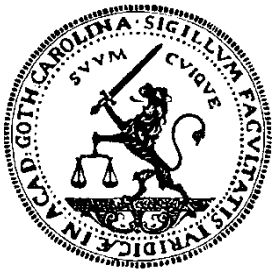

FACULTY OF LAW
Lund University

Lisa Bourghardt

Do You Have to Say "I Do" to be Entitled? - Family Reunification in EU Law

Master thesis
30 credits

Supervisor:
Xavier Groussot

EU Law

Spring 2010

Contents

Abstract

One of the most remarkable changes in European family law systems is the development of new institutions that provide a legal status for unmarried couples. Over the last decade, this change has also been accompanied by a rapid evolution of social attitudes towards same-sex couples that has lead to legal recognition in many Member States of the EU. An area of EU law where such developments could have an impact is the field of family reunification. After an expansion of the Unions competence in matters concerning immigration of third-country nationals, a directive regulating family reunification between third-country nationals was adopted: Directive 2003/86/EC - the Family Reunification Directive. Do you have to be married to enjoy a right to family reunification under this directive or has the growing legal recognition of unmarried opposite-sex couples and same-sex couples been incorporated?

In the initial proposal from the Commission, spouses as well as unmarried couples, who could be of the same sex, were included. However, this proposal proved to be too controversial for some Member States and the drafting process became difficult and long. In the text that finally was adopted, only spouses is given a general right to family reunification. As for all other couples, it is for the Member States to decide whether or not to grant settlement rights for their partners.

The meaning of the word "spouse" is not further determined by the directive, but by looking at the ECJ's jurisprudence it is clear that the term refers to a heterosexual couple joined in a legal marriage. Cases such as *Reed*, *Grant*, and *D and Sweden v Council* shows that the Court is not yet willing to expand this notion to adapt to the growing recognition of unmarried opposite-sex and same-sex couples. The Court has instead repeatedly held that such expansion is a question for the legislature.

An interpretation of the directive, in the light of the right to respect of family life does not seem to improve the situation for unmarried opposite-sex couples or same-sex couples. The right to family reunification under this fundamental right is very limited and far from a general one even for spouses. In fact, the protection under the Family Reunification Directive is more generous than under the ECHR. Nor does the prohibition of discrimination of sexual orientation seem to be of assistance as a same-sex union, e.g. a registered partnership, and a marriage is not found to be in a comparable situation according to the ECJ.

All in all, the Family Reunification Directive fails to respond to the growing legal recognition of unmarried opposite-sex couples and same-sex couples and does not afford any rights to the increasing number of people living in these kinds of relationships. In short, this means that you have to say "I do" to be entitled to family reunification under EU law.

Sammanfattning

En av de mest anmärkningsvärda förändringarna i Europas familjerätts-system är framväxten av rättsverkningar kopplat till samboskap. Denna utveckling har även under det senaste årtiondet följts av en snabb förändring av samhällsattityderna gentemot samkönade par vilket har lett till ökat rättsligt erkännande i många av EU:s medlemsländer. Ett område av EU-rätten som potentiellt skulle kunna påverkas av en sådana framsteg är regleringen av anhöriginvandring. Efter att ha utökat EU:s kompetens över invandring av tredjelandsmedborgare antogs ett direktiv som reglerar anhöriginvandring mellan tredjelandsmedborgare: Direktiv 2003/86 - familjeåterföreningsdirektivet. Måste man vara gift för att ha rätt till familjeåterförening under det direktivet eller avspeglar den rättsakten även det ökade erkännandet av samboskap och samkönade par?

I det ursprungliga förslaget från kommissionen inkluderades både makar och ogifta par, vilka kunde vara samkönade. Detta förslag visade sig dock vara alltför kontroversiellt för vissa medlemsstater vilket ledde till att lagstiftningsprocessen blev svår och långdragen. I den skrivning som slutligen antogs är det endast makar som ges en generell rätt till familjeåterförening. Det är upp till medlemstaterna att själva besluta om den rätten vad det gäller övriga par.

Begreppet ”makar” definieras inte närmare i direktivet men från EU-domstolens praxis är det tydligt att det är det heterosexuella gifta paret som åsyftas. *Reed*, *Grant* och *D och Sverige mot rådet* är fall som visar att domstolen ännu inte är redo att vidga begreppet ”makar” och anpassa det till de ökande rättigheterna för samkönade par och sambor. EU-domstolen har istället vid upprepade tillfällen poängterat att en sådan anpassning måste ske genom lagstiftning.

Att tolka direktivet i ljuset av rätten till respekt för familjeliv verkar inte kunna förbättra situationen varken för heterosexuella par som lever i samboskap eller för samkönade par. Enligt denna grundläggande rättighet är rätten till familjeåterförening väldigt begränsad och långt ifrån ovillkorlig, även för makar. Familjeåterföreningsdirektivet ger i själva verket starkare skydd än vad Europakonventionen gör. Inte heller verkar förbudet mot diskriminering på grund av sexuell läggning kunna förbättra läget eftersom en samkönad relation, t.ex. ett registrerat partnerskap, inte är i en likvärdig situation med äktenskap enligt EU-domstolen.

Sammantaget så misslyckas familjeåterföreningsdirektivet att bemöta det växande rättsliga erkännandet av både heterosexuella och homosexuella ogifta par och ger inga rättigheter till de ökande antal människor som lever i dessa typer av relationer. Detta innebär att ett ”ja” i kyrkan eller i rådhuset är den enda vägen till en rätt till familjeåterförening inom EU-rätten.

Abbreviations

AG	Advocate General
Art	Article
Charter	Charter of Fundamental Rights of the European Union
CLJ	Cambridge Law Journal
CMLRev	Common Market Law Review
COM	Document of the European Commission
CYELS	Cambridge Yearbook of European Legal Studies
EC	Treaty establishing the European Community
ECHR	European Convention on Human Rights and its Protocols
ECJ	European Court of Justice
ECR	Reports of Cases before the Court of Justice of the European Union
ECtHR	European Court of Human Rights
EEC	European Economic Community
ELJ	European Law Journal
ed	editor
EP	European Parliament
EU	European Union
f	following page
ff	following pages
IGC	Intergovernmental Conference
ILGA	International Lesbian and Gay Association
JHA	Justice and Home Affairs
n.y.r.	not yet reported
OJ	Official Journal of the European Union
p	page
PaCS	Pacte civil de solidarité
para	paragraph
TCN	Third Country National
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

1 Introduction

One of the most remarkable changes in European family law systems is the development of new institutions that provide a legal status for unmarried couples. These innovations should probably be seen as a response to wider social and cultural changes in society that has lead to an increase in unmarried cohabitation amongst opposite-sex couples. Over the last decade, this change has also been accompanied by a rapid evolution of social attitudes towards same-sex couples that has lead to legal recognition in many Member States of the EU.[1] A form of registered partnership for same-sex couples have been introduced in most of the Member States.[2] It must however be underlined that there is a great diversity in rights tied to the registered partnerships. The legal consequences vary from almost equivalent to marriage in the Nordic model[3], to giving relatively limited rights as in the French PaCS law.[4]

In 2001, the Netherlands broke the heterosexual monopoly of marriage. Since then Belgium, Spain, Portugal and Sweden have followed and now grant same-sex couples and opposite-sex couples equal access to marriage.[5] Nevertheless, there has been a reverse development in some Member States where the marriage code has been revised and now expressly states that marriage is a heterosexual union between a man and a woman.[6] All in all, 16 of the 27 Member States provide some sort of legal recognition of same-sex couples while such legislation is lacking in 11 countries.

How has the EU responded to this increasing trend towards recognition of de facto families and same-sex partnerships? The union does not have explicit legal competence over family law but an area of EU law where the above-described developments could have an impact is family reunification, as it in a way defines what types of families that the Union wishes to promote and that are held worthy of protection. Family reunification is a

[1] For the situation among the Unions Members States, see Table 1 in the supplement. During merely a few summer months in 2010 important progress was made: Ireland introduced unregistered partnership for same-sex couples and Slovenia made further moves towards legalizing same-sex marriage. But it is not only within the EU this increasing speed of development can be seen. In December 2009, Mexico City became the first Latin American jurisdiction to legalize same-sex marriage, in June 2010 passed a law permitting same-sex couples to marry and a month later the same thing happened in Argentina. Furthermore, in June 2010, Iceland's Prime Minister Johanna Sigurdardottir became the first head of government married to a same-sex partner.

[2] A form of registered partnership exist in Austria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Luxembourg, Slovenia and United Kingdom, see Table 1 in the supplement and the sources there quoted.

[3] Term employed by M Bell, *Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union*, European Review of Private Law 5-2004 and H Toner, *Partnership Rights, Migration and EU Law*, Hart Publishing, Oxford, 2004.

[4] Pacte Civil de Solidarité (Journal Officiel de la République Française 16.11.1999 16959. For a comparison between different types of registered partnerships see M Bell, p 616-617.

[5] *Schalk and Kopf v Austria*, Application no 30141/04, (24.05.2010), para 27.

[6] H Toner (2004), p 20.

recognized reason for immigration and means that the legal residence of one family member in a certain country enables the rest of the family to immigrate to that country as well. In Europe, such family based migration has become more important since 1973 in the wake of the oil crisis when governments put restrictions on the guest-worker system due to a decline in the demand of labour.[7] These restrictions did, however not stop the immigration as the "guest" stayed and wished to be reunited with their family members.[8] Today, family-related migration represents almost half of all immigration to the Union.[9]

The first act in the EU legal order laying down rules for family reunification was Regulation 1612/68.[10] The purpose with regulating this type of migration was that the possibility for family members to join the migrant worker was recognized as a key to facilitating the mobility of prospective migrant workers and their integration in the host society.[11] As for the substance of the right to family reunification under Regulation 1612/68, no distinction was made between couples whose ties was formed before or after the migration took place. The ECJ has furthermore interpreted the provisions generously in relation to spouses in order to set aside immigration policies which unduly interfere with their right to family reunification,[12] as seen in *Commission v Germany*,[13] *Singh*[14], *Carpenter*[15] and *MRAX*[16]. On the other hand, the definition of family in these first rules was narrow, only giving a right to family reunification to the heterosexual nuclear family. This narrow understanding of the notion of family was criticized in 2001 by AG Geelhoed in Baumbast for "not [having] kept pace with the social, cultural and economic developments which have occurred since the 1960s".[17] A couple of years later two directives regulating family

[7] A Kraler, Civic Stratification, Gender and Family Migration Policies in Europe - Final Report, International Centre for Migration Policy Development (ICMPD), May 2010, p 18.
[8] In S Castles and M Miller, *Age of Migration*, Palgrave Macmillan, Basingstoke, 2003, p 30 ff, the Western European experience of guest workers is used as an illustrator of the dynamics of migration. Despite a government's efforts, once a migration flow has started it cannot be turned off like a tap by placing restrictions. It will only lead to a transformation from labor migration to family based migration. A guest worker regime should therefore not be seen as temporary migration.
[9] Statistics as presented in A Kraler (2010), p 18ff. and Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification COM(2008) 610 final, p 2.
[10] Regulation 1612/68 on the Freedom of Movement for Workers within the Community [1968] OJ L 257/2.
[11] Case 63-76 *Inzirillo* [1976] ECR 2057; Case 207/78 *Even and ONPT* [1979] ECR 2019; Case 249/86 *Commission v Germany* [1989] ECR 1263, para 8. It should also be added that Art 48 and 49 EC was the legal basis for the regulation according to its recital 2.
[12] H Toner (2004), p 35 and A Tryfonidou, *Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach*, European Law Journal, Vol. 15, No 5, September 2009, pp. 634-653.
[13] Case 249/86 *Commission v Germany* [1989] ECR 1263.
[14] Case C-370/90 *Singh* [1992] ECR I-4265.
[15] Case C-60/00 *Carpenter* [2002] ECR 6279.
[16] Case C-459/99 *MRAX* [2002] ECR 6591.
[17] Opinion of AG Geelhoed in Case C-413/99 Baumbast [2002] ECR I-7091, para 34.

reunification were adopted, Directive 2004/38/EC[18] and Directive 2003/86/EC[19]. The former regulating family reunification in situations where at least one of the family members is an EU citizen and the latter, and the one at focus in this essay, concerns the group of TCNs that has been called denziens[20] i.e. people that are foreign citizens but with a legal and permanent resident status in a Member State.

1.1 Subject and Purpose

The aim of this essay is to answer the question of whether you have to be married to enjoy a right to family reunification under EU law or if the rapidly growing legal recognition of unmarried opposite-sex couples and same-sex couples has been incorporated in this field of law. For this purpose of examining what types of ties between a couple – marriage, registered partnership or cohabitation – that create a right to family reunification under EU law, I am going to focus on TCNs and their rights under Directive 2003/86/EC, hereinafter the Family Reunification Directive.

However, it is not only the legislation itself and the case-law connected to it that will be of importance. Family reunification is a field that is closely and inevitably tied to fundamental rights. In such circumstances, the ECJ's willingness to make an interpretation in the light of fundamental rights cannot be disregarded. In examining the provisions that define which family members that are entitled under the Directive, emphasis will thus be put on two of central general principles of EU law that interacts with family reunification: the fundamental right to respect for family life and the general principle of equality.

1.2 Delimitations

A number of limitations are in order. The most important delimitation is, as already mentioned, not to examine EU citizens' right to family reunification but to focus on TCNs. Nevertheless, cases and materials concerning EU citizens will at times be used to compare and to draw analogies to the situation of TCNs where that is appropriate.

As my aim is to explore what types of *couples* that are entitled under the Family Reunification Directive, the issues of family reunification between *other family members*, e.g. between parent and child, have been disregarded, in order not to go beyond the limits of this particular examination.

[18] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.
[19] Directive 2003/86/EC on the right to family reunification [2003] OJ L 251/12.
[20] T Hammar, *Democracy and the Nation State*, Avebury, Aldershot, 1990, p 15-23.

Although interesting, the essay will as far as possible stay clear of family reunification in cases involving deportation or expulsion. Member States' positive obligation to admit and give residence rights to a partner will instead be at focus. The reason for this is mainly to confine the scope of this examination within manageable limits and to center the attention on family reunification *stricto sensu*.

Finally, and it may go without saying, situations falling outside of the scope of the Family Reunification Directive, such as family reunification for asylum seekers or for TCNs residing illegally within the Union, will not be examined.

1.3 Outline

Family reunification is an issue that can be found in the intersection of two highly sensitive areas of social, political and religious controversy that at the same time touches upon two of the most controversial issues in EU Law: immigration of TCN and the legal recognition of same sex couples.[21] Member states have not been willing to let go of national competence over the area of marriage and partnership and the control over who has a right to entry and residence to the territory is said to be at heart of a nation's sovereignty. However, family reunification for TCNs does no longer lie within the exclusive competence of the Member States. Chapter 2 *Union Competence over Family Reunification* is descriptive and aims to serve as an overview of how the Union's competence over immigration of TCNs developed.

In the following chapter *Current Legislation - A Substantive look at Family Reunification,* the difficulties in drafting the Family Reunification Directive will be presented as well as the substance of Art 4 that determines what types of couples that have a right under the directive. As the ECJ has not yet had an opportunity to pronounce itself on Art 4, six key cases that involve the notion of family more generally will instead be presented and analyzed in Chapter 4 *The ECJ and the Family*. This is done in order to predict how the said provision will be interpreted in a future examination made by the Court.

Both Chapter 5 *The Fundamental Right to Family Life - Compatibility with the ECHR* as well as Chapter 6 *A Policy of "Married Only" and Discrimination on Grounds of Sexual Orientation* aims to establish how general principles can affect an interpretation of the Family Reunification Directive. The latter will examine whether a policy that only gives a right to family reunification to the married couple could be contrary to the

[21] That family reunification is a highly controversial issue was not at least seen in the aftermath of Case C-127/08 *Metock* [2008] ECR I-6241. The governments' reactions can, inter alia, be seen in the September 2008 JHA Council were a debate about the ruling in the context of the fight against illegal immigration was held.

prohibition of discrimination on grounds of sexual orientation found in the Charter of Fundamental Rights. The former presents how the fundamental right of respect of family life interacts with the Directive. This fundamental right is considered to be identical to Art 8 ECHR, and therefore, an evaluation of the comparability between the Strasbourg Court's jurisprudence and the Family Reunification Directive will be made.

As an analysis will be performed throughout this thesis, I will in the final chapter, simply make some concluding remarks.

1.4 Method

As for method goes, I have chosen to use a legal dogmatic method. Both primary and secondary legislation as well as case law from the ECJ will be presented and analyzed in order to fully assess the state of law. As family reunification is a dynamic area of law, legal doctrine and Opinions of Advocate Generals will be used as supportive sources. Moreover, dwelling in the area of legal principles in chapters 5 and 6, ECHR and relevant case-law from the ECtHR will be of great importance. Furthermore, travaux préparatoires is also used when describing the drafting process of the Family Reunification Directive.

Even if I am of the opinion that married couples, registered partners and unmarried couples *should* have an equal right to family reunification, disregarding their sexual orientation, the aim of this essay is not to advocate such a solution. The objective is instead to demonstrate and explain how the rules have and will be interpreted. With this being said, this essay will however not stay completely unaffected of the authors views.

2 Union Competence over Family Reunification

The first rules of family reunification were adopted in the 1960ties in Regulation 1612/61 which gave a migrant EU worker a right to be joined by his or her spouse.[22] This was seen as a way of promoting free movement.[23]

The above mentioned legislation was, however, only applicable if the sponsor, i.e. the migrant worker, was a national of a Member State. As for TCNs, the situation was unregulated in Community Law before 2003,[24] with the exception of persons covered by certain international treaties between the Community and its Member States on one hand, and third-countries on the other.[25] This did however not mean that Member States had an exclusive competence[26] as several human rights instruments potentially could have an impact on national rules on family reunification.[27] Nevertheless, none of them include a set of legal requirements which determine under what circumstances the Member States are obliged to grant family reunification.[28] Thus, the Member States were left with a very wide margin of discretion.

