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THE PROPORTIONALITY PRINCIPLE; TWO EUROPEAN PERSPECTIVES
How Serving the Community Interest Ends up to be in the Individual's Best Interest

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1. Introduction

The coming into force of Directive 2003/86 on the right to family reunification of third country nationals brought within the judicial scope of the ECJ a type of migration, which, when it comes to international judicial scrutiny, until then primarily 'belonged' to the ECtHR: family reunification not related to Union citizens. The first case on this Directive, *C-540/03*, concerned an annulment action brought before the Court of Justice by European Parliament.¹ The Parliament considered a number of provisions of Directive 2003/86 entailing *ao* integration requirements to be contrary to fundamental rights, among which the right to respect for family life as meant in Article 8 ECHR. Particularly the margin of appreciation left in the Directive to Member States to restrict the right to family reunification raised concerns. On this issue, the Court argued as follows: leaving Member States a certain margin of appreciation in restricting the right to family reunification

“cannot be regarded as running counter to the right to respect for family life. In the context of a Directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the European Court of Human Rights, in its case-law according to that right, for weighing in each factual situation, the competing interests.”²

The Court concluded that, since the margin of appreciation left to Member States on the basis of the Directive goes no further than that as accorded to them by the ECtHR, the Directive cannot said to be in conflict with Article 8 ECHR. Naturally, the circumstance that the Directive is not in conflict with 8 ECHR does not mean that it also works the other way around: State conduct that is in perfect harmony with 8 ECHR might very well be incompatible with the Directive or with general principles of EU law. In this paper I argue that it is even quite likely that restrictions to family reunification that bear the 8 ECHR-test as applied by the ECtHR, will not pass scrutiny by the ECJ. Hence, it may be expected that, unlike the ECtHR's case law on Article 8 of the Convention, Directive 2003/86 as interpreted by the ECJ, *will* result in considerable changes in national policies on family reunification.

¹ Case 540/03, *European Parliament v Council of the European Union* [2006] ECR I-5769.

² Case 540/03, para 62.

The issue that serves as a case study in this respect, concerns the restriction of family reunification by means of income requirements. Income requirements in immigration law can be defined as requirements which make the right of an alien to legally enter and (continue to) reside in another state dependant on a person's income. A perhaps well-known example is the condition applied by The Netherlands with regard to family reunification with third country nationals, requiring the sponsor to have at least an income of 120% of the legal minimum wage. Other examples are the obligation to produce a year contract to prove the sustainability of the means of subsistence, or the condition that the income, in order to be taken into account, may not consist of social assistance benefits since those are generally paid for with public means.

A distinctive feature of the use of income requirements in national policies is what I call their *inevitable arbitrariness*, which can be described as follows: the application of the sufficient means requirement in general can be characterized by the use of standard levels of income, particular means of evidence, etc, to assess a person's solvency. In most, or perhaps even in all cases, the final shape of these often detailed requirements is the result of the very necessity of an applicable norm and not, for example, because the specific amount is the only amount which can be considered to be sufficient as opposed to, for example, an amount which is 10 Euros lower, or because a certain document is the only one with which one can prove his/her solvency. These norms are therefore somewhat arbitrary as a matter of necessity. As will become clear, the inevitable arbitrariness of income requirements will play an important role in the impact that I just ascribed to the coming into force of Directive 2003/86.

The arguments to underpin the above mentioned proposition on the changes that will result from Directive 2003/86, for the most part focus on the application of the proportionality principle by both Courts. For both Courts, the proportionality test is often the primary constituent of the outcome of their judgements. Nevertheless, the actual application of this principle by both Courts feature differences of vital importance. It is primarily the distinction between these features, the origins and the implications thereof, that will be discussed in this paper. At this point of research, however, I haven't been able to point out the way in which the various aspects of distinction and their consequences exactly relate to one another. I hope this seminar will contribute to elaborate a less fragmental, and instead more coherent reasoning on these issues.

2. Family life v family reunification

The first issue to be discussed, regards the fact that the rights that are dealt with by the ECJ and the ECtHR respectively are of a different content. Whereas the right to family reunification incorporated in Directive 2003/86 entails a direct right to immigrate, Article 8 ECHR on the right to respect for family life, does not. Entry and residence of aliens *can* be a means to establish family life, but this is not necessarily the case. In this respect, the ECtHR repeatedly held that the Convention does not in itself provide for the right to entry of aliens on the territory of the Contracting States.³ Instead, the ECtHR merely investigates whether or not the refusal to allow an alien to enter or reside results in a breach of the right to respect for family life. Accordingly, in Article 8 cases, considerations may be at issue, which will not play a role in cases concerning Directive 2003/86. The investigation, for example, whether the family life could also be established elsewhere, is very common in Article 8 cases, but will never take place in the assessment whether there is a right to family reunification on the basis of Directive 2003/86.

