanent residence. The other two themes are addressed in separate working papers (available here).

Two questions are addressed in this examination of national law on the rights of entry, residence and protection against expulsion of third country national family members of EU nationals who are or have exercised a free movement right to live in another Member State. These are:

1. What are the effects in nationals law of CJEU judgments in the case of *O & B*[2] where an EU national having exercised a free movement right seeks to return with third country national family members to the Member State of origin?
2. What are the differences of national law on family reunion for nationals of the state and EU law on family reunion for EU nationals exercising free movement rights?

The objective is to understand better why family reunion with third country national family members has become an issue of substantial concern in some Member States and not in others. Our hypothesis is that where nationals of the state are subject to family reunion rules very similar to those of EU law there is little tension. But where national law is substantially more restrictive that EU law on the subject, state authorities become suspicious of their own nationals seeking to benefit from EU rules to avoid the more restrictive content of their own specific ones.

In this section we examine the issue of family reunion for EU citizens among the Member States. Our interest was particularly directed at how Member States treat their own nationals who acquire third country national family members while exercising a free movement right in another Member State and then seek to return home

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1 National replies to the questionnaire are on file with the author.

2 C-456/12 *O & B*, ECLI:EU:C:2014:135.

with the family. This led us also to examine the current state of convergence of national law on family reunion for citizens of the EU States with the right enjoyed by nationals of other Member States when present and exercising a free movement right. The question of the treatment of third country national family members of EU citizens returning to their home state was the subject of a judgment of the Court of Justice of the European Union in 2014.[3] Seven Member States intervened primarily supporting the position of the lead Member State, the Netherlands, claiming that their own citizens, when returning to their home state after exercising treaty rights in another Member State should not enjoy EU rights to bring their family members home with them. The Court of Justice was not particularly sympathetic to these states' arguments and found that EU citizens had the right to return home after genuinely exercising their free movement right in another Member State and to take with them any family members they may have acquired on route. The key for the Court was whether the EU citizens were actually exercising a free movement right more substantial than as tourists (Article 6 Directive 2004/38). Were these EU citizens actually working, self-employed, studying or self-sufficient in which case at least three months residence would be required? The dividing line of the Court between short stays as tourism and a genuine exercise of a free movement right which was capable of carrying a right to family reunification on return is the difference between Articles 6 and 7 of Directive 2004/38 (less than three months or more than three months). In light of the apparent concern of so many Member States about the matter, we expected to find resistance in application of the judgment at least in those states that intervened. Surprisingly this was not the case. Only one Member State (the UK) was still holding out and refusing to correctly apply the judgment by 2017. Other Member States, with the exception of the Netherlands had not even had to change their guidance, as it was already compliant. We considered it therefore necessary to examine also the differences between the treatment of EU citizens who have a right to family reunion under Directive 2004/38 and nationals of each Member States who are subject to national law only in this area. Was there a correlation between resistance to the Court's judgment in *O & B* and a higher threshold for family reunion for citizens rather than EU citizens? This did appear to be the case – in particular the wide difference in the Netherlands and the UK between the rights of EU citizens and own nationals under national law – seemed to be at the heart of the difficulties these states had with applying the jurisprudence.

2. Admission of Third Country National Family Members of Returning Citizens

In this section we set out the information provided by our experts in the Member States about the impact of the *O & B judgment* in their country. First, we will set out those states where no change was needed to national law following the *O & B* judgment with an explanation where relevant as to why this was the case. In **Austria** no

3 C-456/12 *O & B* ECLI:EU:C:2014:135.

change in legislation was needed as the Supreme Administrative Court had already held that Austrians returning to Austria from residence in another Member State and bringing with them third country national family members were entitled to do so as long as their residence there had been sustainable. Even short periods of employment in another Member State were sufficient. In the **Czech Republic** there is no reverse discrimination between the treatment of EU and Czech nationals. It is a little surprising then that this country participated in the *O & B* proceedings. **Germany** was not affected by the judgment as its Federal Administrative Court had already decided in 2010 that residence which constitutes more than mere visits do entitle German nationals returning to Germany to bring their third country national family members with them. No change of the law was needed. Again, the participation of Germany as an intervener in *O & B* seems to have been perhaps unnecessary unless this was to protect the existing position of German law at the time.