The main reason for this being a unregulated area of EU law until 2003, was the Unions lack of competence over immigration of TCNs. The following chapter will serve as a brief exposé over the development of Union competence over family reunification for TCNs.

---

[22] Art 10, Regulation 1612/68 on the freedom of movement for workers within the Community OJ 1968 L 257.

[23] Case 249/86 *Commission v Germany* [1989] ECR 1263, para 8; Case C-310/91 *Schmid* [1993] ECR I-3011, para 18. This has also been stated in relation to the legislation that amended Regulation 1612/68, see Case C-459/99 *MRAX* [2002] ECR 6591, para 53; Case C-60/00 *Carpenter* [2002] ECR 6279, para 38 and Case C 257/00 *Givane* [2003] ECR I-345, para 30.

[24] S Peers and N Rogers, *EU immigration and asylum law: text and commentary*, Martinus Nijhoff, Leiden, 2006, p 577. Also see Case 12/86 *Demirel* [1987] ECR 3719, para 10

[25] E.g. the EEA Treaty OJ 1994 L 1/1 and EC/Swiss Treaty OJ 2002 L 114/1.

[26] S Peers and N Rogers (2006), p 576f and H Oosterom-Staples, *The Family Reunification Directive* in A Baldaccini, E Guild and H Toner (eds), Whose Freedom, Security and Justice : EU Immigration and Asylum Law and Policy, Hart, Oxford, 2007, p 452f. The Commission expresses itself in a similar way in Proposal for a Council Directive on the Right to Family Reunification COM(1999) 638 final, p 3.

[27] Both the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly by General Assembly resolution 217 A (III) of 10 December 1948 and the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, recognizes the family as a natural fundamental unit of society and that it is as such entitled to the fullest possible protection by the state. However, it is the ECHR that is the most influential international instrument on EU law. Art 8 ECHR guarantees the right to respect of private and family life is the core provision regarding family reunification which will be examined in Chapter 5.

[28] S Peers and N Rogers (2006), p 577.

2.1 The Development of Union Competence over Migration Law

2.1.1 From Maastricht to Amsterdam

While free movement of EU-citizens always has been at heart of the EU project, this is not the case with the position of TCNs within the Union. Even though there was some intergovernmental co-operation on terrorism, cross-border crime and external frontiers before 1993,[29] it was not until the Maastricht Treaty the EU competence was formalized over these matters by creating the three-pillar structure. Immigration policy, conditions of entry and movement of TCNs on the territory of Member States as well as family reunification was now proclaimed as areas of "common interest" between EU Member States and became a part of Title VI of the "Third Pillar".[30] The idea was, according to the Council,[31] that matters within the fields of justice and home affairs[32] could only be solved through co-operation on a national level.

Probably because the intergovernmental method was not very successful,[33] the developments towards greater EU competence over this area continued with the entry into force of the Amsterdam Treaty in 1999. The Union committed to establish a common area of freedom, security and justice.[34] As a consequence, all affairs related to free movement of persons; controls on external borders; asylum, immigration and safeguarding of the rights of third-country nationals were "communitarized", i.e. brought under the legal framework of the "First Pillar" and within the competence of the Community.[35] Issues relating to the position of TCNs were put under Title IV of Part Three of the EC Treaty.

However, due to the Member States concerns, immigration being a highly politically charged area of law, this title was surrounded by special rules, so specific that this title has been called an "institutional ghetto".[36] As admission to the territory could be seen as being at the core of a State's

[29] S Peers and N Rogers (2006), p 4.
[30] Article K 1, Treaty on European Union OJ 1992 C 224/1.
[31] P Craig and G de Burca, *EU Law: Text, Cases and Materials*, Oxford University Press, Oxford, 2008, p 233.
[32] Justice and Home Affairs became the name of Title VI, Arts K1 to K9.
[33] P J Kuijper in *The Evolution of the Third Pillar from Maastricht to the European Constitiution: Institutional Aspects*, 41 CMLRev, p 609-626, uses this as an explanation to why there was a radical change after just a few year of trying to make the intergovernmental approach work, p 610. Aslo see M Bulterman, *Case C-540/03 Parliament v Council, Judgment of the Grand Chamber of 27 June 2006, [2006] ECR I-576*, CMLRev. 45: 245-259, 2008. Also see a progress report from the chairman of the reflection group on the 1996 IGC, SN 509/1/95, REV 1 (REFLEX 10), 1.09.1995, Madrid, p 34.
[34] Art 61 EC.
[35] *Ibid*.
[36] A notion introduced by E Guild and S Peers in *Out of the Ghetto? The Personal Scope of EU Law*, in S Peers and N Rogers eds (2006), chapter 4.

sovereignty it is not surprising that the competence was subject to certain limitations. The Member States were simply not willing to let go of the control over immigration and integration, just to loosen the grip a bit. This was manifested in three ways. Firstly, distinct decision making rules applied, leaving the Community institutions with only a marginal role.[37] Secondly, this title is subject to opt-outs from three Member States: the United Kingdom and Ireland neither participate in, nor are bound by acts adopted under Title IV unless they chose to do so by opting in; [38] Denmark does not participate at all and does not have the possibility to opt in.[39] Finally, Title IV is subject to limited judicial control as Art. 68 that governs the ECJ's jurisdiction within this field stipulates that only courts or tribunals against whose decisions there is no judicial remedy under national law may refer questions for a preliminary ruling.[40]

2.1.2 Moving Forward – Tampere and the Lisbon Treaty

Shortly after the entry into force of the Treaty of Amsterdam the European Council had a special meeting in Tampere.[41] At the meeting the Member States decided upon a new agenda for immigration and integration policies. The conclusions from this summit acknowledged the need for harmonization of national legislation relating to the conditions for admission and residence of TCNs.[42] Furthermore it was agreed that the rights and obligations of TCNs should be approximated to those of EU citizens so that they become comparable.[43] The Council was asked to rapidly adopt the legal instruments necessary. A number of new directives were soon adopted.[44] Two of them regulate family reunification: the Family

[37] Art. 67 EC. For legal migration, this meant that decision making demanded unanimity and consultation of the EP. For a fuller development of decision-making concerning immigration and asylum law under the EC Treaty as well as the Lisbon Treaty see S Peers, *Legislative Update : EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon*, European Journal of Migration and Law 10 (2008) 219-247.

[38] Treaty of Amsterdam, Protocol of the Position of the United Kingdom and Ireland, OJ 1997 C 340/99.

[39] Treaty of Amsterdam, Protocol of the Position of Denmark, OJ 1997 C 340/101.

[40] Case C-45/03 *Dem'Yanenko* order of 18.03.2004 (unreported); Case C-51/03 *Georgescu* [2004] ECR I-3203 and Case C-555/03 *Warbecq* [2005] ECR I-6041. For a more extensive examination of Art 68 EC, see AG Ruiz-Jarabo Colomer in Case C-14/08 *Roda Golf* [2009] ECR I-5439, paras 22-37.

[41] The meeting took place on 15 and 16 October 1999.

[42] Tampere European Council 15 and 16 October 1999, Presidency Conclusions.

[43] *Ibid.*

[44] *Inter alia* Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12; Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals [2001] OJ L 149/34; Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18; Directive 2003/86/EC on the right to family reunification [2003] OJ L 251/12; Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.

Reunification Directive and Directive 2004/38/EC, hereinafter the Free Movement Directive.[45] Despite these new directives there was some uncertainty whether or not the right of first entry of TCNs' family members was still a matter of national competence. *Akrich*[46] seemed to strengthen this view. The case concerned a family whose application for family reunification was rejected due to the fact that the husband, a TCN, had resided illegally in the first Member State prior to the application in the second. The ECJ concluded that there was a requirement of prior legal residence and only if the first Member State previously has accepted the TCN's residence could an application for family reunification in a second Member State be successful. EC law did not create a right of first entry to the territory of the EU, which would mean that Members States still would be in control of the first admission.[47]

However, the Court changed track in *Metock* and more or less overruled *Akrich*, by expressly abandoning the requirement of prior legal residence.[48] From *Metock* it is clear that the competence over first admission no longer lays exclusive with the Member States.[49] For many Member States this was a very controversial judgment and it was said to create "a route for illegal immigration into the EU".[50]

The latest development in the field of migration law came with the Lisbon Treaty[51]. The ordinary legislative procedure, i.e. qualified majority voting and co-decision, now applies to measures concerning legal migration.[52] Another and potentially very important change is the abandonment of the special and highly criticized jurisdiction rule in art 68 EC, a change that is believed to considerably increase the ECJ's role in this area.[53] The application of the Court's normal jurisdiction will instead apply also to immigration and asylum law. The gates to the "institutional ghetto", Title IV, have been opened, even though the opt-outs are still valid.[54]

[45] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.
[46] Case C-109/01 *Akrich* [2003] ECR I-9607.
[47] *Ibid*, paras 51-53. Also see Opinion of AG Geelhoed in the same case on the distinction between the right to entry and residence, paras 119-120 and 136.
[48] Case C-127/08 *Metock* [2008] ECR I-6241, para 58. Confirmed in Case C-155/07 *Sahin* [2008] ECR I-10453.
[49] *Ibid Metock*, para 65.
[50] C Costello, Metock*: Free movement and "Normal family life" in the Union*, CMLRev 46: 587-662, 2009, p 607 ff.
[51] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ 2010 C 83.
[52] Art 78-79 TFEU.
[53] S Peers, *Legislative Update : EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon*, European Journal of Migration and Law 10, 2008, p 219.
[54] S Peers, *In a world of their own? Justice and Home Affairs Opt-outs and the Treaty of Lisbon*, CYELS, vol 10:2007-2008, p 383-412.

2.2 Competence over Family Law

The EU has competence to unify *private international issues* in family matters. The legal basis for this competence is Art 81 TFEU.[55] As to *substantially* regulating marriage and partnership, it can initially be observed that the Union lacks express powers to do so.[56] However, it would be a mistake to assume that family law is an exclusive competence for the Member States. EU law does in fact have the capacity to impinge on the concept of the family.[57]

Firstly, as the Union provides for various entitlements for family members, it has proven necessary to define this group of persons in an EU law context.[58] Secondly, even when Member States legislate in the area of family law, their competence is not unrestricted which is clear from *Maruko*:

> Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that *in the exercise of that competence the Member States must comply with Community law* and, in particular, with the provisions relating to the principle of non-discrimination.[59]

In other words, Members States must ensure that they comply with general principles of EU law when acting in the area of family law.[60]

[55] Art 81 TFEU (ex Art 65 EC) gives the Union competence to develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases.
[56] However, some argues that art 65 EC, now Art 81 TFEU, could confer competence to the Union to take measures in order to harmonize and substantively unify family law in Europe. This interpretation of the article is built on the thought that every internal relationship can hypothetically become a cross-border relationship. In order to fully guarantee free movement, even obstacles, such as the possibility of loss of legal position, for these couples must be removed, K Boele-Woelki, *The Principles of European Family Law: Its Aims and Prospects*, Utrecht Law Review, vol 1, issue 2, 2005, p 162.
[57] M Bell (2004), p 618.
[58] *Ibid*, p 614.
[59] Case C-267/06 *Maruko* [2008] ECR I-1757, para 59. Emphasis added.
[60] To this effect also see Case C-117/01 *K.B.* [2004] ECR I-541, paras 31-34, where the Court held that even if it is for the Members States to chose and to set up the requirements of marriage, these requirements must comply with the ECHR.

3 Current Legislation – a Substantive Look at Family Reunification

The conditions for TCNs' right to family reunification are since 2003 regulated in *Directive 2003/86/EC on the right to family reunification*.[61]

3.1 The Difficulties in Adopting the Directive

The initial proposal was given by the Commission in December 1999.[62] The family members included were spouses and minor unmarried dependent children as well as unmarried couples (who could be of the same sex).[63] The provision on unmarried couples was, however, only to be applicable in Member States where unmarried couples for legal purposes were treated as married couples. In other words, this provision generated no actual harmonisation of national laws in relation to the recognition of unmarried couples but it ensured the principle of *equal treatment* to operate.[64] It is also worth noticing that there was no acknowledgment of registered partners or their rights in this initial proposal.

The proposal was somewhat amended, after advise from the European Parliament, in order to give Member States a wider discretion to adopt more favorable national legislation.[65] This amended proposal remained on the table of the Council for a long time and progress did not ensue. This was due to "profound difference of opinion on several key issues".[66] At this time the pendulum had swung from seeing the positive effects that family reunification could have on integration, to a more problem oriented approach when this question moved to the center of public debates on immigration in Europe. Family reunification was now increasingly seen as an obstacle to integration and a burden on the welfare state.[67]

[61] Council Directive 2003/86/EC [2003] OJ L251/12.
[62] Proposal for a Council Directive on the Right to Family Reunification COM(1999) 638 final.
[63] *Ibid*, p 14.
[64] *Ibid*.
[65] Amended proposal for a Council Directive on the Right to Family Reunification COM(2000) 624 final.
[66] The draft minutes of the 2266th session of the Justice and Home Affair Council held in Brussels on 29 May 2000, 5 September 8992/00, p 7.
[67] A Kraler, *Civic Stratification, Gender and Family Migration Policies in Europe - Final Report*, International Centre for Migration Policy Development (ICMPD), 2010, p 34-38.

Seeing the difficulties to reach solution within the Council, the Commission submitted a third proposal[68] in 2002.[69] This proposal included some substantial and more or less restrictive changes compared to the initial proposal and this as a result of the Member States' concerns.[70] As one of the most controversial issues in the original proposal was the family reunification of unmarried partners,[71] the Commission tried to reach a consensus by limiting the rights of unmarried partners. Art 4 now read:

> The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third-country national, with whom the applicant is in a duly attested stable long-term relationship, or of a third-country national who is bound to the applicant by a registered partnership in accordance with Article 5(2), and the unmarried minor children, including adopted children, of such persons.

The right to family reunification for unmarried partners, including registered partners, was thus entirely optional for the Member States. Furthermore, there would be no obligation to extend the right for TCNs beyond the members of the nuclear family even if there was a right for a national to be reunited with his or hers unmarried partner under national law.[72] The Commission justified this change of course by referring to the diversity in national legislation concerning those enjoying the right to family reunification and pragmatically stating that

> it does not seem possible for the moment to extend the obligation to allow entry and residence beyond the spouse and minor children.[73]

When the third proposal reached the Council it is clear that the Member States' point of departure still were diametrical opposed: the Swedish delegation suggested that registered partners should be granted the same rights as spouses at the same time that Spain, Greece and Portugal wanted to remove even the possibility for Member States to admit unmarried partners.[74] In the end, the Council accepted the policy of "married only" - unless-the-state-whishes-to.

The European Parliament, however, disagreed with the Commission's change in the list of family members who may join the TCN.[75] Without accommodating these views, political agreement was reached on the final text of the Directive in February 2003. The Family Reunification Directive

---

[68] Amended proposal for a Council Directive on the Right to Family Reunification COM(2002) 225 final.
[69] M Bulterman (2008), p 252.
[70] Inter alia the scope ratione personae was restricted and integration condition was introduced. Also see the *Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification* , COM (2008) 610 final, Brussels, 8.10.2008 and A Kraler (2010) , p 38.
[71] Council document 7675/1/00 REV 1 MIGR 33 and M Bulterman (2008), p 252.
[72] COM (2002) 225, p 6.
[73] Ibid.
[74] H Toner (2004), p 74 who refers to Council Document 10857/02, p 8.
[75] H Toner (2004), p 364.

was formally adopted in September the same year. The Parliament replied by challenging the validity of three of the provisions in the Directive in the case *EP v Council*,[76] on the ground that the level of protection of human rights was unsatisfactory. However, none of the three provisions related to the definition of family members.

All in all, four years past from the initial proposal to the adoption of the Directive. As already mentioned previously, immigration measures are seen as somewhat problematic for Member States so it is not surprising that it was hard to reach an agreement on family reunification for TCNs. The difficulties in drafting the directive were later acknowledged by the ECJ in *EP v Council*.[77] According to Peers and Rogers, the reason why it took so long to reach an agreement was also the unwillingness by any Member States to alter the national legislation in a way that would increase the level of protection for family reunion.[78] The difficulties connected to the Family Reunification Directive could also be explained by referring to the divergence of the national definition of family. This point is made by Bell in relation to the Free Movement Directive,[79] but it is also relevant for the Family Reunification Directive as concerns of the potential spillover effect of the definition of family, was raised in drafting discussions in the Council.[80] The reluctance of some Member States to allow the mere possibility of family reunification for unmarried couples and registered partners must mean that these states were afraid of the potential spillover effect that the definition of family in the Family Reunification Directive could have. The restrictive formula, that finally was adopted, could thus be said to protect national family law systems from the infiltration of new family law statuses.

3.2 The Family Reunification Directive

3.1.1 Do You Have to Say "I Do" to be Entitled Under the Family Reunification Directive?

Three types of partners are mentioned in the Family Reunification Directive: spouses, registered partners and unmarried partners. The only group out of these three that are actually given a right to family reunification under the Directive are the spouses.[81] Member States are not obliged to allow family reunification for registered partners and unmarried couples; it is only optional which follows from Art 4 (3):

[76] Case C-540/03 *European Parliament v Council* [2003] ECR I-5769.
[77] Ibid, para 102.
[78] S Peers and N Rogers (2006), p 579f.
[79] M Bell (2004), p 620.
[80] H Toner (2004), p 74 who refers to Council Document 10857/02, p 8.
[81] Art 4 (1) a of Directive 2003/86/EC (the Family Reunification Directive).