³ See f.e. *Abdulaziz e.o. v. United Kingdom; Berrehab*.

Consequently, when it comes to family reunification, it may be expected that the right to family reunification is more inclusive than the right to respect for family life.

3. The proportionality test: a humanitarian versus an institutional approach

Besides the content of the rights concerned, there is also a distinction between the context in which the protection of both rights are framed. Within the framework of the European Union, the acknowledgement of rights to Union citizens serves the purpose of establishing the European internal market without borders: integration through rights, so to say.⁴ The Strasbourg perspective, on the other hand, has quite a different rationale: here, the protection of the right to respect for family life is an end in itself; it primarily serves an individual, humanitarian purpose. Obviously, the EU right to family reunification for third country nationals cannot be placed on the same footing as Union citizens' right to free movement: indeed, family reunification is not one of the pillars in the establishment of the internal market. Still, according to the fourth preamble to Directive 2003/86,

[f]amily reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.

Apparently, according to the EU legislator, family reunification of third country nationals is not in principal an individual, humanitarian matter as it is in Strasbourg perspective, but has a clear, Community interest-related purpose. The question whether family reunification is seen as serving a humanitarian purpose or as serving a Community interest is an important one, for it connects to the very function of the proportionality test. That is, it connects to the core issue to be addressed by the respective courts when judging on restrictions to family reunification. This can be explained as follows: On the basis of Article 8 ECHR, the proportionality test serves to ascertain whether the consequences of state measures, even though in itself correctly applied, perhaps are disproportionately aggravating for the *individual* who is affected by that measure, considering the interests involved. The ECtHR's judgement hence comes down to weighing the interests of the state against those of the individual concerned and see whether a fair balance was struck. The use of the proportionality principle in the Strasbourg context, therefore, is by nature humanitarian, dealing with the position of the state towards the individual that needs protection.

In cases before the ECJ, on the other hand, even in the rare case that humanitarian aspects like the importance of family life *are* mentioned, they are not part of the actual considerations, they have no function in the discussion on the (dis)proportionality of state measures affecting the right to free movement.⁵ In stead, the ECJ uses the proportionality principle to make sure that Member States do not needlessly, that is, without being 'necessary in order to attain the objective pursued', take measures which go against the *Community* interest (consisting of the promotion of free movement of Union citizens or the promotion of economic and social cohesion by means of family reunification by third country nationals). The very fact that the individual interest in EC law is treated as a Community interest, has the result that the function of the proportionality principle in EC law is an institutional one (a matter of division of powers), focusing on the

⁴ Douglas-Scot, CML Rev. 2006, p. 630.

⁵ See f.e. *Metock*.

division of powers between the Community and the Member State. This difference in starting points between both Courts as to the function of the proportionality principle, becomes visible in their case law in various ways, to be discussed in the paragraphs below.

4. Strasbourg case law: the national interest as a non-variable factor

One of the questions prescribed by Article 8 in the assessment whether or not the state measure concerned resulted in a violation of the Convention, regards the legitimate aim, which, in case of income requirements in immigration law, will be the national economic well-being as mentioned in the second paragraph of Article 8. The national economic well-being is a broad concept, and correspondingly, income requirements will usually be acknowledged to indeed serve this legitimate aim.⁶ Notably, when it comes to immigration in relation to family life, the ECtHR is particularly reluctant to scrutinize state conduct. In this respect it takes as a starting point that ‘as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non- nationals into its territory.’⁷ Moreover, according to the ECtHR,

‘its function is not to pass judgment on the Netherlands’ immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants’ mutual interest in continuing their relations’⁸

Placing the point of view of immigration and residence against having regard for the applicants’ mutual interest in continuing their relations, suggests that the latter is something that takes place *in spite of* the fact that it concerns immigration. It even can be argued that when it comes to scrutiny of state conduct in ‘immigration’ cases in which family life and the national economic well-being have to be weighed against each other, the interest of the state is taken as a given. In these cases, the state’s current figures on economic growth or unemployment, for example, never play a role in answering the question whether the individual interest outweighs the interest of the Contracting Party. Indeed, the national interest is treated as an abstract, non-variable factor, impervious to circumstances of the case. This point is very well exemplified in the *Berrehab* case, in which the Court also considered that

‘the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes, such as [...] the preservation of the country’s economic well-being within the meaning of paragraph 2 of Article 8: the Government were in fact concerned, because of the population density, to regulate the labour market.’⁹

The first thing to be noted, is that apparently without any further regard, the mere fact that the disputed decisions are consistent with Dutch immigration-control policy, appoints those decisions to having been taken for legitimate purposes in the sense of paragraph 2 of Article 8 ECHR. This shows that the fundamental attitude with which the Court’s assessment of state conduct takes place, is one of trust. Secondly, it is interesting to see that whereas the Dutch government in this

⁶ *Konstatinov*, para. 50.