In **Estonia** there was no impact at all of the judgment (again raising the question why did this state bother participating in the proceedings?). **Spain** had already introduced equality between EU and Spanish nationals seeking family reunion in 2010. The basis of this equalization was to raise the rights of Spanish nationals to the same level as those of EU citizens. Thus the judgment did not have any effect here. **Finland** also appears to not have had any difficulty with the judgment. Its legislation already provided for family reunion for Finnish nationals where the relationship is established in the host state and there has been genuine residence there. No time limit was placed on the duration of that residence. In **Greece** there is no difference between the right of family reunion of Greek citizens and EU citizens thus the case had no impact. The same is true of **Croatia**. In **Hungary** although there is no legislation covering the issue in practice the administration applies the same rules to Hungarians coming home and EU citizens arriving. There are questions about whether the Hungarian nationals have actually moved back to Hungary or whether they are still living in another Member State (usually Romania) but setting up their family in Hungary. Similarly, the judgment had no impact in **Ireland** where national policy has remained unchanged since 2013. In **Luxembourg** there was no need to take any action to implement the judgment. As well, in **Latvia** and **Malta** no changes were required. **Poland**, notwithstanding having intervened in the case of *O & B* has no legislation which creates an obstacle for Polish nationals returning to the country after exercising free movement rights in another Member State to bring with them third country national family members acquired there. However, Polish law does not recognize a right of permanent residence for these family members equivalent to that of family members who joined a Polish national resident in the state without moving. The national configuration of rules on acquisition of a residence permit and holding it for a minimum of three years fits uneasily with EU law.

In **Portugal** the case had no impact as the constitutional right of family life has been interpreted as meaning that the rights of Portuguese nationals returning from another Member State is fully protected to the same extent as EU nationals arriving for the first time. In **Romania** there are no practical implications of the case as Romanian nationals have wider family reunion rights even than EU citizens. **Slovenia** needed no change of law or practice after *O & B* as its law was in conformity. **Slovakia**

did not change its law or practice either though it appears that Slovakian nationals returning after exercising free movement rights in another Member State where they acquired third country national Member States should seek visas for those family members before returning to Slovakia.

This overview is a little surprising as quite a few Member States which intervened in the case of *O & B* actually did not need to change their legislation following the judgment. This indicates that they were already fully compliant with the Court's judgment though perhaps they were eager to see a change in the constant jurisprudence nonetheless. These states are Belgium, the Czech Republic, Denmark, Germany, Estonia and Poland.

A second, and small group of states, were required to make minor amendments to their legislation to accommodate the Court's judgment. In **Belgium** a 2016 law clarified the difference between sedentary citizens and those who exercised a free movement right. A simple three months requirement was established for Belgians living in other Member States to be able to seek a visa for their third country national family members to return to Belgium with them. In **Denmark** a minor change of law was required to differentiate between economically inactive and economically active: as soon as Danish nationals become economically active in another Member State they are entitled to return with their third country national family members. All cases which had been rejected on this ground were re-opened. In **Italy** the judgment had no consequences. **Lithuania** considered that the case had implications for same sex partnerships, which is an issue of some political salience. In a Supreme Court decision, the issue was about the threshold to determine whether genuine family life had been established in another Member State. In **Sweden** while there does not appear to have been a substantial issue, nonetheless the legislature amended the law in 2014 to ensure that Swedish nationals returning there have the same rights as EU nationals on arrival.

A third group of states have on going or substantial issues with implementing the judgment. **Bulgaria** comes within this group. The principle of *O & B* has still not been implemented. Instead a 2016 law and Supreme Court judgment of the same year provide that EU law on family reunification of third country nationals with third country nationals (Directive 2003/86) applies to Bulgarian nationals returning home with third country national family members. **France** appears to continue to have issues with third country national family members of French citizens when returning to France. The authorities continue to apply a visa requirement and require the passing of a test of the French language and French values. There are expensive maintenance requirements and a cohabitation obligation. The **Netherlands** was the state against whose practices the case was brought. Following the judgment the authorities changed the guidelines regarding genuine residence in another state for its nationals returning after exercising free movement rights elsewhere in the EU. First, these authorities still required at least six months residence by their nationals in another Member State before accepting an application for a residence card for their third country national family members on return to the Netherlands. But this was changed

three months after the *O & B* judgment to bring national legislation into conformity with it.