> The Member States *may*, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2)[82]

These couples must rely on willingness of the Member State to extend the rules beyond the traditional married couple and have no directly effective right to rely on.[83] This also means that Member States can refuse to admit registered partners or cohabitees even if these groups are treated as spouses under national law and even if nationals and migrant EU citizens in the same situation are entitled to family reunification.

EU-citizens, on the other hand, do have a right to be treated as nationals when it comes to family reunification. In *Reed*,[84] the ECJ held that family reunification cannot be denied to migrant workers from other Member States if it is granted to the host state's own nationals. The holding of this case have been extended to EU-citizens generally and incorporated in Art 2 of the Free Movement Directive.[85]

The Family Reunification Directive lacks a *Reed-rule*, which means that the unmarried TCN couple is given substantially less rights to family reunification than EU-citizens, as the Member States are allowed to discriminate against the former but not the latter. The potentially lower standard for TCNs that this could lead to is clearly incompatible with the conclusions from the Tampere summit,[86] referred to in the preamble,[87] and the aim to approximating the rights of TCNs to those of EU citizens.[88]

Even though the protection for migrant couples are stronger for EU citizens than for TCNs, both the Free Movement Directive and the Family Reunification Directive, failed to bring the family notion up to date with the social and cultural developments that have lead to new demographic patterns of family life, referred to by AG Geelhoed in *Baumbast*[89] as early as 2001. By only acknowledging the rights of traditional nuclear family, the

---

[82] Emphasis added.

[83] According to well established case-law of the Court, a provision of a directive could only have direct effect when the provision confers an unconditional and sufficiently precise right upon an individual, Case 41/74 *van Duyn* [1974] ECR 1337: Case 148/78 *Ratti* [1979] ECR 1629 and Case 8/81 *Becker* [1982] ECR 53.

[84] Case 59/85 *Reed* [1986] ECR 1283.

[85] This directive applies to *all* EU-citizens, Art 3. Family member are in Art 2 defined as:
(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

[86] Tampere European Council 15 and 16 October 1999, Presidency Conclusions.

[87] Recital 3 in the preamble of the Family Reunification Directive.

[88] H Toner (2004), p 78.

[89] Opinion of AG Geelhoed in Case C-413/99 Baumbast [2002] ECR I-7091, para 34.

concept of family in EU law remained "distinctively heterosexual and married".[90]

To summarize, there is nothing in the Family Reunification Directive that requires Member States to admit a TCN partner other than a spouse. Thus, in order to guarantee your right to family reunification you still have to say "I do".

3.1.2 Same-Sex Marriages – Will All "I Do"s Count?

The introduction of same-sex marriages began in the Netherlands in 2001 and several Member States have since followed, as mentioned in Chapter 1. Even though this development started while the Family Reunification Directive was drafted, the possible impact of these marriages was never discussed neither in the Council nor by the EP.[91] Consequently, the Directive gives no clear solution to the question of how same-sex marriages should be treated in relation to family reunification as it lacks a clear and unconditional right to settlement for same sex spouses. However, the wording of the Directive cannot easily be interpreted as having the opposite meaning, i.e. that same sex spouses would not have a right to family reunification. The reason is that the term that is used in the adopted text is neutral in relation to sex and sexual orientation: *spouse* is consistently used instead of husband and wife. This together with the fact that same-sex marriages and a marriage between a man and a woman produces the same ties and legal status, could be seen as a strong presumption that same-sex spouses are included in "spouse" in Art 4(1) of the Family Reunification Directive, which would mean that same-sex spouses have a right to family reunification.

There have nonetheless been some suggestions in sharp contrast to such presumption, implying that some "I do"s are less important than others. The Commission has stated, in relation to the right to family reunification for EU citizens in the Free Movement Directive,[92] that "it should be concluded that same-sex spouses do not yet have the same rights as traditional spouses".[93] In other words, the Commission admits that same-sex married partners are "spouses", but not "traditional" spouses.[94] The Council also seems to support a distinction between "traditional" and "non-traditional" spouses and declared itself to be reluctant to accept a definition of the term spouse

[90] H Toner, *Partnership Rights, Migration and EC Law* in T Tridimas and P Nebbia (eds), European Union Law for the Twenty-First Century, vol 2, Hart, Oxford, 2004, p 352.
[91] Such discussions are at least not reproduced in the travaux préparatoires.
[92] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.
[93] Communication from the Commission, *Free Movement of Workers – achieving the full benefits and potential*, COM (2002) 694 final, p 8.
[94] C McGlynn, *Family Reunion and the Free Movement of Persons in European Union Law*, International Law FORUM du droit international 7: 2005, p 160.

which made express reference to spouses of the same-sex.[95] Such an interpretation, applied to the Family Reunification Directive, would mean that only the heterosexual married couple has a right to family reunification and that all homosexual couples are excluded, even the ones that are married.

3.3 Interpretation of the Directive by the ECJ and the Impact of Art 68 EC

The question of how to treat same sex marriages as well as other questions of interpretation of the Directive will ultimately be for the ECJ to solve. The Court sees itself as having monopoly of interpreting the Treaties and the legislation connected to them as this is the only way to ensure that the rules are uniformly and effectively applied in the various Member States.[96] This also means that concepts in Union law does not necessarily have the same meaning as in the Member States national law and must therefore be clarified by the ECJ in order to ensure uniform application of EU law throughout the Union.[97] There would otherwise be a risk that the meaning of a provision of EU law could vary from one State to another which would jeopardize the attainment of the objectives of the Treaties.[98] To ensure the uniformity is also the main purpose with the preliminary ruling procedure.[99]

The ECJ is known for its teleological interpretation; the provisions is placed in their context and interpreted in the light of Union law as a whole and the Court seeks to find an interpretation that is in line with what that provision sought to achieve.[100] It is therefore possible that the ECJ gives the provisions or the notions a meaning that is far from a literal interpretation of the legislation in question. By using this method, the Court could potentially give "spouse" in Art 4 (1) of the Family Reunification Directive a wider meaning than a husband and wife joined in legal marriage and thereby extending the scope of the right to family reunification.

---

[95] Common Position (EC) No 6/2004 adopted by the Council on 5 December 2003 with view to adopting Directive 2004/…/EC of the European Parliament and the Council of … on the right of citizens of the Union and their family members to move and reside freely within the territory of the Members States, at 28.

[96] According to the Treaty, the Court's role is to ensure that in the interpretation and application of the Treaties the law is observed, Art 19 TFEU.

[97] Case 283/81 *CILFIT* [1981] ECR 3415, para 19.

[98] Case 6/64 Costa v ENEL [1964] ECR 585. Also see K Lenaerts, *The Unity of European Law and the Overload of the ECJ – the System of Preliminary Rulings Revisited* in I Pernice, J Kokott and C Saunders (eds), The Future of the European Judicial System in a Comparative Perspective, Baden-Baden, Nomos, 2006, p 211, who holds that the need for uniform application must not be underestimated.

[99] Case 66/80 *International Chemical Corporation* [1981] ECR 1191, para 11; Case 314/85 *Foto-Frost* [1987] ECR 4199, para 15 and Joinded Cases C-188-189/10 *Melki and Abdeli* [2010] n.y.r., para 54. Also see AG Ruiz-Jarabo Colomer in Case C-14/08 *Roda Golf* [2009] ECR I-5439, para 29.

[100] Case 283/81 *CILFIT* [1981] ECR 3415, para 20.

Unfortunately, the ECJ has not yet had an opportunity to pronounce itself on this question. In fact, there is a very limited amount of cases from the ECJ concerning this Directive. The reason for this is probably not that it has been correctly implemented,[101] but rather that former Art 68 EC heavily restricted the possibility for national courts to refer questions to the ECJ.[102] This article prescribed that the referring court or tribunal had to be one against whose decisions there are no judicial remedy under national law. The purpose was to restrict the ECJ's workload.[103] To this aim Art 68 EC has been effective as it has obviously restricted the access to the ECJ in practice but at the same time the result has been that the uniform interpretation and effective judicial protection was disregarded.[104]

By examining cases where the ECJ has given an interpretation of "spouse" or family, the next chapter will try to answer the question whether it is likely that the Court will give a broad interpretation of "spouse" in the Family Reunification Directive.

[101] Several issues of incorrect implementation is revealed in the Commission Report to the European Parliament and the Council *on the application of Directive 2003/86/EC on the right to family reunification*, COM (2008) 610 final, Brussels, 8.10.2008. In addition, before that report was given four infringement proceedings was brought before the ECJ against Germany, Italy, Luxembourg, Malta: three of them were withdrawn and a judgment was given for one, Case C-57/07 *Commission v Luxembourg* [2007] ECR 188.
[102] M Bulterman (2008), p 257.
[103] S Peers *The Jurisdiction of the Court of Justice Over EC Immigration and Asylum Law: Time For a Change?* in A Baldaccini, E Guild and H Toner eds (2007), p 89 that refers to the summary of remarks of the Dutch Justice Minister, Council doc 13502/04, 18 October 2004.
[104] *Ibid S Peers*, p 103f. AG Ruiz-Jarabo Colomer expressed similar concerns in his Opinion in Case C-14/08 Roda Golf [2009] ECR I-5439

4 The ECJ and the Family

As there are no cases from the ECJ on what type of TCN couples that are entitled to family reunification under Union law, the following section will try to explore how this question *would be* interpreted by the ECJ. In order to make such prediction, six key-cases where the ECJ has had an opportunity to pronounce itself of the notion of family will be presented and analyzed. Two of the cases; *Reed*[105] and *Eyüp*[106], concerns family reunification for unmarried heterosexual couples, where the sponsor was an EU citizen. The subsequent four; *Grant*,[107] *D and Sweden v Council*,[108] *KB*,[109] and *Maruko*[110] are cases where the ECJ had to consider whether or not same-sex couples could enjoy some of the same benefits as married couples.

4.1 Heterosexual Cohabitation as Ground for Family

4.1.1 Reed

How does Community law treat unmarried couples when it comes to family reunification? That was the main legal question in *Reed*[111]. The applicant, Ann Reed, first entered the Netherlands in pursuit of a job, but she did not succeed. Instead she applied for a residence permit on the ground that she was living with her partner Mr. W since five years.[112] Mr. W was a British national working in the Netherlands and in possession of a residence permit. Ann Reed's application was rejected on the grounds that she did not meet the requirement set out in Art 10 of Regulation 1612/68, i.e. she was not married to Mr. W.[113]

The applicant argued that given the legal and social development, unmarried cohabiting companions must as far as possible be treated as spouses. The ECJ, however, pointed out that an interpretation of a provision in a Community regulation has effects in all of the Member States and that any interpretation of a legal term on the basis of social developments, therefore, must take into account not only the situation in one Member State, but rather the situation in the whole Community.[114] In the absence of any indication of a *general* social development which would justify a broad

[105] Case 59/85 *Reed* [1986] ECR 1283.
[106] Case C-65/98 *Eyüp* [2000] ECR I-4747.
[107] Case C-249/96 *Grant* [1998] ECR I-621.
[108] Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319.
[109] Case C-117/01 *K.B.* [2004] ECR I-541.
[110] Case C-267/06 *Maruko* [2008] ECR I-1757.
[111] Case 59/85 *Reed* [1986] ECR 1283.
[112] *Ibid*, para 4.
[113] *Ibid*, para 2.
[114] *Ibid*, para 13.

construction, the ECJ stated that the term "spouse" in Article 10 of the regulation refers to a marital relationship only. This was also supported by the absence of any indication of a wider meaning in the regulation.[115]

The Court still held that Ann Reed had a right to reside in the Netherlands as the right to family reunification was considered as a "social advantage" and that it therefore could be no discrimination between domestic nationals and EU migrant workers in this field. As Dutch nationals had the right to be joined by their unmarried partner, this rule had to be extended to all EU migrant workers.[116]

This judgment sets the conservative tone of the ECJ's approach to untraditional couples which is the main feature in the cases concerning interpretation of spouse and family.[117] The ECJ were obviously not willing to extend the meaning of spouse beyond the traditional sense of the word. When reaching this conclusion, the Court did not examine the purpose of the provision but rather referred to the state of national law among the Member States. However, by reasoning in this manner, the ECJ does not in the judgment seem to exclude that unmarried couples in the future could be included in the notion of "spouse". This will however only be possible after there has been a general development in the Member States of granting rights and recognizing these couples.

4.1.2 Eyüp

Fourteen years after *Reed*, another judgment touching upon the question of family reunification for unmarried couples was delivered by the ECJ – the *Eyüp* case.[118] To assess the Courts findings in this case, special attention must be given to the peculiar facts of the case.

Mrs. Eyüp applied for residence documents in Austria on the basis of her marriage to Mr. Eyüp, a migrant Turkish citizens working in Austria.[119] This application was denied because the Austrian authority found that she did not fulfill the qualification period under the EEC-Turkey Association Agreement, which was applicable in this case.[120] The couple first got married almost 15 years prior to the refusal of the application, then divorced after two years of marriage, only to be remarried after another eight years.

---

[115] *Ibid*, para 15.
[116] *Ibid*, paras 28-29. This was, as already mentioned in section 3.4, later incorporated in the Free Movement Directive which means that migrant EU citizens must be treated as nationals in purposes of family reunification.
[117] Toner (2004), p 157; C McGlynn, *Families and European Union Law* in R Probert (ed), Family Life and the Law – Under One Roof, Ashgate,Aldershot, 2007, p 248f and H Stalford, *Concepts of Family under EU Law – Lessons from the ECHR*, International Journal of Law, Policy and the Family, vol 16, 2002, p 411ff.
[118] Case C-65/98 *Eyüp* [2000] ECR I-4747.
[119] *Ibid*, para 13.
[120] *Ibid*, para 16, which refers to Art 7 of Decision No 1/80, part of the EEC-Turkey Association Agreement.

Mr. and Mrs. Eyüp continued to live together during the time that they were not married and four of their seven children were born during this time. Furthermore, Mr. Eyüp continued to provide for the family and Mrs. Eyüp took care of the children.[121]

The ECJ found that the period of extra-marital cohabitation could not be seen as an interruption of their family life and as a consequence, that period must be taken into account when calculating periods of legal residence under the EEC-Turkey Association Agreement.[122] In other words, the ECJ found that a period of cohabitation between an unmarried couple could be equivalent to a period of marriage. Even though this definitely appears to be a step forward and away from *Reed*, the Court's findings must be seen in light of the specific circumstances of this case.[123] The ECJ seemed to focus on the fact that the period of unmarried cohabitation took place between periods of marriage, that several of their children were born during that period and that Mr. Eyüp "brought home the bacon" while Mrs Eyüp was the main childcarer.[124] It is therefore not at all unlikely that only some cohabitees could benefit from the ECJ's findings in this case, i.e. heterosexual couples demonstrating significant levels of commitments via children, marriage and dependency.[125]

Furthermore, *Eyüp* is interesting for the references to Art 8 ECHR. AG La Pergola extensively referred to the case law of the Strasbourg Court and argued that it would be a breach of fundamental rights not to include "de facto" family such as the Eyüps in the category of "family members".[126] The ECJ did however not explicitly refer to the reasoning of the AG but used the same expression, "de facto" family.[127] The connection between family reunification and the fundamental right to respect for family life will be further examined in Chapter 5.

4.2 Same-sex Couples

4.2.1 Grant

Grant[128] concerned the Equal Pay Directive[129] but also touched upon the question whether same-sex partnerships could constitute a "family" in the

[121] *Ibid Eyüp*, para 32.
[122] *Ibid*, para 36.
[123] Opinion of AG Ruiz-Jarabo Colomer in Case C-117/01 *K.B.* [2004] ECR I-541, para 60 and Toner (2004), p 152.
[124] Case C-65/98 *Eyüp* [2000] ECR I-4747, para 32.
[125] C McGlynn, *Challenging the European Harmonisation of Family Law: Perspectives on "the Family"* in K Boele-Woelki K Boele-Woelki (ed), Perspectives for the unification and harmonization of family law in Europe, Antwerpen, Intersentia, 2003, p 224 f.
[126] Opinion of AG La Pergola in Case C-65/98 *Eyüp* [2000] ECR I-4747, paras 18-23.
[127] Case C-65/98 *Eyüp* [2000] ECR I-4747, para 34.
[128] Case C-249/96 *Grant* [1998] ECR I-621.
[129] Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal treatment for men and women as regards access to

eyes of EU law. Lisa Grant was an employee at South-West Trains (hereinafter SWT), which provided its employees the opportunity to apply for travel concessions for their partners. Ms. Grant had applied for this benefit for her female partner with whom she had been living together with for 2 years. SWT refused the application on the ground that for unmarried persons, travel concessions could only be granted for a partner of the opposite sex.

In this case, the ECJ considered whether persons who have a stable relationship with a partner of the same sex are in the same situation as those who are married or have a stable relationship with an opposite-sex partner.[130] The Court's answer was in the negative. This conclusion was mainly based on the lack of consensus among Member States regarding the recognition of same-sex relationships, i.e. there was no *general* recognition. Support for this was also found in the jurisprudence of the ECtHR where same-sex relationships did not fall within the scope of the right to respect for family life under Art 8 ECHR.[131] Finally, the ECJ stated that "it is for the legislature alone to adopt, if appropriate, measures which may affect that position".[132]

The line of argument is very similar to the reasoning in *Reed*. In both judgments, the ECJ refers to the lack of general developments in national law and that Member States must take the lead in recognizing the rights of unmarried partners. There is a clear unwillingness on behalf of the ECJ to engage in judicial activism to increase the rights for non-traditional families.