⁷ *Haydarie*, p.12 (under the heading “the law”)

⁸ *Berrehab*

⁹ *Berrehab*, para 25-26.

case claimed that the expulsion was necessary in the interests of public order, and the Commission was convinced that the disputed decisions were taken for purposes such as the prevention of disorder and the protection of the rights and freedom of others, the Court corrects both the Dutch government and the Commission with respect to the ‘real’ legitimate aim that was pursued, namely the preservation of the national economic well-being.¹⁰ Apparently, the legitimate aim pursued is not so much applied in the sense of a state ‘intrinsically’ pursuing such aim, as well as in the sense of a way to qualify a State’s actions: could these actions be placed under one of the aims that may legitimately be pursued? If that is the case, the correction of the Court must be seen as a correction of the choice of qualification made by the Dutch government and the Commission, and not as some sort of mind reading. This might sound self-evident, or even ridiculous, but it could be of importance whether the assessment of the legitimate aim involves an actual assessment of the state’s policy goals, or whether the legitimate aim of the state’s actions regards an abstract concept and is in fact decoupled from the state that actually conducted those actions.

The consequence of the state interest being dealt with as an abstract, non-variable component in the equation between the individual and the national interest, is apparent from pretty well all ECtHR immigration cases in which family life and the national economic well-being are weighed against each other: the focus of these cases is mainly on the circumstances on the side of the individual. This is only logical, a matter of math, considering the fact that if the interest of the state is a constant factor, the only variable left in the equation is constituted by the circumstances of the individual.

The primary focus on the circumstances of the individual has two main consequences. First, it means that in bringing forward arguments in a particular case, the individual is forced to stand on the defensive, since his circumstances are decisive for the outcome of the case. This puts the individual on beforehand in a weaker position in the legal argument. Secondly, the fact that such ECtHR judgements usually entail assessments of individual circumstances, considerably limits their impact factor. For even a case won by the individual does not necessarily force the state concerned to change its policy: it could merely mean that in that particular case, the circumstances of the individual were so poignant that the balance was not struck fairly but that in general this policy may very well be continued.

In the following paragraphs, I will argue that the very aspects that lead the Strasbourg case law on Article 8 ECHR to be of modest consequence for national policies regarding income requirements in immigration law, seem to have exactly the opposite effect within the EU framework.

5. ECJ case law: thorough/substantive scrutiny of state conduct

Like the ECtHR, the EU legislator acknowledges income requirements potentially to serve a legitimate aim. The aim concerned, however, does not in the least allow for an interpretation as broad as the Convention’s ‘national economic well-being’. Imposing income requirements should in stead serve the purpose to prevent persons from becoming a burden on the social assistance

¹⁰ The Court considers in this respect that ‘the Court has reached the same conclusion (as the Commission). It points out, however, that the legitimate aim pursued was the preservation of the country’s economic well-being within the meaning of paragraph 2 of Article 8 rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market.’

scheme of the Member State,¹¹ an aim with clearly a much stricter scope, with no room for arguments like the labour market calling for a restrictive immigration policy, let alone the pursuance of immigration restriction as a policy goal in itself. Consequently, where the Strasbourg Court is compelled to exercise restraint as to the necessity of the measure concerned and where it takes the legitimate interest of the state as a given, the ECJ is provided with a substantive handle to scrutinise thoroughly whether the Member State did not overstep its purpose related powers. Hence, whereas the proportionality test as performed by the ECtHR focuses on balancing the competing interests, the ECJ is able to use the proportionality principle to make a real assessment as to the necessity of the particular income requirement in protecting the national social assistance scheme. Accordingly, in *Commission/Belgium*, the requirement of a legal link with the person whose income besides that of the Union citizen himself could be taken into account, was considered to be disproportionate, since

[t]he loss of sufficient resources is always an underlying risk, whether those resource are personal or come from a third party, even where that third party has undertaken to support the holder of the residence permit financially. The source of those resources thus has no automatic effect on the risk of such a loss arising, as the materialisation of such is the result of a change of circumstances.¹²

Indeed, in ECJ-cases concerning income requirements, it is the Member State that needs to give account of its actions and for which a mere referral to a restrictive immigration policy is no longer possible. The individual's circumstances, on the other hand, are barely even touched upon. That is, not in the sense that the outcome of an ECJ case is dependent on the urgency of the particular situation at hand. At this point it is important to note that the proportionality test as applied by the ECJ not only regards the necessity of the measure concerned in general (does the measure in general contribute to the prevention of persons becoming a burden on the social assistance scheme?).