The **United Kingdom** falls within the group of states for whom the judgment came as a disagreeable surprise. The authorities, rather than bringing their law and practice into line with the judgment, changed their rules after the (British) Advocate General's Opinion which was not upheld by the Court and which allows a much greater exercise of subsidiarity than the Court permitted. The result is that UK legislation is substantially inconsistent with the judgment. National guidance on British citizens returning to the UK after exercising free movement rights in another Member State are required to prove that their residence in another Member State was not only genuine, but to do so must show that the centre of the British citizens life moved to the other Member State. The length of residence of the third country national family members with the British citizen is considered to be highly relevant as well as whether the British citizen's residence in the host Member State was declared to all relevant authorities as his or her principal residence. Further the British citizen's integration into the host state is a relevant consideration as to whether the exercise of the free movement right is genuine. A long list of questions are posed to all families of British citizens returning to the UK after an exercise of a free movement right in another Member State which appear to seek to tease out answers which will place in doubt the 'genuineness' according to national law of the exercise of the free movement right and provide grounds for exclusion. Further, the right of residence of the third country national family members is strictly limited to the quality of the residence of the British sponsor – which must be on the basis of work, self-employment, studies or self-sufficiency. As soon as the underlying ground for residence in EU law of the principal falls away (for instance unemployment or reliance of social assistance) the right of residence of the third country nationals also falls away and they are liable to expulsion unless they are able to bring themselves with the scope of national law (which is generally not possible because the income thresholds are so much higher than in EU law). If the divergence of national law from EU law and the resolute refusal to comply with a judgment of the Court is an indication of integration into the EU then the UK reveals in response to this judgment alone a failure to be a faithful Member State or to respect the supremacy of EU law. The logic of BREXIT and the insistence on national sovereignty over immigration control is inscribed into the response of this Member State to the judgment.

Finally there is the situation of **Cyprus** which has not legislation in place regarding the subject.

3. National law on Family Reunion and EU Law

Article 2 of Directive 2004/38 is generous as regards the conditions of family reunion of EU nationals who are exercising free movement rights. For all of this class family is defined as including spouses (including registered partners under national law), children up to the age of 21 or dependent if older (including adopted children), descending and ascending family members in the first degree of consanguinity of the EU national and his or her spouses so long as they are dependent (a definition of which is

contained in EU law and is primarily economic in nature). There is also a duty in Article 3(2) of the Directive to facilitate the admission of persons not coming within this group if they are in a durable partnership with the EU citizen (duly attested), wider family members who are dependent on the EU citizen and his or her spouse or formed part of the household in the state of origin or where serious health grounds strictly require the personal care of the family member by the Union citizen. Only students do not enjoy a right to be joined by family members in the ascending line. For workers and the self-employed there are no health insurance or minimum income thresholds applicable.[4] These can only be applied in respect of economically inactive EU citizens.

In order to understand the reaction of Member States to the *O & B* judgment we sought to understand how different national law on family reunion for their own nationals who have not moved is from the right of family reunion for EU citizens moving to their state. This issue has been the subject of a number of studies over the past twenty years.[5] Interestingly, over the years, there appears to be a convergence of EU family reunion rules for EU nationals exercising their free movement rights and sedentary nationals. This convergence which diminishes the sense of unfairness between the treatment of EU nationals and own citizens may be critical to the lack of difficulty which the vast majority of Member States have had with the Courts judgment in *O & B*.