4.2.2 D and Sweden v Council

In *D and Sweden v Council*,[133] which is the first case on the status of registered partnerships, the ECJ followed the direction set out in *Grant*. D, a Swedish national, worked as an official at the Council and had a registered partnership under Swedish law with another man.[134] His application for household allowance, which the Staff Regulations confined to married persons, was refused.[135] D claimed that terms such as "spouse" and "married official" in this Regulation, had to be interpreted by reference to the law of the Member State and not be given an independent definition and that the refusal to pay the allowance therefore amounted to discrimination based on sex.

---

employment, vocational training and promotion, and working conditions [1976] OJ L 39/40.

[130] Case C-249/96 *Grant* [1998] ECR I-621, para 29.

[131] *Ibid*, para 33.

[132] *Ibid*, para 36.

[133] Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319.

[134] *Ibid*, para 4.

[135] *Ibid*, para 5.

The ECJ stated that, an increasing number of Member States have introduced arrangements of legal recognition of same-sex partners. However, the Court continued by holding, and agreeing with AG Mischo,[136] that it is clear that theses statuses are distinct from marriage, as "according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons or the opposite sex".[137] Consequently, a registered partner could not be included in the notion of "spouse".

Just as in *Reed* and *Grant*, the ECJ was interested in the situation in the Community as a whole as a mean of interpretation rather than the situation in a single Member State. This means that "spouse" was given an independent interpretation, not tied to the legislation in a specific State.[138] The outcome of that interpretation was that the EU "family" remained heterosexual and married.

Furthermore, the ECJ held that it was not a violation of the principle of equality to treat a person living with a registered partner of the same sex differently than a married person. The Court based this conclusion on the finding that the legal ties arising from a registered partnership was different and not comparable to the ones created by a marriage. A registered partner and a married person was accordingly not considered to be in a similar situation, thus, there was no discrimination at hand.

4.2.3 K.B.

The case *K.B.*[139] concerns transsexuals' inability to marry a person from their initial sex. K.B. worked for the National Health Service (NHS) for 20 years and was a member of the NHS Pension Scheme under which a survivor's pension was to be paid to a member's surviving spouse.[140] K.B.'s partner, R, born a woman and registered as such in the Register of Births, suffered from gender dysphoria and had gone through a surgical gender reassignment.[141] However, as British law prohibited changes in the Register of Birth, R. was still seen as a woman. The couple was therefore regarded as a same-sex couple which meant that the couple could not get married as marriage was defined as a union between a man and a woman.[142] A consequence of being unmarried, R could never receive a survivor's pension if K.B. were to pre-decease R. According to the applicant this amounted to discrimination on grounds of sex and held that "spouse" should therefore be interpreted extensively to include their situation.

[136] Opinion of AG Mischo in Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319, para 43.
[137] *Ibid D and Sweden v Council*, paras 34 and 35.
[138] Confirmed in Case T-58/08 P Commission v Roodhuijzen [2009] n.y.r., para 79.
[139] Case C-117/01 *K.B.* [2004] ECR I-541.
[140] *Ibid*, paras 11 and 13.
[141] *Ibid*, para 12.
[142] *Ibid*.

The ECJ on the other hand referred to *D and Sweden v Council* and held that the national legislature, just as the Community legislature, is free to restrict certain benefits to the married couple while excluding all other couples.[143] Having dismissed that this was a case of discrimination, the Court continued by stating that it is impossible, for the couple to satisfy the marriage requirement due to the legislation prohibiting any alteration in R.'s birth certificate.[144] The ECJ followed by holding, with support from a recent case from the ECtHR,[145] that such legislation was in breach of the right to marry under art 12 of the ECHR.[146] The outcome of this case was therefore that EU law[147] forced the UK to change provisions in the marital code in order to admitting legal recognition of transsexuals' new identity. This shows that even if Member States have the competence to set the requirements of marriage, it is not without restrictions. The ECJ made it clear that this competence cannot be exercised in breach of the right to marry under art 12 of the ECHR – a right that also covers transsexuals. In this regard it is important to point out that the *general* recognition, which the ECJ was looking for in *Reed*, *Grant* and *D and Sweden v Council*, existed among the Member States in this case. All but two States already acknowledged transsexuals' right to marry in their new sex.[148] Such general support most definitely played a role for both the ECtHR and the ECJ. It also gives us a hint of the magnitude of support that is needed for it to be *general*.

4.2.4 Maruko

The legal question in *Maruko*[149] is quite similar to the one in *Grant*[150], as both cases concerned survivor's benefits and the German registered partnership.[151] An important difference between the cases is however, the entry into force of Directive 2000/78/EC[152] that meant that discrimination on grounds of sexual orientation was prohibited within the field of employment. Mr Maruko and his male partner entered into a registered partnership in 2001.[153] Mr Maruko's partner was a former designer of theatrical costumes and was still a member of the German Theatre Pension Institution (VddB). When he died in 2005, Mr Maruko applied for a widower's pension but this was refused as the VddB Regulations only

[143] *Ibid*, para 28.
[144] *Ibid*, para 31.
[145] *Goodwin v UK*, Application no 28957/95 (11.07.2002).
[146] Case C-117/01 *K.B.* [2004] ECR I-541, paras 31-34.
[147] In this case Art 141 EC, now Art 157 TFEU.
[148] Only Ireland and UK did not at the time recognize the new sex of transsexuals, Opinion of AG Ruiz-Jarabo Colomer in Case C-117/01 *K.B.* [2004] ECR I-541, para 28.
[149] Case C-267/06 *Maruko* [2008] ECR I-1757.
[150] Case C-249/96 *Grant* [1998] ECR I-621.
[151] Lebenspartnerschaften – [Life Partners Act] BGBI.2001 I 226.
[152] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[153] Case C-267/06 *Maruko* [2008] ECR I-1757, para 19.

provided for survivor's benefits for "spouses".[154] Mr Maruko then brought an action claiming that this refusal was contrary to Directive 2000/78 as it constituted discrimination on grounds of sexual orientation.

The meaning of the word spouse or family was never really addressed by the ECJ in this case. At the same time, the Court made a clear statement that civil status and the benefits flowing there from, fall within the competence of the Member States. It was however pointed out that there are limits to this competence and that national rules on civil status "must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination".[155]

As for the examination of the alleged discrimination on grounds of sexual discrimination, the ECJ referred to the gradual harmonisation of the rules for registered partnership to those applicable to marriage and to the fact that registered partnership is equivalent to marriage as regards the survivor's pension in Germany.[156] It continued by finding that legislation, under which the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, constitutes discrimination on grounds of sexual orientation *if* registered partners are placed in a situation comparable under national law to that of spouses.[157]

This meant that *Maruko* was the first case where the ECJ decided in favour of the applicant in a case of discrimination on grounds of sexual orientation.[158] Interestingly enough, considering the Court's reasoning in *D & Sweden*, it is clear from this case that the ECJ does not require a *general* comparability between registered partnership and marriage but rather that they are comparable when it comes to survivor's pension.[159] In *D & Sweden*, the ECJ was more formalistic and seemed to state that as registered partnership is not formally a marriage, they could never be comparable.[160] In this sense, *Maruko* must be seen as a case being part of "the long process of accepting homosexuality"[161]. However, it should be emphasised that even though deciding in favour of the applicant, the ECJ in *Maruko* also clearly pointed out that civil status was a matter of national competence. In other

[154] *Ibid*, para 22.
[155] *Ibid*, para 59.
[156] *Ibid*, para 68.
[157] *Ibid*, para 72. The question of whether the civil statuses actually were comparable in relation to widower's pension was left for the referring court to decide but it is clear from the judgment that the national court in Germany did considered them to be comparable, paras 68-69.
[158] C Tobler and K Waaldijk, Case C–267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, CMLRev, Vol 46, 2009, p 723.
[159] Case C-267/06 *Maruko* [2008] ECR I-1757, para 73.
[160] Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319, para 47. Also see H Toner (2004), p 185.
[161] Opinion of AG Ruiz-Jarabo Colomer in Case C-267/06 *Maruko* [2008] ECR I-1757, para 2.

words, nothing in Union law requires Member States to actually introduce a form of registered partnership.[162]

4.3 Analysis: How Would the ECJ Interpret the Family Reunification Directive?

Initially, it shall be underlined that the presented cases all but one concern EU citizens. An assumption that the ECJ would distinguish between these cases and the application of the Family Reunification Directive cannot automatically be ruled out. The EU system is to some extent based on the dichotomy EU citizen/TCN. This division is particularly visible when it comes to the field of immigration and movement of persons,[163] as TCNs cannot rely on the Treaty provision of free movement of persons, Art 45 TFEU.[164] Consequently, TCNs have also been denied access to rights that are derivable from that fundamental freedom.[165] The fact that EU citizens' right to family reunification is tied to free of movement of persons,[166] could thus be used as an argument to limit TCNs' right to be joined by their partners. We have already seen, in the previous chapter, that TCNs are treated less favourably than EU citizens, as they are not covered by the right to non-discrimination on grounds of nationality in relation to family reunification – the *Reed-rule*. The difference between these two groups could be further enhanced by a more restrictive interpretation of the Family Reunification Directive. However, an argument in favour of an analogy between the cases presented in this chapter and the interpretation of spouse in the Family Reunification Directive is the Tampere conclusions. In these conclusions it was stated that that the rights of TCNs shall be approximated to those of EU citizens, which could be a justification for the ECJ not to make a distinction between TCNs and EU citizens.

Moreover, as the ECJ interpretation of spouse seen in the presented cases has been narrow, it is hard to imagine an even more restrictive interpretation of this notion in relation to the Family Reunification Directive.[167] On the other hand, TCNs are generally not treated more favourably than EU citizens in the EU legal order which rules out a more favourable

[162] Case C-267/06 *Maruko* [2008] ECR I-1757, para 59. Also see C Tobler and K Waaldijk (2009), p 743.
[163] E Guild and S Peers, *Out of the Ghetto? The Personal Scope of EU Law* in S Peers and N Rogers eds (2006), p 82ff.
[164] Case C-147/91 *Ferrer Laderer* [1992] ECR I-4097, para 7; Case C-230/97 *Awoyemi* [1998] ECR I-6781, para 29 and Case C-70/09 Hegartner and Gasser [2010] n.y.r., para 25.
[165] *Ibid Awoyemi*, paras 26-30.
[166] See supra notes 11 and 23.
[167] It is of course possible that a stricter interpretation would demand some kind of qualification of the marriage but as there is no such support neither in the preamble of the directive nor in the actual wording of the article, this seems highly unlikely.

interpretation for TCNs than in the six key cases.[168] It is therefore in my view not believable that the ECJ would interpret spouse in the Family Reunification Directive neither stricter nor wider than it has done in relation to EU citizens and that an analogy therefore can be made.

As for substance, the restrictive formula adopted in the Family Reunification Directive, only giving a right to family reunification to married couples, is not likely to be expanded in an interpretation made by the ECJ. "Spouse" in Art 4 (1) in the Directive will mean spouse and nothing else.

This conclusion is based on the rather conservative approach to the notion of family that emerges from the ECJ's jurisprudence presented previously in this chapter. Not only does the Court privileges marriage before all other family forms,[169] but the ECJ has also been unwilling to give a broad interpretation of the notion of family and of "spouse". In *Reed*, *Grant* and *D and Sweden v Council* it can be seen that the focus has been on the formal ties between couples rather than *de facto* ties. In the latter case, equal treatment of marriage and registered partnership was denied on the basis that it was not *formally* a marriage, by Toner described as an overly formalistic and narrow understanding.[170] The time of cohabitation, the intention of the couple and if the couple have joint financial affairs are thus matters that are given little or none attention.

In contrast, the ECJ in *Eyüp* actually recognized a period of de facto family life as assimilated to marriage. Unfortunately, the facts of this case are, as already mentioned, too peculiar to lead to any general change of the rights to family reunification for unmarried couples. The fact that the Eyüps was remarried and that the ECJ focused on the woman as the primary childcarer and the man as the principal breadwinner,[171] could in fact reproduce and reinforce the construction of "the EU family" as being based on the traditional married nuclear family.[172] It was only because the Eyüps walked and talked like one that they were protected by Union Law. It is therefore too optimistic to hold that *Reed* is overruled which would mean that an unmarried couple will still not fall under the application of "spouse" in Art 4 (1) of the Family Reunification Directive.

As for same-sex couples, there have been some development from *Grant* to *Maruko*. In *Grant*, the only family deemed worthy of protection was the

[168] The absurdity of TCNs being treated more favorably than EU citizens are expressed by the Court in Case C-242/97 Sahin [2009] ECR I-8465, paras 68-69.
[169] This is most clearly seen in Case C-117/01 *K.B.* [2004] ECR I-541, para 28, where the Court held that Member States are free to restrict certain benefits to married couples while excluding all other couples. By finding that the married couple could be afforded more favorable treatment than other couples without it amounting to discrimination, the Court confirmed the privileged position of marriage over other family forms.
[170] H Toner (2004), p 185.
[171] This line of reasoning can also be found in Case C-60/00 *Carpenter* [2002] ECR I-6279.
[172] C McGlynn argues in a similar way in *Families and European Union Law* in R Probert ed (2007), p 250.

married couple and the ECJ was not willing to extend the scope of the Equal Pay Directive to cover discrimination on grounds of sexual orientation. In *Maruko*, such an extension was made and there was a recognition of the similarities between marriage and registered partnership. However, the impact that *Maruko* and the described developments will have on the rights of registered partners under the Family Reunification Directive may be limited. The conclusion in this case was that if national legislation in a specific field places registered partners in a situation comparable to spouses, difference in treatment (in this field) between the groups would be considered as discrimination on grounds of sexual orientation. However, the ECJ did not prohibit the legislature to construct different rules for registered partners and married couples, such as giving the right to family reunification to married couples while excluding registered partners. This means that despite *Maruko*, the right to family reunification for registered partners lays within Member States' discretion. It is therefore not probable that the ECJ would consider that registered partners fall within Art 4 (1) of the Directive, were the right to family reunification are mandatory. Furthermore, if Member States are not obliged to introduce registered partnership as a civil status, they are definitely not obliged to give such union a particular effect.

From the examined case law it is difficult to predict how the ECJ will handle the question of same-sex marriages in relation to family reunification in the future - will all "I do"s count? In *D & Sweden*, the Court held that same-sex marriages are not comparable to a real marriage, i.e. between a man and a woman:

> It is not in question that, according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex.[173]

However, this comment must probably be seen as obiter as the case in question concerned registered partnership and not same-sex marriage and a literal interpretation of "spouse" would lead to the inclusion of all spouses, not only the traditional husband and wife.

Nevertheless and unfortunately, it is possible, that the ECJ would take a more conservative and pragmatic approach and deny same-sex spouses the right to family reunification. In that case, the ECJ would probably justify itself by using the lack of general recognition of such marriages among the Member States. By using the diversity in national legislation as a mean of interpretation, the Court could avoid entering into a politically, religiously and culturally very delicate subject and instead be guided by the lowest common denominator among the Member States. The method of referring to the absence of general social development that could justify a broader construction was used in *Reed,*[174] *Grant,*[175] and *D & Sweden*.[176] The level of

[173] Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319, para 34.
[174] Case 59/85 *Reed* [1986] ECR 1283, para 15.
[175] Case C-249/96 *Grant* [1998] ECR I-621, para 32.

consensus on a Member State level that the ECJ is looking for in order to classify a development as general seems, in light of *K.B.*, to be very high. Only if almost all Member States have adopted measures can the ECJ give an interpretation based on social developments. As it is still controversial in some Member States to confer even limited rights to same-sex couples and to reinforce the protection for unmarried opposite-sex couples, it is not a wild guess that it will take decades before same-sex spouses are given a general right to family reunification if the above mentioned mean of interpretation is to be used.

Even though the conclusion from examining the six cases is that the ECJ is not likely to expand the right to family reunification under the Family Reunification Directive beyond the married couple, the Court's future reasoning could be affected by general principles of EU Law. These are principles that the ECJ has deemed sufficiently important and adequately recognized throughout the Union, to be proclaimed to be general principles of Union law.[177] In relation to Union acts such as the Family Reunification Directive, the above mentioned principles have two main functions.[178] Firstly, they serve as aids of interpretation of written law.[179] Secondly, as compliance with general principles of Union law is a prerequisite of lawfulness of secondary legislation, these principles can also be used as a ground for review of the legality of a Union act.[180]

Many of the examined judgments have been criticized for non-compliance with the ECHR and in several of the cases issues relating to the right to family life and the general principle of equality were raised.[181] The next two chapters will explore how these two general principles could affect the right to family reunification for non-traditional couples.

---

[176] Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319, paras 35-36.

[177] For an examination of how these principles are distilled from common national legal traditions see, X Groussot, *General Principles of Community Law*, Europa Law, Groningen, 2006, p 43-48; T Tridimas, *General Principles of EC Law*, Oxford University Press, Oxford, 2006, p 17-29 and Opinion of AG Léger in Case C-87/01 P *Commission v CEMR* [2003] ECR I-7617, paras 41-43.

[178] In addition to these two main functions, the Union may also be held liable in damages if a Union institution acts in breaches of general principles of Union Law, T Tridimas (2006), p 35.

[179] The Treaties and the general principles of law are superior rules of laws which means that any interpretation of secondary legislation must be compatible with these rules, Case C-314/89 *Rauh* [1991] ECR I-647, para 17.

[180] *Opinion 2/94* [1996] ECR I-1759 and Case C-540/03 *EP v Council* [2003] ECR I-5769.