The proportionality principle as applied by the ECJ, also works on a micro-level: it prescribes Member States to apply measures that restrict the rights as provided for by EU law only in a way that takes into account the circumstances of the case at hand, so that the necessity of every restrictive measure is considered. Hence, while the ECJ refrains from performing an assessment of the individual circumstances of the case, it sees to it strictly that the national legislator/judiciary *did* perform such an assessment. It is only logical that particularly national legislation that makes use of standard criteria, not allowing individual circumstances to be taken into account or that is applied automatically, will be subject to disqualification by the ECJ. However, as addressed above, the use of standard criteria is precisely what characterises the practice of income requirements in immigration law. As opposed to Strasbourg case law, in these cases the underlying, but impossible to specify rationale behind particular income requirements is actually put to the test. This leaves the state that imposed the income requirements with the short end of the stick: the inevitable arbitrariness of income requirements simply seems incompatible with the strict requirement always to take into account the circumstances of the case.

Of course, a thorough scrutiny of state measures as described above is of great consequence in cases regarding Union citizens,¹³ since their right to free movement is regarded as one of the

¹¹ See Art. 7(1)(b) Directive 2004/38 and Art. 7(1)(c) Directive 2003/86.

¹² Case C-408/03, *Commission v Belgium*, para. 47.

EU's fundamental principles. The basic rule in that regard is that the right itself is to be interpreted extensively, whereas limitations to this right need to be interpreted restrictively. Accordingly, even though income requirements are provided for in Directive 2004/38 on the right to reside for Union citizens and their family members, their practical applicability is to say the least, marginal. It is to be expected, though, that such scrutiny will also considerably affect the ability of Member States to impose income requirements on the basis of Directive 2003/86 on family reunification for third country nationals. AG Sharpston's opinion in *Chakroun* therefore might not come as a surprise.¹⁴ This case concerns the admissibility of the Dutch 120% income standard as mentioned earlier, which only applies to the establishment of family and not to family reunion. According to the AG,

1. Articles 2(d) and 7(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, read together, preclude national legislation which, in applying the resource requirement pursuant to Article 7(1)(c), makes a distinction according to whether a family relationship arose before or after the entry of the resident into the Member State, to the extent that such a distinction is not based on any objective factor related to the level of resources required to maintain the sponsor and his or her family and applies without regard to the circumstances of each case;
2. Article 7(1)(c) of Directive 2003/86 does not permit a Member State to set a resource requirement which leads to systematic rejection of an application for family reunification in cases where the reunited family would have no automatic entitlement to social assistance, but merely a potential entitlement in exceptional circumstances.

As is apparent from the Conclusion, Sharpston does not shrink from making an assessment of whether the national measure entails an actual contribution in protecting the national social assistance scheme. Furthermore, it is clear that once again, the application of standard norms which leave no room for the individual circumstances of each case, or which are automatically applied, are dismissed. Hence, it can be argued that although EU law explicitly provides for income requirements in immigration law, this instrument simply does not make a very good match with the EU proportionality principle. Moreover, as opposed to Strasbourg case law on this issue in which the circumstances of the individual are decisive for the outcome of the case, the ECJ's case law entails a judgement on national legislation. Therefore, the precedent effect of these judgements is considerable.

Conclusion

It appears that the coming into force of Directive 2003/86 and its interpretation by the ECJ will result in some considerable changes in national policies on income requirements in immigration law. This development raises a number of questions, a couple of which I will recount to conclude this paper.

The first question regards the extent to which the lines of reasoning in national case law on this issue, which are traditionally based on Article 8 ECHR, will be adjusted to the EU approach of the principle of proportionality. The same goes of course for the ECtHR itself when confronted

¹³ See f.e. C-... *Zhu and Chen*; C-..., *Commission v Belgium*; C-... *Commission v The Netherlands*.

¹⁴ C-578/08, *Chakroun v Minister van Buitenlandse Zaken*.

with a third country national who appeals to Directive 2003/86. Furthermore, it is interesting to see how both national courts and the Strasbourg Court will deal with the different treatment between third country nationals and Dutch nationals resulting from the *Chakroun* judgement, for the dismissal of the 120%-norm only affects family reunification of third country nationals.

Finally, it does not go without saying that Member States will just submit to a considerable decrease in potential of an instrument which traditionally is one of the most powerful tools in immigration regulation. Hence, it may be expected that Member States try to find a way to circumvent income requirements' incompatibility with the EU principle of proportionality.