On the basis of information provided by our national experts, the first group of states, and by far the largest are those where the family reunion rights of own nationals and EU citizens are converging. These include **Austria** (though the class of third country nationals for whom EU law only requires facilitation of family reunion is not equally applied). The **Czech Republic** also has no discrimination between EU and national citizens as regards family reunion. In this group also falls **Estonia**. **Spain** similarly has no difference between the treatment of EU and Spanish nationals as regards family reunion. In 2016, the Supreme Court rejected a law purporting to place a requirement of income or resources for the purposes of exercising a family reunion right for Spanish nationals. In 2015 the law was widened to include the EU group of family members entitled to facilitation for entry to join also Spanish nationals who have not exercised an EU free movement right. In **France** in 2014 the law was changed to remove reverse discrimination against French national's family reunion with their

4 K. Groenendijk, 'Family reunification as a right under community law', 2006 *European Journal of Migration and Law* 8(2), p. 215-230; A. Wiesbrock, *Legal migration to the European Union*, Leiden: Brill 2010; C. Costello, 'Metock: Free Movement and Normal Family Life in the Union', 2009 *Common Market L. Rev.* 46, p. 587.

5 A. Walter, *Reverse discrimination and family reunification*, Nijmegen: Wolf Legal Publishers, 2008; K. Groenendijk, 'Family reunification as a right under community law', 2006 *European Journal of Migration and Law* 8(2), p. 215-230; C. Costello, L. Halleskov Storgaard & K. Groenendijk, *Realising the Right To Family Reunification of Refugees in Europe*, Issue Paper by Council of Europe Commissioner for Human Rights, Strasbourg: Council of Europe 2017; K. Groenendijk, E. Guild & R. Barzilay, *The Legal Status of Third-country Nationals who are Long-term Residents in a Member State of the European Union*, University of Nijmegen, Strasbourg: Council of Europe 2001.

third country national family members in comparison with their EU national counterparts. In **Greece** there is no difference of treatment between Greek nationals and EU citizen regarding family reunion. This is also the case in **Croatia**. **Italy** also comes within this group of equality. **Portugal** also has no discrimination between the treatment of its nationals for the purposes of family reunion and EU nationals. This is protected by the constitutional right to family life as interpreted by the courts. **Romania** is similar. In **Sweden** and **Slovenia** there are no substantial differences between family reunion for citizens and EU nationals.

The second group of states are those where there are minor differences between the right to family reunion with third country national family members and national laws regarding own citizens. In **Belgium** sedentary citizens have a slightly higher set of requirements for family reunion with third country nationals than their EU counterparts. These include proving sufficient accommodation, health insurance even in the case of a Belgian worker principal, and a fairly low subsistence requirement. In **Bulgaria** there is a slightly more restrictive definition of family members than the EU counterpart (other family members are not included). In **Germany** there is equivalence as far as spouses and minor children go but no other family members where EU nationals are privileged. The Federal Constitutional Court has refused to consider the issue of reverse discrimination against German nationals vis a vis their EU counterparts and the compatibility of such discrimination with the constitution. **Finland** comes within this group – national law is more restrictive for Finnish nationals than for EU citizens but the differences are not dramatic. Children are limited to those under 18 years and cohabitation for two years is required. There is no maintenance requirement but where there is no maintenance link nor a blood link between the putative parent and a child, the child cannot established a right to join the putative parent or to remain in Finland.

Hungary comes within this group as there are some administrative obstacles such as evidence in the form of proving cohabitation by means of a registered address. Also there are higher fees for Hungarian nationals than for EU citizens seeking family reunion. In **Lithuania** there are minor differences in rules on family reunion for own nationals and EU citizens but not so substantial as to place considerable obstacles in the way of nationals being joined by third country national family members. The same is true in **Latvia** where the group most discriminated against are same sex couples. **Malta** also follows this pattern but does not permit durable partners to work. Further couples must show stable and regular resources to support themselves. **Poland** also comes within this group where the differences are minor. However a recent court judgment found that an EU national with a third country national spouse where the EU national naturalized as a Polish citizen was disadvantaged in that his spouse could not get a permanent residence permit as the national rules which are more advantageous for Polish nationals (three years residence in the state and marriage to a Polish national) were not fulfilled as the Polish national had only recently become one. In **Slovakia** there are only minor differences in the treatment of own nationals and EU citizens regarding family reunification with third country national family members. There is an interview requirement and also a visa obligation.