[181] *Inter alia* M Bell, *Shifting Conceptions of Sexual Discrimination – From P v S to Grant v SWT*, ELJ 1999, p 73; H Stalford (2002); C McGlynn, *Family Reunion and the Free Movement of Persons in European Union Law*, International Law FORUM du droit international, 2005 and C Barnard, *The Principle of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?*, CLJ 57:2, 1998

5 The Fundamental Right to Family Life - Compatibility with the ECHR

5.1 Family Life and the Status of ECHR within the EU Legal Order

Even though there was no provisions concerning the protection of family life or other human rights in the original treaties signed in the 1950s, such protection have gradually been evolved by the ECJ since the late 1960s.[182] In *Stauder* it was held that general principles of EC law include fundamental human rights.[183] This was a couple of years later elaborated upon in the *Internationale Handelsgesellshaft*[184] were the ECJ produced the famous statement

> …respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[185]

This means that the respect of fundamental rights is a prerequisite for lawfulness of EU acts, secondary legislation included.[186]

The Constitutional traditions common to the Member States was, in *Internationale Handelsgesellshaft*, mentioned as the source of inspiration of fundamental rights, but the ECJ's jurisprudence evolved. It was soon clear that the Court also draw from international human rights agreements.[187] Among these international agreements, the ECHR has special significance and is referred to as a key source of standards of the protection of fundamental rights within the EU legal order.[188] These developments have

[182] A Arnull, *The European Union and its Court of* Justice, Oxford University Press, Oxford, 1999; S Peers and N Rogers (2006), p 116 and H Toner (2004), p 124.
[183] Case 29/69 *Stauder* [1969] ECR 419, para 7.
[184] Case 51-54/71 *Internationale Handelsgesellshaft* [1970] ECR 1125.
[185] Ibid, para 4. This statement has since been reproduced innumerous times *inter alia in* Case 44/79 *Hauer* [1979] ECR 3727, para 15; Case C-260/89 *ERT* [1991] ECR I-2925, para 41 and Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 70.
[186] *Opinion 2/94* [1996] ECR I-1759; Joined cases C-20 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411 and Case C-540/03 *EP v Council* [2003] ECR I-5769.
[187] Case 4/73 Nold [1974] ECR 491, para 13.
[188] Case law beginning with Case 222/84 *Johnston* [1986] ECR 1651, para 18. See also inter alia Case C-299/95 *Kremzow* [1997] ECR I-2629, para 14; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71; and Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 33.

later been confirmed by the Member States in treaty amendments, from the preamble to the Single European Act to the Lisbon Treaty and Art 6(3) TEU which proclaims that:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law

The special position of the ECHR within the EU legal order is also confirmed by the ECJ's many express references to the jurisprudence of the Strasbourg court.[189] Many of these cases where such references are made concern the interpretation of the right to family life.[190] The ECJ has clearly stated that this is a fundamental right[191] and has also repeatedly held that legislation concerning family reunification must be interpreted in the light of Art 8 ECHR.[192]

5.2 Family Life in the Charter of Fundamental Rights

One of the institutional initiatives in the human rights field that confirms that the right to family life is protected in EU law is the Charter of Fundamental Rights of the European Union.[193] The Charter became legally binding in December 2009 when the Lisbon Treaty was signed,[194] but even before this date it was of importance as it was referred to by the ECJ.[195]

The Charter draws heavily on the ECHR with many provisions being almost identical.[196] However, the Charter cannot be seen as a mere copy of the ECHR as it contains some modifications and additional rights.[197]

---

[189] Case law beginning with Case C-13/94 *P v S* [1995] ECR I-2159.
[190] Case C-249/96 *Grant* [1998] ECR I-621, para 33; Case C-60/00 *Carpenter* [2002] ECR I-6279, para 42; Case C-109/01 *Akrich* [2003] ECR I-9607, para 60 and Case C-540/03 *EP v Council* [2003] ECR I-5769, paras 54-55. Also see H Stalford (2002), p 425.
[191] Case 249/86 *Commission v Germany* [1989] ECR 1263, para 10; Case C-60/00 Carpenter [2002] ECR I-6279, para 41 and Case C-109/01 *Akrich* [2003] ECR I-9607, para 58.
[192] Case 249/86 *Commission v Germany* [1989] ECR 1263, para 10; Case C-413/99 *Baumbast* [2002] I-7091, para 72; Case C-540/03 *EP v Council* [2006] ERT I-5769, para 52 and Case C-578/08 Chakroun [2010] n.y.r., para 44. Also see Peers in S Peers and N Rogers eds (2006), p 119.
[193] First proclaimed in December 2000, OJ 2000 C 364/1. The text has since been subject to several amendments the most recent being OJ 2010 C 83/02.
[194] Art 6(1) TEU.
[195] Case C-540/03 *EP v Council* [2003] ECR I-5769, para 38, 58; Case C-438/05 *Viking Line* [2007] ECR I-10779, para 44; Case C-341/05 *Laval* [2008] ECR I-11767, para 91 and Case C-244/06 *Dynamic Medien* [2008] ECR I-505, para 41.
[196] However the Charter is also to some extent built on other international human rights treaties, EU constitutional and free movement law and on national constitutional traditions, S Peers, *Human Rights in the EU Legal Order* in S Peers and N Roger eds (2006), p 129.
[197] U Bernitz, EU:s nya rättighetsstadga – hur kommer den att tillämpas?, ERT Jubileumsnummer 2008, p 73-83.

Nevertheless, when it comes to the right to respect for private and family life, the wording of Art 7 of the Charter is very close to Art 8 ECHR.

> Everyone has the right to respect for his or her private and family life, home and communications.

Art 7 of the Charter and Art 8 ECHR are indeed listed as "corresponding" articles in the Explanations Relating to the Charter.[198] As a consequence of being corresponding, the meaning and scope of Art 7 shall be the same as laid down by the convention.[199] According to the explanations this also refers to the case law of the ECtHR.[200]

5.3 Family Life and Family Reunification under the ECHR

Art 8 ECHR indicates that the contracting parties have an obligation to respect and not unjustifiable impede the individual's family and private life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

There is no doubt that the married couple is included in the meaning of the notion "family life" and even so if they have not yet lived together,[201] but what about the "non-traditional" families? And if a couple establishes "family life", what consequences will this have on the right to family reunification? These two questions will be discussed in the following subchapters.

5.3.1 What Types of Couples are Protected Under Art 8 ECHR?

It is settled case law that the expression "family" in Art 8 ECHR has a wider application stretching beyond persons linked together by a legal bond. Other *de facto* family ties where the parties are living together could also fall

[198] These explanations were first drafted under the authority of the Praesidium of the Convention which drafted the Charter. They have later been updated, Explanations Relating to the Text of the Charter of Fundamental Rights OJ 2007 C 303/02. Even though they do not as such are legally binding, due regard shall be given to these explanations when interpreting the Charter according to Art 6(1) TEU and the preamble of the Charter.
[199] Art 52 (3) of the Charter.
[200] Explanation Relating to the Charter under Art 52 (3).
[201] *Abdulaziz, Cabales & Balkandali v UK*, Application no 9214/80; 9473/81; 9474/81, (28.05.1985).

within the definition of family.[202] In this regard the ECtHR has repeatedly held that marriage is not a prerequisite to the enjoyment of family life,[203] and the general conclusion from this jurisprudence is that an unmarried cohabiting couple *may* enjoy family life.[204]

According to Toner, the key elements in the Strasbourg court's assessment of whether such a couple enjoys this protection are the stability and intention of the parties.[205] If the couple have a longstanding relationship, if they cohabit and raise children together, if they have joint financial affairs they will be particularly likely to fall within the scope of "family life".[206] These criteria could all be seen as a manifestation of the stability of the relationship. Most unmarried cohabiting couples could probably fulfill these requirements. This is in turn also related to the fact that Art 8 ECHR provides protection for family life, i.e. the actual living together rather than for the family itself as a unit.

The above described case law does, however, only concern heterosexual couples. Up until recently, the ECtHR have been reluctant to accept that the emotional and sexual relationship of a same-sex couple could constitute "family life".[207] In cases such as *WJ & DP v UK* and *ZB v UK*, these couples have instead been given the lesser protection under "private life".[208] Starting in 2001 with *da Silva Mouta*,[209] a different attitude to this point started to evolve in the Strasbourg court. In this judgment, later confirmed in *Fretté*[210] and *Karner*[211], the ECtHR establishes clearly that sexual orientation is one of the grounds covered by Art 14 ECHR. The development continued with *Schalk and Kopf*[212] delivered in June 2010 where the court in paragraph 94 of the judgment stated that:

---

[202] The cohabitation of the couple is important but not an absolute criterion, *Berrehab v the Netherlands*, Application no 10730/84, (21.06.1988), para 21. *Kroon and others v. The Netherlands*, Application no 18535/91, (27.10.1994). To this point also see R Clayton and H Tomlinson, *The Law of Human Rights*, Oxford University Press, Oxford, 2000, section 13.93-13.95 and H Stalford, Concepts of Family under EU Law – Lessons from the ECHR, International Journal of Law, Policy and the Family, vol 16, 2002, p 417.

[203] *Marckx v Belgium*, Application no 6833/74, (13.06.1979); *Berrehab v the Netherlands*, Application no 10730/84, (21.06.1988) and *Keegan v Ireland*, Application no 16969/90, (26.05.1994)

[204] *Ibid Marckx v Belgium*; *Keegan v Ireland*, Application no 16969/90, (26.05.1994); *Kroon and others v. The Netherlands*, Application no 18535/91, (27.10.1994); *X, Y and Z v The United Kingdom*, Application no 21830/93, (22.04.1997) and *Schalk and Kopf v Austria*, Application no 30141/04, (24.05.2010).

[205] Toner (2004), p 81.

[206] *X, Y & Z v The United Kingdom*, Application no 21830/93, (22.04.1997) and *Emonet and others v Switzerland*, Application no 39051/03, (13.12.2007), para 36.

[207] *X & Y v UK*, Application no. 9369/81, (3.05.1983); *S v UK*, Application no. 11716/85, (14.05.1986) and *Mata Estevez v Spain*, Application no 56501/00, (10.05.2001)

[208] *WJ & DP v UK* Application no 12513/86 (13.07.1987), and *ZB v UK* Application no 16106/90 (02.10.1990). See also *C & LM v UK* Application no 14753/89, (09.10.1989).

[209] *Da Silva Mouta v Portugal*, Application no 33290/96, (21.12.1999).

[210] *Fretté v France*, Application no 36515/97, (26.02.2002).

[211] *Karner v Austria*, Application no 40016/98, (24.07.2003).

[212] *Schalk and Kopf v Austria*, Application no 30141/04, (24.06.2010).

> … the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

Thus, same-sex couples may now fall within "family life". As justification for the shift in approach to same-sex couples, the court referred to the rapid evolution of social attitudes towards same-sex couples in many Member States. Reference was also made to an "emerging European consensus towards legal recognition of same-sex couples".[213] Such consensus is vital for the court when developing its interpretation of the convention. The convention is a so called "living instrument" which means that its interpretation may evolve over time to adapt to new ways of family life, as was done in relation to family life and same-sex couples.[214] It is here the state of law among the contracting parties comes in; it is used as proof of the present-day conditions in light of which the interpretation can made. If a general development among the Member States is lacking, there is in other words nothing that justifies an interpretation of the convention as a "living instrument".

To summarize, the ECtHR is in its judgments more focused on the factual reality rather than legal formality when assessing whether a couple are protected under Art 8 ECHR. As a consequence, *de facto* family ties are producing "family life". Even thought the ECtHR recognizes de facto families, the jurisprudence shows a hierarchy of relationships. Heterosexual marriage is *always* considered to have a family life, a heterosexual cohabiting couple *could* enjoy protection while same-sex partners have not until recently been deemed worthy of protection for their "family life" but was previously given the lesser protection under private life.

5.3.2 Does Art 8 ECHR Provide a Right to Family Reunifcation?

As already mentioned, it is not very difficult to fall within the notion of "family life" under Art 8 ECHR but the question is what implications that have on the right to family reunification.

There is no provision specifically on immigration in the ECHR. Nevertheless, this does not mean that the convention never could interfere with Member States' right to control and to restrict the entry of TCNs to their territory. It is settled case law that a right to family reunification flows

[213] *Ibid*, para 105.
[214] *Dudgeon v UK*, Application no 7525/76, (23.09.1981); *Christine Goodwin v UK*, Application no 28957/95, (11.07.2002) and *E.B. v France*, Application no 43546/02, (22.01.2008), para 92.

from the right to respect of family life in Art 8 ECHR.[215] This right is, however, nowhere near an absolute right under the Convention.

First and foremost it must be underlined that the ECtHR has made a clear distinction between cases concerning admission and those on expulsion. The leading case *Abdulaziz*[216] is seen as the origin of this distinction.[217] Expulsion has in principle been found to be an interference with family life where a state seeks to expel a person who has established family life in that State.[218] On a case by case basis the ECtHR have held that a Member State had a negative obligation not to expel a non-national.[219] In cases concerning a positive obligation on the other hand, the ECtHR's approach has been stricter and couples arguing that a Member State has an obligation of admission have been much less successful than in cases where a member of a family stand the risk of expulsion.[220]

In the admission cases, the ECtHR takes its point of departure in a principle of international law; namely that a sovereign state has a right to control the entry of non-nationals into its territory.[221] Furthermore, the ECtHR has stated clearly that there is no general obligation to respect the married couple's choice of residence for the family and to accept the non-national spouse to settle in that country.[222] This means that a claim that Member States must have an immigration policy which automatically grants a right to family reunification even between spouses will be rejected.[223] The court has instead emphasized that the contracting parties enjoys a wide margin of appreciation in this area as a state's obligations to admit family members will vary according to the particular circumstances of the case.[224] In other

[215] *Gül v Switzerland,* Application no 23218/94, (19.02.1996); *Boultif v Switzerland*, Application no 54273/00, (02.08.2001); *Sen v Netherlands*, Application no 31465/96, (21.12.2001), paras 40-41; *Jakupovic v Austria,* Application no 36757/97, (06.02.2003).
[216] *Abdulaziz, Cabales & Balkandali v UK,* Application no 9214/80, 9473/81, 9474/81, (28.05.1985).
[217] Toner (2004), p 94.
[218] S Peers, *EU Justice and Home Affairs Law*, Oxford University press, Oxford, 2006, p 190 and K Gronenendijk, R Barzilay, S Peers and E Guild, The Legal Status of persons Admitted for Family Reunion – A Comparative Study of Law and Practice in Some European States, Council of Europe Publishing, Strasbourg, 2000, p 9.
[219] *Inter alia*, *Moustaquin v Belgium*, Application no 12313/86, (18.02.1991); *Nasri v France,* Application no 19465/92, (13.07.1995) and *Boultif v Switzerland*, Application no 54273/00, (20.12.2001).
[220] *Gül v Switzerland,* Application no 23218/94, (19.02.1996). *Ahmut v Netherlands,* Application no 21702/93, (28.11.1996). *Nsona v Netherlands,* Application no 23366/94, (28.11.1996).
[221] *Abdulaziz, Cabales & Balkandali v UK,* Application no 9214/80, 9473/81, 9474/81, (28.05.1985) para 67 and *Moustaquin v Belgium*, Application no 12313/86, (18.02.1991). Also see D Thyms, *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?*, International and Comparative Law Quarterly, Cambridge University Press (2008) 57, p 87.
[222] *Ibid Abdulaziz, Cabales & Balkandali v UK,* para 68.
[223] H Toner (2004), p 90.
[224] *Abdulaziz, Cabales & Balkandali v UK,* Application no 9214/80, 9473/81, 9474/81, (28.05.1985). para 67.

words, only in a case by case situation can a right to family reunification appear when it comes to admission.

According to Peers, the Member States has an almost unlimited discretion in relation to admission.[225] It is true that even in a case where one spouse had difficulty leaving a host state due to illness, settlement of the other spouse was denied.[226] Nevertheless, there are limits in the Member States margin of discretion as there are a few cases where a refusal to permit family reunification was considered as an unjustified breach of Art 8 ECHR.[227] It is however important to mention that these cases where ECtHR found that there was an obligation to admit a non-national, concerned couples with children. It cannot be ruled out that there would have been another outcome if the couples were childless.[228]

The reluctance of imposing an obligation of permitting the settlement of a partner is closely connected to what could be called the *elsewhere doctrine*. The Strasbourg court has consistently ruled that if it is possible for the couple to live *elsewhere* there is no interference with the right to respect for family life.[229] Even though there is a growing willingness to accept the couples' complaints that family life will be impossible elsewhere,[230] the ECtHR still insist that some difficulties in the spouse settling abroad will not necessary lead to an obligation for a Member State.[231] In other words, not even when there is difficulties to settle abroad is there a general obligation to respect family life.

