

Case C-540/03

European Parliament

v

Council of the European Union

(Immigration policy — Right to family reunification of minor children of third-country nationals — Directive 2003/86/EC — Protection of fundamental rights — Right to respect for family life — Obligation to have regard to the interests of minor children)

Opinion of Advocate General Kokott delivered on 8 September 2005 I - 5776
Judgment of the Court (Grand Chamber), 27 June 2006 I - 5809

Summary of the Judgment

1. *Actions for annulment — Actionable measures*
(Art. 230 EC)

2. *Community law — Principles — Fundamental rights — Respect for family life (Charter of Fundamental Rights of the European Union, Arts 7 and 24)*
3. *Visas, asylum, immigration — Immigration policy — Right to family reunification — Directive 2003/86 (Council Directive 2003/86, Arts 4(1), 5(5), and 17)*
4. *Visas, asylum, immigration — Immigration policy — Right to family reunification — Directive 2003/86 (Council Directive 2003/86, Arts 4(6), 5(5), and 17)*
5. *Visas, asylum, immigration — Immigration policy — Right to family reunification — Directive 2003/86 (Council Directive 2003/86, Arts 5(5), 8 and 17)*

1. The fact that the provisions of a directive that are challenged in an action for annulment afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the directive cannot have the effect of excluding those provisions from review by the Court of their legality as envisaged by Article 230 EC.

to adopt or retain national legislation not respecting those rights.

(see paras 22-23)

Furthermore, such provisions could, in themselves, not respect fundamental rights if they required, or expressly or implicitly authorised, the Member States

2. The right to respect for family life within the meaning of Article 8 of the European Convention on Human Rights (the ECHR) is among the fundamental rights which are protected in Community law. This right to live with one's close family results in obligations for the Member States which may be negative, when a Member State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory. Thus, even though the ECHR does not guarantee as a fundamental right the right of an alien to enter or to

reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the ECHR.

24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.

The Convention on the Rights of the Child also recognises the principle of respect for family life. This Convention is founded on the recognition, expressed in the sixth recital in its preamble, that children, for the full and harmonious development of their personality, should grow up in a family environment. Article 9(1) of the Convention thus provides that States Parties are to ensure that a child shall not be separated from his or her parents against their will and, in accordance with Article 10(1), it follows from that obligation that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification are to be dealt with by States Parties in a positive, humane and expeditious manner.

These various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification.

(see paras 52-53, 57-59)

The Charter of Fundamental Rights of the European Union likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article

3. While Article 4(1) of Directive 2003/86 on the right to family reunification imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation, the final subparagraph of Article 4(1) has the effect, in strictly defined circumstances, namely where a child aged over 12 years arrives independently from the rest of the family, of partially preserving the margin of appreciation of the Member States by permitting them, before

authorising entry and residence of the child under the directive, to verify whether he or she meets a condition for integration provided for by the national legislation in force on the date of implementation of the directive.

The final subparagraph of Article 4(1) of the directive cannot be regarded as running counter to the right to respect for family life, set out in Article 8 of the European Convention on Human Rights, since this right is not to be interpreted as necessarily obliging a Member State to authorise family reunification in its territory and the final subparagraph of Article 4(1) of the directive merely preserves the margin of appreciation of the Member States while restricting that freedom, to be exercised by them in observance, in particular, of the principles set out in Articles 5(5) and 17 of the directive, to examination of a condition defined by national legislation. In any event the necessity for integration may fall within a number of the legitimate objectives referred to in Article 8(2) of the Convention.

The fact that the concept of integration is not defined in Directive 2003/86 cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in parti-

cular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation existing on the date of implementation of the directive in order to examine the specific situation of a child over 12 years of age arriving independently from the rest of his or her family. Consequently, the final subparagraph of Article 4(1) of the directive cannot be interpreted as authorising the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life.

Nor does it appear that the Community legislature failed to pay sufficient attention to children's interests in the final subparagraph of Article 4(1) of the directive. The content of Article 4(1) attests that the child's best interests were a consideration of prime importance when that provision was being adopted and it does not appear that its final subparagraph fails to have sufficient regard to those interests or authorises Member States which choose to take account of a condition for integration not to have regard to them. On the contrary, Article 5(5) of the directive requires the Member States to have due regard to the best interests of minor children.

In this context, the choice of the age of 12 years does not appear to amount to a criterion that would infringe the principle of non-discrimination on grounds of age, since the criterion corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties.

Accordingly, the final subparagraph of Article 4(1) of the directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

(see paras 60-62, 66, 70-71, 73-74, 76)

4. Article 4(6) of Directive 2003/86 on the right to family reunification gives the Member States the option of applying the conditions for family reunification which are prescribed by the directive only to applications submitted before children have reached 15 years of age. This provision cannot, however, be

interpreted as prohibiting the Member States from taking account of an application relating to a child over 15 years of age or as authorising them not to do so.

It does not matter that the final sentence of the provision in question provides that the Member States which decide to apply the derogation are to authorise the entry and residence of children in respect of whom an application is submitted after they have reached 15 years of age 'on grounds other than family reunification'. The term 'family reunification' must be interpreted in the context of the directive as referring to family reunification in the cases where family reunification is required by the directive. It cannot be interpreted as prohibiting a Member State which has applied the derogation from authorising the entry and residence of a child in order to enable the child to join his or her parents.

Article 4(6) of the directive must, moreover, be read in the light of the principles set out in Article 5(5) thereof, which requires the Member States to have due regard to the best interests of minor children, and in Article 17, which requires them to take account of a number of factors, one of which is the person's family relationships. It follows

that, where an application is submitted by a child over 15 years of age, the Member State is still obliged to examine it in the interests of that child and with a view to promoting family life.

Moreover, it does not appear that the choice of the age of 15 years constitutes a criterion contrary to the principle of non-discrimination on grounds of age.

Accordingly, Article 4(6) of the directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

(see paras 85-90)

5. Article 8 of Directive 2003/86 on the right to family reunification, which authorises the Member States to derogate from the rules governing family reunification laid down by the directive, does not have the effect of precluding

any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family life set out in particular in Article 8 of the European Convention on Human Rights as interpreted by the European Court of Human Rights.

Also, as is apparent from Article 17 of the directive, duration of residence in the Member State is only one of the factors which must be taken into account by the Member State when considering an application and a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors. The same is true of the criterion of the Member State's reception capacity, which may be one of the factors taken into account when considering an application, but cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases. Analysis of all the factors, as prescribed in Article

17 of the directive, does not allow just this one factor to be taken into account and requires genuine examination of reception capacity at the time of the application.

In addition, in accordance with Article 5 of the directive, the Member States must have due regard to the best interests of minor children.

Consequently, Article 8 of the directive cannot be regarded as running counter to the fundamental right to respect for family life or to the obligation to have regard to the best interests of children, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.

(see paras 97-101, 103)