A third group of states are those where there are substantial differences between the treatment of own nationals (disadvantageously) in comparison with the more generous rules which apply in EU law. This differential is usually the reason for political, administrative and judicial reluctance to recognize the rights of EU nationals and in particular the assimilation of own nationals who have exercised a free movement right to the class of persons entitled to the wider EU rights. **Denmark** comes within this group of states where the difference between a restrictive national family reunion law and EU rules come into conflict. For Danish nationals, family reunion is only possible where very strict rules on genuine residence are fulfilled and it is clear that this is necessary to strengthen family life. Only spouses over the age of 24 may join a Danish national in Denmark and children under 15 years of age. There is an obligatory declaration of cohabitation and a substantial financial guarantee is required from the sponsor. Public assistance is not permitted at all for the first three years and the aggregate ties to Denmark of the couple must be greater than their ties to any other country in the world and must be proven. There is an accommodation and integration test to be passed. The couple must undertake to teach their children the Danish language. Further the primary purpose of the marriage must not be for the foreign spouse to come to Denmark (a negative burden of proof). In **Ireland** there is no right to family reunion with third country national family members. Acknowledged by the courts, family reunion is a 'gift' of the state not an entitlement. Many factors therefore need to be taken into account including economic ones which carry the most weight – can the family support itself properly without recourse to public funds. Not only is there a higher income threshold but the documentary evidence required is substantially more onerous. The **Netherlands** also comes within this group with very substantial differences between the treatment of their own nationals with no free movement background in comparison with EU nationals. Not only are there substantial income thresholds, health insurance requirements, language and integration test but also high fees for applications and special visa requirements. The **UK** has substantial differences in its law on family reunion for British nationals and EU citizens. These include visa requirements, high fees, language requirements, very high income requirements, obligatory health insurance and accommodation requirements. All of the requirements are applied in an administratively complex and document heavy procedure with no time limits on the state's consideration of the application.

As indicated above, **Cyprus** is in a sui generis situation as there is not legislation thus the rights, in particular, of Turkish Cypriots remain unclear.

3. Conclusions

A number of aspects of this review of national law in the light of a judgment of the Court of Justice and the convergence of EU law and national law on family reunion are revealed by this new study. First, notwithstanding the number of Member States which intervened in the case before the Court of Justice, it appears that most of the interveners actually had little interest in the case as their national law already provided for assimilation of the rights of their nationals to those of EU citizens moving to their country. Thus the differential between the treatment of own citizens and EU

citizens was equal to zero and not controversial. It remains unclear why, then, these states did intervene in the case considering that there was no particular interest from the perspective of their own national law in a clarification of the EU obligation. The applicability of Directive 2004/38 in the area of family reunion however, was a matter of interest and concern in some Member States.

Secondly, only four EU states had substantially different national law on family reunion for their own citizens from those applicable to EU citizens coming to live there (and own citizens returning after exercising free movement rights). These are **Denmark, Ireland, Netherlands** and **the UK**. These states have a real problem of reverse discrimination vis a vis their own nationals whose treatment as regards family reunion is substantially inferior to that of EU nationals. It is this differential which appears to push their citizens to go to other Member States to exercise free movement rights with the idea in mind of exercising their family reunion rights under EU law and possibly moving back to their home Member States afterwards. All four of these states appear, from the political discourse, to consider that this exercise of EU rights simply for the purposes of better family reunion right is somehow an abuse of rights which they should be entitled to stop. This discourse is particularly abrasive in the UK where the deal which the former Prime Minister made with the EU so that he could campaign for the UK to remain in the EU in the referendum which he called, included the incorporation of differential and more disadvantageous rules for British citizens' family reunion after exercising free movement rights elsewhere.[6]

Thirdly, the number of Member States where the family reunion rights of their own nationals have been assimilated to that of EU citizens has become the majority. Since the study by Walter in 2008, there has been a substantial move towards greater harmonization.[7] This has not been the result of legislation as EU law does not require Member States to change their laws as regards their own nationals but rather seems to be the result of a gradual move towards simplification and assimilation of EU rules, including beyond the actual scope of EU law.

6 E. Guild, *BREXIT and its Consequences for UK and EU Citizenship or Monstrous Citizenship*, Leiden: Brill 2016.

7 A. Walter, *Reverse discrimination and family reunification*, Nijmegen: Wolf Legal Publishers 2008.