For same-sex couples, the elsewhere doctrine has been applied particularly hard as they, at the time, were not considered to be protected under "family life".[232] However, this jurisprudence is probably not relevant any more owing to the fact that ECtHR now holds that a same-sex couple will fall under the notion of "family life" in the same way as heterosexual couples.[233]

To summarize, a couple living together will normally fall within the scope of family life in Art 8 ECHR. In spite of this, Art 8 ECHR does not produce a general obligation on Member States to permit settlement of even the closest family members. Member States will only have such an obligation

[225] S Peers (2006), p 191 ff.
[226] *Gül v Switzerland,* Application no 23218/94, (19.02.1996).
[227] *Sen v Netherlands,* Application no 31465/96, (21.12.01) and *Tuquabo-Tekle v Netherlands,* Application no 60665/00, (01.12.2005).
[228] H Stalford (2002), p 417.
[229] *Inter alia Abdulaziz, Cabales & Balkandali v UK,* Application no 9214/80, 9473/81, 9474/81, (28.05.1985) and *Solomon v Netherlands,* Application no 44328/98, (05.09.2000)
[230] *Boultif v Switzerland,* Application no 54273/00, (02.08.2001); *Amrollahi v Denmark,* Application no 56811/00, (11.07.2002). *Yildiz v Austria,* Application no 37295/97, (31.10.2002) and *da Silva v Netherlands,* Application no 50435/99, (31.01.2006).
[231] *Ibid Boultif v Switzerland*; *Kaya v. Netherlands,* Application no 44947/98, (06.11.2001) and *Useinov v Netherlands,* Application no 61292/00, (11.04.2006).
[232] E.g. the fact that homosexual activities was an offence in the alternative country was not enough to produce an obligation of admission, *X, Y and Z v The United Kingdom,* Application no 21830/93, (22.04.1997).
[233] *Schalk and Kopf v Austria,* Application no 30141/04, (24.06.2010).

when the couple does not have a reasonable possibility of residence elsewhere.

5.4 Analysis: Are EU Policies Compatible with the ECHR?

The main conclusion from a comparison between Art 8 ECHR and its jurisprudence on the one hand and the right to family reunification for TCNs on the other is that the protection under the Family Reunification Directive is stronger than the one offered by the Strasbourg regime. To challenge the settlement policy of "married-partners-only" in the Family Reunification Directive purely on Art 8 ECHR is not likely to be successful nor would an interpretation in light of the examined principle expand the types of couples that are entitled under the Family Reunification Directive.

This conclusion might seem surprising in the light of the divergence in the definition of family between the courts. The ECtHR deploys a much wider definition and focuses on *de facto* family ties. In addition to married couples, unmarried cohabiting couples, heterosexual as well as homosexual, have the capacity to enjoy protection for their family life. In sharp contrast to that we find the formalistic and narrow understanding of the notion of family, emerging in the ECJ's jurisprudence and in the Family Reunification Directive. Only the married couple is here deemed worthy of protection which means that many of the couples living in the EU are excluded. The EU policies, contrary to the ECHR, thus fail to incorporate the rapid evolution of family patterns in Europe.

The difference in approach to the notion of family could partly be explained by reference to the fact that the two courts, in reality, are pronouncing itself on two different things. Art 8 ECHR provides protection for family life, i.e. for the actual living together rather than the family itself as a unit. If you live like a family, you are entitled to protection. The same type of protection can be found in Art 7 of the Charter. The ECJ on the other hand have focused on who is part of the family unit and tried to pinpoint the meaning of "spouse". In such an analysis, it could be seen as natural that the focus lies on legal ties rather than on the way the couple conduct their life together.

The fact that the notion of "family life" in Art 8 ECHR includes much more types of family constellations than Art 4 of the Family Reunification Directive would suggest that this directive does not comply with the ECHR. However, Art 8 ECHR is not constructed to work in the abstract and family life has to be put in a context in order to assess the protection that this article actually is giving. If that context is family reunification rights for TCNs it is clear that the right to have a non-national partner admitted to a Member State is very limited under the ECHR. The weaknesses of Art 8 ECHR are firstly that even though a couple's family life is protected, there is no

general right to family reunification even for the closest family members. Secondly, the possibility of the family to settle elsewhere may be decisive and have to be considered. Not only is the Family Reunification Directive compatible with ECtHR case law, it does in fact offers wider protection than the ECHR. Even though the directive can be criticized for not including registered partners and unmarried couple, it at least gives a general right to family reunification between spouses.

As for the elsewhere doctrine, it seems difficult to reconcile with EU immigration law that encourages movement. The individual's choice of where to reside seems to be central in this system. As put by Guild:

> The Community, in developing its immigration law, consistently removed from the Member State Authorities the power to decide whom to admit. Instead the process was transformed into one increasingly characterised by the power of the individual to choose.[234]

In a system that is based on the individual's choice, the possibility of residing elsewhere with a partner cannot be decisive. This means that the possibility for a Turkish worker living in France to reside, with his or her partner, elsewhere in the Union or in a third country should not be taken into account when determining whether or not there is a right to family reunification. On the other hand one could argue that the EU only encourages free movement of EU citizens and that the system is only constructed to respect the choices of this group. However, such an objection can be questioned in the light of Directive 2003/109[235] as one of the purposes with the directive was to facilitate free movement of long-term residence TCNs. Movement within the Union is thus no longer exclusively for EU citizens.

As a final observation there is an interesting similarity between the ECtHR's and the ECJ's approach to cases concerning family and family reunification that is worth mentioning. In the judgments, both the ECJ and the ECtHR handle this question delicately and with a certain amount of caution. Firstly, the courts exert themselves to expressly point out the limits in their jurisdiction and underline the Member States sovereignty within this area. Furthermore, both courts make extensive references to the Member States national legislation and legislature. All in all, this draws a picture of two courts that seems to be on a quest for consensus. Only where such is found among its Member States does the courts find it appropriate to take a step forward. Thus, it is not only the EU legislature but also the ECtHR and the ECJ that has shown cautiousness when dealing with family reunification – a question that touches upon two highly controversial issues: immigration of TCN and gay rights.

[234] E Guild, *Immigration Law in the European Community*, Kluwer, The Hague, 2001, p 13.
[235] Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.

5.5 Can the EU Offer Wider Protection than ECHR?

The risk of divergent interpretations of human rights standards by the ECJ and the ECtHR and what the consequences would be if the Union's protection is *weaker* than the ECHR are issues that have been widely discussed in the doctrine.[236] But the conclusion from the previous section rather raises the opposite question: can the EU offer *wider* protection than the ECHR?

The ECHR is clearly meant to serve as a "floor" for its contracting parties, allowing them to adopt more extensive rights than the ones set out in the convention.[237] The EU is, however, not presently a contracting party, even though the Union now has the competence to accede to the ECHR,[238] and is thus not directly bound by the convention. Would that affect the Union's ability of creating a more extensive right to family reunification than the one offered by the ECHR? AG Jacobs suggested in 1994 that:

> There is no reason why national courts or the Court of Justice should not apply a higher standard, based on a more far-reaching interpretation of the Convention, or on national provisions or indeed on other international human rights instruments. To accept this view is not to question the pre-eminent status of the Convention but merely to recognise the obvious, that its role is necessarily limited, however important.[239]

Since this statement was made, the Charter has entered into force and does now have the same legal value as the Treaties,[240] which brings a new dimension to the question. Art 52 (3) of the Charter defines the relationship to the ECHR:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be *the same* as those laid down by the said

---

[236] R Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Luxembourg and Strasbourg*, in R Lawson and M de Bloijs (eds), The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of H Schermers, vol iii, Martinus Nijhoff, Dordrecht, 1994; P Craig, *EU Administrative Law*, Oxford University Press, Oxford, 2006 and S Douglas-Scott, *The Tale of Two Courts: Luxembourg and Strasbourg and the Growing European Human Rights Acquis*, CMLRev 43, p 629-665, 2006.

[237] T Lock *The ECJ and the ECtHR: The Future Relationship between the Two Courts*, The Law and practice of International Courts and Tribunals 8 (2009), p 376.

[238] In *Opinion 2/94* [1996] ECR I-1759 the Court came to the conclusion that the EU did not have the competence to accede to the ECHR. Such competence was however acquired with the adoption of the Lisbon Treaty, Art 6 (2) TEU. When the EU accedes to the Convention it will serve as a minimum standard, as it does for all the other contracting parties.

[239] F Jacobs (writing extra judicially), *European Community Law and the European Convention on Human Rights*, in D Curtin and T Heukels (eds), Institutional Dynamics of European Integrations, Martinus Nijhoff, Dordrecht, 1994, p 571.

[240] Art 6 (1) TEU.

> Convention. This provision shall not prevent Union law providing *more extensive protection*.[241]

The wording of the article is not free from ambiguity. On the one hand, the first sentence seems to prevent the Union from providing more extensive protection as it states that when a right in the Charter corresponds to a right set out in the Convention, which is the case of the right to respect of family life,[242] the meaning of those rights should be *the same* (nb. not *at least* the same). On the other hand, the last sentence of Art 52 (3) would only make sense if the Union could do exactly the opposite, i.e. if the possibility to provide more extensive protection existed. As the latter interpretation is the only reasonable interpretation, it must therefore be concluded that there is nothing that prevents the Union to adopt more far-reaching interpretation of rights provided for in the ECHR.[243] Thus, the Family Reunification Directive is not contrary to the convention on grounds that it offers a more extensive right to family reunification than under Art 8 ECHR.

[241] Emphasis added.
[242] This is stated in the Explanations Relating to the Text of the Charter of Fundamental Rights OJ 2007 C 303/02.
[243] H Toner (2004), p 141 and P Craig (2006), p 516.

6 A Policy of "Married Only" - Discrimination on Grounds of Sexual Orientation?

We have already seen that the rules of the Family Reunification Directive, only giving a right to family reunification to married couples, does not constitute a breach of Art 8 ECHR. But this Directive has also been criticized for being discriminatory to same-sex couples as they are treated less favorably than couples joined by marriage.[244] The following chapter will therefore examine whether the "married-only" policy in the Family Reunification Directive is contrary to the prohibition of discrimination on grounds of sexual orientation mentioned in the preamble of the Directive[245] and if people in a stable same sex relationship can invoke the principle of equality in order to claim a right to family reunification.

6.1 General Principle of Equality

Equality or the general principle of equal treatment operates on many different levels in the EU legal order. The ECJ has established that this principle forms part of the general principles of EU law and has ever since the 1970s held that this principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.[246]

Equality is a wide[247] principle that sometimes is divided into a formal and a substantive side.[248] Formal equality correlates to ECJ's findings that public authorities have an obligation to treat similar situation in the same way but it also stipulates that different situations must be treated differently. As such, it does not affect the substance of the law, only how it is applied. Substantive equality, or equality of result, on the other hand, has an impact on the content of the law and demands a positive reordering of society in order to combat discrimination on certain grounds.[249] Yet, it should be noted

[244] S Peers and N Rogers (2006), p 595 and M Bell, *Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union*, European Review of Private Law 5-2004, p 613-632.
[245] Recital 5.
[246] Joined Cases 117/76 and 16/77 *Ruckdeschel et al v Hauptzollamt* [1977] ECR 1753, para 7; Joined Cases 124/76 and 20/70 *S.A. Moulin ser Huilieries de Pont-à-Mousson* [1977] ECR 1753 paras 14-17; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, p 39 and Case C-101/08 *Audiolux* [2009] n.y.r., para 54.
[247] The concept of equality is by some regarded as so dynamic that its content is determined by the society where its interpretation is made, to this effect see J Shwarze, European Administrative Law, London; Sweet and Maxwell, 2006, p. 546. Also see T Tridimas (2006), p 60 for a similar analysis.
[248] *Ibid* Tridimas (2006), p 61.
[249] C Barnard and B Hepple, *Substantive Equality*, CLJ 2000:3, p 564.

that the described distinction between formal and substantive equality is not made by the ECJ.[250]

6.2 Discrimination on Grounds of Sexual Orientation

6.2.1 Legislation

Equality is primarily an unwritten principle of EU law,[251] but equality has also been formalized in both primary and secondary legislation. Art 19 TFEU gives the Union competence to take action to combat discrimination "based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*".[252] This article does not prescribe any specific obligations on Member States and does therefore not have direct effect.[253] The competence has however been used to adopt Directive 2000/78 that seeks to combat discrimination *inter alia* on grounds of sexual orientation in the field of employment and occupation (thus, not of importance to immigration law).[254] Furthermore, the Charter of Fundamental Rights reinforces that the prohibition of discrimination on grounds of sexual orientation is a fundamental value whereas this ground is expressly included in the general anti-discrimination provision in Art 21 (1).

6.2.2 Case Law

Even though the principle of equality to certain extent has been formalized, it is important to underline that this legislation is merely seen as a specific enunciation of the wider general principle of equality.[255] According to the ECJ, this enable it to rule that a certain discriminatory measure is prohibited even where there is no support in secondary legislation, e.g. in relation to age-discrimination in *Mangold*.[256] Another case that shows the Court's

[250] The Court have traditionally been seen as only favoring formal equality but C Barnard and B Hepple (2000) argues that indirect discrimination is an example of how the ECJ have used substantive equality.
[251] T Tridimas (2006), p 60.
[252] Former Art 13 EC. Emphasis added.
[253] T Tridimas (2006), p 64. For case law on the requirements for direct effect, see supra note 83.
[254] Directive 2000/78 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L303/16. Directive 2000/43 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L180/22 was also adopted on the basis of the old Art 13 EC (now Art 19 TFEU) but does not concern sexual orientation.
[255] Joined Cases 117/76 and 16/77 *Ruckdeschel et al v Hauptzollamt* [1977] ECR 1753, para 7; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, p 39 and Case C-144/04 Mangold [2005] ECR I-9981, para 74.
[256] *Ibid Mangold*, paras 74-76. In Case C-555/07 *Kücükdevici* [2010] n.y.r, para 50, the Court confirmed that the prohibition of discrimination of grounds of age is a general principle of EU law. *Mangold* was however highly criticized and an action in order to

willingness to apply the general principle of equality generously is *P v S* concerning discrimination against transsexuals.[257]

Would the ECJ reason in a similar way as to the application of the general principle of equality to different forms of family life, registered partnerships and other same-sex relationship? The Court's answer in *Grant* was in the negative. The fact that fundamental rights could not extend the obligations on Member States under the Treaty was underlined and the ECJ continued by establishing that sexual orientation was not included in the discrimination based on sex in the Treaty.[258] It was stated that:

> Community law as it stands at present does not cover discrimination on sexual orientation[259]

This statement must also mean that the ECJ did not consider that this ground formed part of the wider principle of equality. It shall be observed that when *Grant* was delivered, the Member States were drafting Art 13, now Art 19 TFEU, giving the Union competence to combat discrimination on the basis of sexual orientation.[260] However, even after the Treaty amendment, the reluctance to deal with this type of discrimination continued in *D & Sweden*, which related to household allowance.[261] The ECJ held that the difference in treatment between a registered partner and a married person was not due to sexual orientation but that it was rather related to the different legal ties that these statuses produced. The ECJ did not, as was done in *K.B.* concerning transsexuals, consider the fact that all homosexuals in contrast to heterosexuals were denied the possibility to fulfill the requirement for the allowance due to their incapacity to marry.[262] According to Craig and de Burca, the Court, in stating that it was the legal ties that determined the difference in treatment and not the sexual orientation, actually denied the possible existence of a general principle prohibiting discrimination on the grounds of sexual orientation.[263] In fact, the only time where the ECJ has actually held that a case fell within the possible application of non-discrimination on grounds of sexual orientation was when the matter concerned the application of Directive 2000/78 that prohibits discrimination on that ground. It seems like the ECJ, in contrast to the approach to discrimination of transsexuals or on grounds of age, is reluctant to

---

declare the said decision as an ultra-vires act was brought before the German Federal Constitutional Court. That claim was however recently rejected by the German court in *Honeywell*, F Schulyok, August 31st 2010, on Adjudicating Europe (http://adjudicatingeurope.eu).

[257] Case C-13/94 *P v S* [1996] ECR I-2143. To this effect also see Case C-117/01 *K.B.* [2004] ECR I-541.

[258] Case C-249/96 *Grant* [1998] ECR I-621, paras 45 and 47. AG Elmer on the other hand held that discrimination was at hand, para 42 of the Opinion in this case.

[259] *Ibid Grant*, para 47.

[260] This fact was even mentioned in the judgment, ibid Grant, para 48.

[261] Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319

[262] In Case C-117/01 *K.B.* [2004] ECR I-541, para 34, the Court held that a transsexual could not be denied a survivors' pension because he or she is no married when it is impossible for a transsexual to fulfill the marriage requirements, para 34.

[263] P Craig and G de Burca (2008), p 560.

pronounce itself on the field of discrimination on the basis of sexual orientation without express support in secondary law.

6.3 The Policy of "Married Only" and Discrimination on Grounds of Sexual Orientation

From the previous section it can be concluded that the ECJ has yet to acknowledge the prohibition of discrimination on grounds of sexual orientation as a general principle of EU law. This together with the fact that family reunification is not covered by any secondary legislation that prohibits such discrimination, as in the *Maruko* case, would suggest that there is little justification for a closer examination of the Family Reunification Directive's compliance with a prohibition of discrimination of grounds of sexual orientation. However, in light of Art 21 of the Charter and the preamble of the Family Reunification Directive that both refers to the prohibition of such discrimination, this question is still relevant.

In order to conclude that the rules in the Family Reunification Directive, only giving a right to family reunification between spouses, constitutes unlawful discrimination, married couples and same-sex couples must first be considered to be in a similar situation, and as a second limb an objective justifications to the policy should be lacking.[264] According to Schwarze, it is important to acknowledge that the decision of what qualities you compare, will determine the outcome of the similarity test.[265] He also holds that the court never should search for total equality, only close similarity, as total equality only is a possible outcome in a comparison between two things that are identical. If that is the case, there is no need for a comparison in the first place.[266]

The ECJ has assessed the similarities between marriage and a same-sex relationship on three occasions: in *Grant*, *D and Sweden v Council* and *Maruko*. In *Grant* the ECJ held that a stable relationship between two persons of the same sex was equivalent neither to a marriage nor to a stable relationship between persons of opposite sex.[267] This conclusion was reached after observing that there was a lack of consensus among Member States regarding the recognition of same-sex couples and that the ECtHR had held that such couples did not fall within the scope of "family life" under Art 8 ECHR.[268] The *Grant* case concerned an unregistered couple but in *D and Sweden v Council*[269] the ECJ pronounced itself on the similarity

[264] P Craig (2006), p 580ff.
[265] J Schwarze, European Administrative Law, Sweet and Maxwell, London, 2006, p 549. Also see C Barnard and B Hepple (2000), p 563, on this effect.
[266] *Ibid Schwarze*, p 548f.
[267] Case C-249/96 *Grant* [1998] ECR I-621, para 35.
[268] *Ibid*, paras 32-34.
[269] Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319.

between a registered partnership and a marriage. The Court established that these two civil statuses was clearly distinct from each other and gave rise to different legal ties and effects.[270] As in Grant, the ECJ also referred to the great diversity in the Member States' legislations as regards the assimilation of marriage and same-sex unions and to the fact that this was a question for the legislature.[271] Therefore, the ECJ continued, it cannot be held that the Swedish registered partners are comparable to a married couple.[272] This conclusion could definitely be questioned. In Swedish law at the time, registered partnership was considered to be equivalent to marriage.[273] There was even an express presumption of equality in the legislation. However, without actually examining the substance of the Swedish law, the ECJ dismissed the comparability with marriage by referring to the absence of any general assimilation of marriage and registered partnerships.

In both *Grant* and *D and Sweden v Council* the ECJ examined the similarities between a same-sex relationship and a marriage in the legal system as a whole, but in *Maruko*[274] the approach to the similarity test was different. The ECJ was not interested in similarities between registered partnership and marriage in the *entire* legal order. The question was rather whether they were in a comparable situation as concerned the *specific* field of law that regulated the benefit that were at stake in the case.[275] This approach to the similarity test lead to the first case were an applicant was successful in claiming that a measure constituted discrimination on grounds of sexual orientation and that the ECJ acknowledged that a registered partnership could be comparable to marriage.[276] Although the outcome of the case is very welcome, it probably not supports same-sex couples claiming that the "married-only" policy in the Family Reunification Directive is discriminatory. In fact, *Maruko* implies that if a same-sex couple does not have the same right as a married couple in a specific field of law, e.g. when it comes to family reunification, then they are not in a similar situation and cannot therefore successfully claim that a difference of treatment amounts to discrimination on grounds of sexual orientation. Circular as it might sound, this means that as the legislation in question, the Family Reunification Directive, does not treat a same-sex couple and a couple joined by marriage as equivalent, they are therefore not in a similar situation. Consequently, the Directive is not discriminatory on the grounds of sexual orientation.

Grant, *D and Sweden v Council* and *Maruko* shows that the ECJ will not consider that a same-sex couple is in a similar situation, neither generally

[270] *Ibid*, para 47.
[271] *Ibid*, paras 49-50.
[272] *Ibid*, paras 50-51.
[273] This is supported by the wording of the law, Lag (1994:1117) om registrerat partnerskap, but also by the fact that when same-sex marriages was introduced in Sweden, the possibility of registered partnership was removed, Lag (2009:260) om upphävande av lagen (1994:1117) om registrerat partnerskap.
[274] Case C-267/06 *Maruko* [2008] ECR I-1757.
[275] *Ibid*, para 72.
[276] *Ibid*, para 73.

nor in the specific field of family reunification, as a married one and it is therefore not necessary to examine if the more favorable treatment of the married union is objectively justified. It can be concluded that, in the present state of EU law, the Family Reunification Directive would not be seen as contrary to a prohibition of discrimination on grounds of sexual orientation.

6.4 Policies of ”Married Only” and Art 14 ECHR

Another source that can be used to question the difference in treatment between heterosexual and homosexual couples is Art 14 ECHR. This article provides that rights and freedom set out in the Convention shall be secured without discrimination. As the ECtHR consistently has held that this article complements the other substantive provisions of the convention, the facts of a case must fall within the ambit of one or more additional articles of the ECHR.[277] Among the grounds of discrimination that is enumerated in Art 14, sexual orientation is not mentioned.[278] Nevertheless, the ECtHR has repeatedly held that sexual orientation is part of that provision.[279]

In order for an issue to arise under Art 14 there must furthermore be a difference in treatment of persons in relevantly similar situations. In relation to the right to marry, the ECtHR have found that same-sex couples and opposite-sex couples are in a relevantly similar situation as regards their need for legal recognition.[280] This could suggest that same-sex couples, even if they do not have access to marriage and the protection this status offers, have the *same need* for protection of their family as the married couples and that they consequently are in a similar situation in relation to family reunification. A policy giving settlement rights only for the married couple would in that case be discriminatory unless the difference in treatment is objectively and reasonably justified.[281] Nevertheless, such difference in treatment could, and is likely to, be seen as objectively justified by the ECtHR. On the one hand, the ECtHR has repeatedly held that unequal treatment based on sexual orientation require particularly serious reasons by way of justification.[282] On the other hand, more favorable

[277] *Chassagnou v France*, Applications nos. 25088/94, 28331/95 and 28443/95, (29.04.1999), para 89. *Karner v Austria*, Application No. 40016/98, (27.07.2003), para 32 and *E.B. v France*, Application no 43546/02, (22.01.2008), para 47.
[278] The grounds mentioned in Art 14 ECHR are: “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.
[279] *da Silva Mouta v Portugal*, Application 33290/96, (21.12.1999); *L and V v Austria*, Applications 39392/98 and 39829/98, (9.01.2003); *Karner v Austria*, Application No. 40016/98, (27.07.2003).
[280] *Schalk and Kopf*, Application no 30141/04, (24.06.2010), para 99.
[281] *Ibid*, *para 97.*
[282] *L and V v Austria*, Applications 39392/98 and 39829/98, (9.01.2003), para 45; *Karner v Austria*, Application No. 40016/98, (27.07.2003), para 37 and *Schalk and Kopf*, para 97.

treatment of married persons than of persons of the same sex living together in a stable relationship, have been accepted, without further consideration, as clearly legitimate for the purpose of *special protection* of the traditional family.[283] Moreover, in *Schalk and Kopf* where the ECtHR identified a similar situation, the difference in treatment was accepted even though the respondent Government did not offered any justification.[284] Thus, for the moment, policies of limiting a particular right or benefit, e.g. a right to family reunification, to married different-sex couples without providing means for same sex couples to qualify, is not discriminatory under Art 14 ECtHR.[285]

6.5 Analysis and Conclusion

The issue of interest here is whether discrimination on grounds of sexual orientation could question the ”married only” policy in the Family Reunification Directive? The first hurdle to pass when arguing from an anti-discrimination perspective is that the ECJ have remained cautious in relation to discrimination on grounds of sexual orientation. In the foregoing, we have seen that even though the ECJ has applied the principle of equality liberally there has been no willingness to do so in relation to sexual orientation. The ECJ has in fact never confirmed that the prohibition of discrimination on this basis is a general principle, as demonstrated in *Grant*, and *D and Sweden v Council*, and only applied this ground of discrimination in *Maruko* where this was stipulated by secondary legislation.

The ECJ’s narrow understanding of discrimination on grounds of sexual orientation is at its clearest in *D and Sweden v Council* were the Court exerted itself to the utmost in order to avoid entering into this controversial area by claiming that it was the civil status and not the sexual orientation of the applicant that was the basis for the difference in treatment. The obvious flaw in this line of reasoning is the failure to consider the notion of indirect discrimination. A requirement to be married in order to be granted a benefit is indirectly discriminating on the grounds of sexual orientation. The reason for this is that, in most Member States, only heterosexual couples are allowed to marry which means that a same sex couple is denied the possibility to fulfill the requirement for the benefit due to their incapacity to marry which in turn is due to their sexual orientation. Such a conclusion would also be in line with the ECJ’s holdings in K.B. where the same type of obstacle for a transsexual was found to be discriminating. On the other hand the fact that the ECJ seems to distinguish between cases concerning transsexuals and homosexuals can be used as a counter-argument for an

[283] *WJ & DP v UK*, Application no 12513/86, (13.07.1987); *C and LM v UK*, Application no 16106/90, (9.10.1989) and *B v UK*, Application no 16106/90 (10.02.1990). Also see T Tridimas (2006), p 109.
[284] *Schalk and Kopf*, Application no 30141/04, (24.06.2010), paras 80, 98 and 101. Also see the joint dissenting opinion of judges Rozakis, Speilmann and Jabens, para 8.
[285] There is a pending case, *Chapin and Carpentier v France*, Application no 40183/07, where the ECtHR will have an opportunity to revise this.

analogy between the above mentioned situations. It is true that the ECJ has, in my view rightfully seen a distinction between a homosexual and a transsexual, but that does not justify why the ECJ should fall short of examining indirect discrimination in cases such as *D and Sweden v Council*.

The ECJ's unwillingness to address the issue of discrimination on grounds of sexual orientation seems to be founded on a fear of trespassing on national competence over family law, considering the many references to the state of law in the Member States. The level of protection offered by the Member States national law appears to be the most important factor for the ECJ when determining whether the same sex couple is entitled to equal treatment. Yet, this approach is not consistent with *P v S* that concerned transsexuals.[286] In that case the ECJ held that the difference in treatment was discriminating and disregarded the fact that none of the Member States had an express prohibition of discrimination of transsexuals. Even though such legislation exists in many Member States in relation to homosexuals, the ECJ has apparently found that the rights of transsexuals are more recognized. The conclusion must be that the ECJ is clearly not willing to take the pole position in protecting lesbian and gay rights. To the contrary, the ECJ has on several occasions stated in relation to this question, that its role is to follow the legislature. This tendency to follow is also to certain extent tied to the jurisprudence from the ECtHR. In *K.B.* the ECJ justified a more progressive approach by referring to a recent judgment from the ECtHR, *Goodwin*, and in *Grant* the fact that the ECtHR had held that same-sex couples did not fall under the notion of family life was used as an argument for a more narrow understanding of equal treatment.

Even if the preamble of the Family Reunification Directive and the Charter could be used in order to persuade the ECJ to assess whether the rule of only granting settlement rights for the married couple are discriminating on the grounds of sexual orientation, new troubles lies ahead: the similarity test. When analyzing how the ECJ has performed the comparison, two remarks can be made. Firstly, in *D and Sweden v Council* the Court seems to request that a registered partnership must be identical to marriage in order to merit equal treatment. It is of course self evident that a registered partnership is not formally a marriage and to deny that the two is in a similar situation solely on this basis is a very narrow understanding of the principle of equal treatment. Just as Schwarze does, one could definitely question if it is meaningful to demand total equality between the two components in a similarity test.

Secondly, the ECJ has, contrary to the ECtHR, only assessed whether the *legal recognition* of a person in a same-sex relationship is equivalent to that of a married person. The similarities in needs and the factual reality of the couples have been left aside. In choosing to limit the comparison in this way, the ECJ has, according to Schwarze, already determined the outcome of the similarity test. As a consequence, a same-sex relationship is only in a

[286] M Bell (1999), p 73.

similar situation to marriage if these statuses are treated as equal in the field of law that is being examined. This means that one will not be able to pass the obstacle of the similarity test when claiming that the Family Reunification Directive discriminates on grounds of sexual orientation as this directive *in itself* differentiates between same-sex couples and married couples and according to recital 10 in the preamble, favors the traditional nuclear family, i.e. the married couple. If this line of argument would be carried to an extreme it would mean that no directive that treats same-sex couples different than opposite-sex couples could be discriminating. The method of only assessing the wording of the law must therefore be regarded as insufficient. All types of differences in the treatment of these groups cannot be said to be acceptable in today's Europe, even if it would be upheld by law. A law that prescribes that lesbian and gay couples for example did not have the right to sign a lease unless they could prove that no heterosexual couples wanted the apartment, must be seen as unacceptable. The whole idea of introducing the Charter and the prohibition of discrimination on grounds of sexual orientation must be that they are, in the words of Locke, "natural rights" - values that is of higher rank that is not contingent upon the laws.

Although the ECtHR has employed a more generous approach towards discrimination on grounds of sexual orientation and clearly established that this ground is included in Art 14 ECHR, it is highly arguable that the convention would prohibit an immigration policy that denies settlement rights for same-sex partners. Even if it is true that the ECtHR probably would find that a same-sex couple and a married couple have the same need for family reunification and therefore are in a similar situation, the acceptance of policies that differentiates between married and unmarried couples, giving special protection of "traditional families" seems well settled. It is unfortunate that the ECtHR has not more clearly stated why it finds that protection for the traditional family excludes protection for the less traditional families, as the court now seems to be allocating rights as if it was a zero-sum game.

To conclude: a claim that the application of the Family Reunification Directive would lead to discrimination on grounds on sexual orientation is not likely to be successful, nor would an interpretation of the directive in the light of the general principle of equality, *at present*, result in increased rights for same-sex couples**.** However, by referring to the state of law of the Member States, which implicitly must mean the present state of law, it is possible that the ECJ could make a revision on this point if a consensus on the recognition of same-sex couples would emerge among the Member States. Nevertheless, a pessimists' approach to that possibility, since the Union has expanded to include more States that are far from increasing the rights for same-sex couples, is that it now represent a missed opportunity.

This however sits alongside more promising developments by the ECJ which has given its first decision on sexual orientation that was favorable for the plaintiff, and the fact that the ECtHR now holds that same sex

couples could enjoy family life. It also has to be kept in mind that the ECHR undergoes a never-ending evolvement and that there has been an acceleration of acknowledging the rights of homosexuals and same-sex couples. Moreover, any future progress in the Strasbourg court will also in a more direct way affect the Union when it accedes to the ECHR. All in all, it is far from inconceivable that the obstacles to pass when arguing from an anti-discrimination perspective will diminish and that this will become a road less difficult to travel in the future. But for the moment it seems like some couples are more equal than others.[287]

[287] Paraphrase of ”All animals are equal, but some animals are more equal than others” in *Animal Farm: A Fairy Story* by George Orwell.

7 Concluding Remarks

Throughout this essay it has been shown that only a married person has a right to be reunited with his or her partner under the Family Reunification Directive. An interpretation of the directive, in the light of the right to respect of family life or in relation to the prohibition of discrimination on grounds of sexual orientation, does not seem to improve the situation for unmarried opposite-sex couples or same-sex couples. This means that the Family Reunification Directive fails to respond to the pluralisation of family models in contemporary Europe, and does not afford any rights to the increasing number of people living in these kinds of relationships. Even though that it is true that law often lags behind, other areas of law, such as national family law, has adapted to changing empirical realities of family life across the EU by increasingly affording legal recognition of unmarried opposite-sex couples and same-sex couples.

Why did this directive turn out to be a missed opportunity to adapt to the new emerging reality of family formation in Europe? The Family Reunification Directive must be seen as a pragmatic solution to a politically sensitive question. The Member States was not only afraid that extensive rights to unmarried couples could have a potential spill-over effect on national legislation on civil statuses. The Members States was also reluctant to extend the rights for TCNs in any way, despite the grand rhetoric during the Council meeting in Tampere. This must be explained by referring to the shift in the political debate surrounding immigration – family reunification was now seen an obstacle to integration and a way in to the Union where roadblocks was needed.

The result was that the lowest common denominator among the Member States was decisive as to what couples that were given a right to family reunification. The Family Reunification Directive is in other words modeled after the thought that no Member State should be forced to expand the level of protection for same-sex couples and other unmarried couples. For a Union claiming to be safeguarding other values than purely economical, e.g. mentioned in the Charter, such level of ambition is disappointing. The Union, having an important role in offering social protection which e.g. was shown in relation to transsexuals in *K.B.*, should be seeking to *improve* the situation for homosexuals in Europe and respect the way people within the Union chose to live and love. If this is not done, the identity of a modern and dynamic union must be questioned. It is possible that the Family Reunification Directive in fact could have an opposite effect and be used as an argument to lower the standard of protection under national law. In Sweden, the directive has been used to justify more restrictive policies, e.g. a financial support requirement have been introduced by referring to the fact

that such conditions are permissible under the directive.[288] It is not unthinkable that the lack of recognition of rights of same-sex couples and unmarried opposite-sex couples in the directive in a similar way could be used to lower the standard of these couples's rights to family reunification under national law.

The notion of family that emerges from the directive is a narrow one, identical to what in the preamble is called the "nuclear family". The norm is in other words that the European family should consist of a heterosexual married couple. Only if a family falls within this category is it worthy of the highest protection. The problem with such a construction is obvious: it excludes millions of European couples with the same needs for protection as married couples from the ambit protection. There will also be an add-on effect to this exclusion due to the fact that Directive 2003/109/EC, giving long-term resident TCNs a right to move freely within the Union with their family members, refers to the Family Reunification Directive when defining what types of family members that have a right to accompany the long-term resident. Only spouses will therefore have this right. For everyone that is not part of the "nuclear family" their right to join their TCN partner that has moved within the EU will be left to the Member States discretion. As a consequence the Union will be divided into different areas of free movement depending on if you are married or not and ultimately also depending on your sexual orientation.

Even though a narrow understanding of the notion of family impinges on the right to family reunification and rights to certain social benefits, the ECJ has never engaged in an examination of the consequences of denying same-sex couples and unmarried opposite-sex couples these rights. The potential effects on the internal market have thus unfortunately not been considered. It would be very interesting to see a more in depth analysis from the ECJ on this issue that took the purpose of permitting family reunification into account and that also considered the consequences that the construction of family has on the internal market. It is, from my point of view, obvious that a narrow understanding of "family member" and "spouse" will be a substantial obstacle to movement for the millions of couples excluded. To move to a new country, where there are legal obstacles of being joined by the one you love, is a very difficult decision to make. To encourage mobility, not only for married couples, the rules of family reunification have to be expanded in order to include more types of couples.

Instead of considering the effects of a restricted interpretation of "spouse", the ECJ has, which have been demonstrated throughout this essay, been guided by the Member States national law, a fear of trespassing on their competence and a desire not to enter in a politically sensitive question. The Member States concerns of a potential spill-over-effect on national family laws, that not at least became apparent during the drafting process, has been

[288] Such justification is found in the travaux préparatoire such as SOU 2008:114 *Försörjningskrav vid anhöriginvandring*, p 11. An amendment to the Aliens Act have recently been made, SFS 2010:175.

taken seriously by the ECJ, both before and after the Family Reunification Directive was adopted. In Maruko for example, the ECJ reassured the Member States that there was nothing in EU law requiring Member States to provide an institution of registered partnership, not even the prohibition of discrimination on grounds of sexual orientation. Moreover, the Court has repeatedly held that it is for the legislature to alter the situation. The legislative caution in some Member States has in this way fed a judicial caution. The ECJ feels obliged to mirror the Member States' passivity.

Even though it is regretful that the EU legislature does not afford a right to family reunification to unmarried opposite-sex couples, in the end of the day, at least these couples have the possibility to change their situation by a marriage. The most troublesome with the directive is rather that for same-sex couples, the possibility of saying "I do" in order to come under the protective wings of EU law does not exist (in most Member States). In other words, a same-sex couple could never earn a right to family reunification under union law. These couples, but also the unmarried opposite-sex couples as their choice to stay unmarried is not respected, are not deemed worthy of protection.

It is clear that the Union, with the Family Reunification Directive, has taken a further step into people's homes and actually even into their bedrooms. With whom you share it with and how you have manifested the relationship will determine the right to family reunification under EU law. Are the lawmakers really suited to be the moral judge of which family form that is the preferable?

In the movie Love and Death (1975), Woody Allen attempted to question such a role for the legislature. The following line from the movie highlighted the problem with lawyers trying to prohibit homosexual activity in 1975, but could still be said relevant in relation to the examined Family Reunification Directive where Member States in a way regulate love:

Some men are heterosexual and some men are homosexual, and some men don't think about sex at all - they become lawyers.

Supplement

Table 1.
Same-sex union policy in the EU by policy type and date of adoption

Marriage	**Registered partnership**	**Unregistered partnership**	**No recognition**
Netherlands (2000)	Denmark (1989)	Ireland (2010)	Bulgaria
Belgium (2003)	France (1999)		Cyprus
Spain (2005)	Germany (2000)		Estonia
Sweden (2009)	Finland (2001)		Greece
Portugal (2010)	UK (2003)		Italy
	Luxembourg (2004)		Latvia
	Czeck Republic (2006)		Lithuania
	Slovenia (2006)’		Malta
	Hungary (2009)		Poland
	Austria (2010)		Romania
			Slovakia

*In Slovenia a revision on the Family Code is taken place, in the bill that has passed the National Assembly, legalized same-sex marriages.

Sourses: D Ottosson, *ILGA report: LGBT world legal wrap up survey 2006* and statistics presented by the ECtHR in *Schalk and Kopf v Austria,* Application no 30141/04, (24.06.2010), paras 27-34. The author of this thesis has updated this information in order to comprise the latest development in this field.

Bibliography

MONOGRAPHS AND ANTHOLOGIES

A Arnull, *The European Union and its Court of* Justice, Oxford University Press, Oxford, 1999

A Baldaccini, E Guild and H Toner (eds), Whose Freedom, Security and Justice : EU Immigration and Asylum Law and Policy, Hart, Oxford, 2007

K Boele-Woelki (ed), *Perspectives for the unification and harmonization of family law in Europe*, Antwerpen, Intersentia, 2003

S Castles and M Miller, *Age of Migration*, Palgrave Macmillan, Basingstoke, 2003

R Clayton and H Tomlinson, *The Law of Human Rights*, Oxford University Press, Oxford, 2000

P Craig, *EU Administrative Law*, Oxford University Press, Oxford, 2006

P Craig and G de Burca, *EU Law: Text, Cases and Materials*, Oxford University Press, Oxford, 2008

D Curtin and T Heukels (eds), *Institutional Dynamics of European Integrations*, Martinus Nijhoff, Dordrecht, 1994

X Groussot, *General Principles of Community Law*, Europa Law, Groningen, 2006

E Guild, *Immigration Law in the European Community*, Kluwer, The Hague, 2001

T Hammar, *Democracy and the Nation State*, Avebury, Aldershot, 1990

R Lawson and M de Bloijs (eds), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of H Schermers*, vol iii, Martinus Nijhoff, Dordrecht, 1994

R Probert (ed), *Family Life and the Law Under One Roof*, Ashgate, Aldershot, 2007

G Orwell, Animal farm: a fairy story, Secker & Warburg, London, 1945

I Pernice, J Kokott and C Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden, Nomos, 2006

S Peers, *EU Justice and Home Affairs Law*, Oxford University press, Oxford, 2006

S Peers and N Rogers (eds), *EU immigration and asylum law: text and commentary*, Martinus Nijhoff, Leiden, 2006

R Probert (ed), Family Life and the Law Under One Roof, Ashgate, Aldershot, 2007

J Schwarze, European Administrative Law, Sweet and Maxwell, London, 2006

H Toner, *Partnership Rights, Migration and EU Law*, Hart Publishing, Oxford, 2004

T Tridimas, *General Principles of EC Law*, Oxford University Press, Oxford, 2006

T Tridimas and P Nebbia (eds), European Union Law for the Twenty-First Century, vol 2, Hart, Oxford, 2004

ARTICLES

C Barnard, *The Principle of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?*, Cambridge Law Journal 57:2, 1998, p 352-373

C Barnard and B Hepple, *Substantive Equality*, Cambridge Law Journal, vol 59:3, 2000, p 562-585

U Bernitz, *EU:s nya rättighetsstadga – hur kommer den att tillämpas?*, Europarättslig tidskrift Jubileumsnummer 2008, p 73-83

M Bell, *Shifting Conceptions of Sexual Discrimination – From P v S to Grant v SWT*, European Law Journal vol 5, 1999, p 63-81

M Bell, *Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union*, European Review of Private Law 5-2004, p 613-632

K Boele-Woelki, *The Principles of European Family Law: Its Aims and Prospects*, Utrecht Law Review, vol 1, issue 2, 2005

M Bulterman, *Case C-540/03, Parliament v. Council, Judgment of the Grand Chamber of 27 June 2006, [2006] ECR I-5769*, Common Market Law Review 45: 245-259, 2008

C Costello, *Metock: Free movement and "Normal family life" in the Union*, Common Market Law Review 46: 587-662, 2009

S Douglas-Scott, *The Tale of Two Courts: Luxembourg and Strasbourg and the Growing European Human Rights Acquis*, CMLRev 43, p 629-665, 2006

C McGlynn, *Family Reunion and the Free Movement of Persons in European Union Law*, International Law FORUM du droit international 7: 159-166, 2005

T Lock, *The ECJ and the ECtHR: The Future Relationship between the Two Courts*, The Law and practice of International Courts and Tribunals 8, 2009

S Peers, *In a world of their own? Justice and Home Affairs Opt-outs and the Treaty of Lisbon*, Cambridge Yearbook of European Legal Studies, vol 10: 383-412, 2007-2008,

S Peers, *Legislative Update : EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon*, European Journal of Migration and Law 10, 219-247, 2008

H Stalford, *Concepts of Family under EU Law – Lessons from the ECHR*, International Journal of Law, Policy and the Family, vol 16, 2002, p410-434

D Thyms, *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?*, International and Comparative Law Quarterly, Cambridge University Press (2008) 57:87-112

C Tobler and K Waaldijk, *Case C–267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008*, Common Market Law Review, Vol 46, p 723-746, 2009

A Tryfonidou, *Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach*, European Law Journal, Vol. 15, No 5, September 2009, p 634-653

LEGISLATION

PRIMARY LAW

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ 2010 C 83

Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community OJ 2006 C 321E

Treaty of Amsterdam, Protocol of the Position of the United Kingdom and Ireland, OJ 1997 C 340/99

Treaty of Amsterdam, Protocol of the Position of Denmark, OJ 1997 C 340/101

Treaty on European Union OJ 1992 C 224/1

Charter of Fundamental Rights of the European Union OJ 2000 C 364

Charter of Fundamental Rights of the European Union OJ 2010 C 83/02

SECONDARY LAW

REGULATIONS:

Council Regulation 1612/68 of 15 October 1968 on the Freedom of movement for Workers within the Community [1968] OJ L 257/2

DIRECTIVES:

Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40

Council Directive 2000/43 of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22

Council Directive 2000/78 of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16

Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals [2001] OJ L 149/34

Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18

Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L 251/12

Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third Country Nationals who are Long Term Residents [2003] OJ L 16/44

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC,

75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77

NATIONAL LEGISLATION

Lag (1994:1117) om registrerat partnerskap

PACS – Pacte Civil de Solidarité (Journal Officiel de la République Française 16.11.1999 16959)

Lebenspartnerschaften – [Life Partners Act] BGBI.2001 I 226

Utlänningslag (2005:716)

Lag (2010:175) om ändring i utlänningslagen

Lag (2009:260) om upphävande av lagen (1994:1117) om registrerat partnerskap

INTERNATIONAL TREATIES

Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III)

European Convention on Human Rights and Fundamental Freedoms and its Protocols

International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

Agreement establishing an association between the EEC and Turkey, signed on 12 September 1963 in Ankara, OJ 1973 C 113/2

Decision No 1/80 of the Association Council, of 19 September 1980, on the development of the Association

Agreement on the European Economic Area, OJ 1994 L 1/3

Agreement on the free movement of persons concluded between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other [2002] OJ L 114/1

TRAVAUX PREPARATOIRES

Proposal for a Directive of the Council Directive on the Right to Family Reunification COM(1999) 638 final [2000] OJ 116/66

Amended proposal for a Directive of the Council on Family Reunification COM(2000) 624 final [2001] OJ C 65/99

Amended proposal for a Directive of the Council on Family Reunification COM(2002) 225 final [2002] OJ C 203/136

Council document 7675/1/00 REV 1 MIGR 33

Draft minutes of the 2266th session of the Justice and Home Affair Council held in Brussels on 29 May 2000, 5 September 8992/00

OTHER EUROPEAN UNION SOURCES

Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification , COM (2008) 610 final, Brussels, 8.10.2008

Communication from the Commission, Free Movement of Workers – achieving the full benefits and potential, COM (2002) 694 final, Brussels, 11.12.2002

Tampere European Council 15 and 16 October 1999, Presidency Conclusions, http://www.europarl.europa.eu/summits/tam_en.html last visited on 24.8.2010

Progress Report from the Chairman of the Reflection Group on the 1996 Intergovernmental Conference, SN 509/1/95, REV 1 (REFLEX 10), 1.09.1995, Madrid

OTHER SOURCES

A Kraler, *Civic Stratification, Gender and Family Migration Policies in Europe - Final Report*, International Centre for Migration Policy Development (ICMPD), May 2010. Available at: http://research.icmpd.org/1445.html last visited on 13.09.2010

D Ottosson, *ILGA report: LGBT world legal wrap up survey 2006*, Available at: http://www.ilga-europe.org/home/issues/beyond_europe/other_resources last visited on 10.09.2010

F Schulyok, *Guest Blogger: Felix Schulyok on Mangold is not ultra-vires*, August 31st 2010, available on Adjudication Europe: http://adjudicatingeurope.eu, last visited on 5.09.2010

Table of Cases

THE EUROPEAN COURT OF JUSTICE
(IN NUMERICAL ORDER)

JUDGMENTS OF THE COURT

Case C-249/96 *Grant* [1998] ECR I-621

Case C-230/97 *Awoyemi* [1998] ECR I-6781

Case C-292/97 *Karlsson and Others* [2000] ECR I-2737

Case C-65/98 *Eyüp* [2000] ECR I-4747

Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319

Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611

Case C-459/99 *MRAX* [2002] ECR 6591

Joined cases C-20 and C-64/00 *Booker Aquaculture* [2003] ECR I-7411

Case C-60/00 *Carpenter* [2002] ECR 6279

Case C-94/00 *Roquette Frères* [2002] ECR I-9011

Case C-112/00 *Schmidberger* [2003] ECR I-5659

Case C 257/00 *Givane* [2003] ECR I-345

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

Case C-117/01 *K.B.* [2004] ECR I-541

Case C-36/02 *Omega Speilhallen* [2004] ECR I-9609

Case C-45/03 *Dem'Yanenko* order of 18.03.2004 (unreported)

Case C-51/03 *Georgescu* [2004] ECR I-3203

Case C-555/03 *Warbecq* [2005] ECR I-6041

Case C-540/03 *European Parliament v Council* [2003] ECR I-5769

Case C-144/04 *Mangold* [2005] ECR I-9981

Case C-341/05 *Laval* [2008] ECR I-11767

Case C-438/05 *Viking Line* [2007] ECR I-10779

Case C-242/06 *Sahin* [2009] ECR I-8465

Case C-244/06 *Dynamic Medien* [2008] ECR I-505

Case C-267/06 *Maruko* [2008] ECR I-1757

Case C-551/07 *Sahin* [2008] ECR I-10453

Case C-555/07 *Kücükdevici* [2010] n.y.r.

Case C-101/08 *Audiolux* [2009] n.y.r.

Case C-127/08 *Metock* [2008] ECR I-6241

Case C-578/08 *Chakroun* [2010] n.y.r.

Case C-70/09 *Hegartner and Gasser* [2010] n.y.r.

Joinded Cases C-188-189/10 *Melki and Abdeli* [2010] n.y.r.

JUDGMENTS OF THE GENERAL COURT

Case T-58/08 *P Commission v Roodhuijzen* [2009] n.y.r

OPINIONS OF ADVOCATE GENERALS

Opinion of AG Elmer in Case C-249/96 *Grant* [1998] ECR I-621

Opinion of AG Geelhoed in Case C-413/99 *Baumbast* [2002] ECR I-7091

Opinion of AG Mischo in Joint Cases C-122/99 P and C-125/99 *P D and Sweden v Council* [2001] ECR I-4319

Opinion of AG Léger in Case C-87/01 P *Commission v CEMR* [2003] ECR I-7617

Opinion of AG Geelhoed in Case C-109/01 *Akrich* [2003] ECR I-9607

Opinion of AG Ruiz-Jarabo Colomer in Case C-117/01 *K.B.* [2004] ECR I-541

Opinion of AG Ruiz-Jarabo Colomer in Case C-267/06 *Maruko* [2008] ECR I-1757

Opinion of AG Ruiz-Jarabo Colomer in Case C-14/08 *Roda Golf* [2009] ECR I-5439

OPINIONS OF THE COURT

Opinion 2/94 on Accession by the Community to the European Convention on Human Rights [1996] ECR I-1759

EUROPEAN COURT OF HUMAN RIGHTS (IN ALPHABETICAL ORDER)

Abdulaziz, Cabales & Balkandali v UK, Application no 9214/80; 9473/81; 9474/81, (28.05.1985)

Ahmut v Netherlands, Application no 21702/93, (28.11.1996)

Amrollahi v Denmark, Application no 56811/00, (11.07.2002)

B v UK, Application no 16106/90 (10.02.1990)

Berrehab v the Netherlands, Application no 10730/84, (21.06.1988)

Boultif v Switzerland, Application no 54273/00, (02.08.2001)

C & LM v UK Application no 14753/89, (09.10.1989)

Chapin and Carpentier v France, application no 40183/07, pending

Chassagnou v France, Applications nos. 25088/94, 28331/95 and 28443/95, (29.04.1999)

Christine Goodwin v UK, Application no 28957/95, (11.07.2002)

Da Silva v Netherlands, Application no 50435/99, (31.01.2006)

Da Silva Mouta v Portugal, Application no 33290/96, (21.12.1999)

Dudgeon v UK, Application no 7525/76, (23.09.1981)

E.B. v France, Application no 43546/02, (22.01.2008)

Emonet and others v Switzerland, Application no 39051/03, (13.12.2007)

Fretté v France, Application no 36515/97, (26.02.2002)

Goodwin v UK, Application no 28957/95 (11.07.2002)

Gül v Switzerland, Application no 23218/94, (19.02.1996)

Jakupovic v Austria, Application no 36757/97, (06.02.2003)

Karner v Austria, Application no 40016/98, (24.07.2003)

Kaya v. Netherlands, Application no 44947/98, (06.11.2001)

Keegan v Ireland, Application no 16969/90, (26.05.1994)

Kroon and others v. The Netherlands, Application no 18535/91, (27.10.1994)

L and V v Austria, Applications 39392/98 and 39829/98, (9.01.2003)

Marckx v Belgium, Application no 6833/74, (13.06.1979)

Mata Estevez v Spain, Application no 56501/00, (10.05.2001)

Moustaquin v Belgium, Application no 12313/86, (18.02.1991)

Nasri v France, Application no 19465/92, (13.07.1995)

Nsona v Netherlands, Application no 23366/94, (28.11.1996)

S v UK, Application no. 11716/85, (14.05.1986)

Schalk and Kopf v Austria, Application no 30141/04, (24.06.2010)

Sen v Netherlands, Application no 31465/96, (21.12.2001)

Solomon v Netherlands, Application no 44328/98, (05.09.2000)

Tuquabo-Tekle v Netherlands, Application no 60665/00, (01.12.2005)

Useinov v Netherlands, Application no 61292/00, (11.04.2006)

WJ & DP v UK Application no 12513/86, (13.07.1987)

X & Y v UK, Application no. 9369/81, (3.05.1983)

X, Y & Z v The United Kingdom, Application no 21830/93, (22.04.1997)

Yildiz v Austria, Application no 37295/97, (31.10.2002)