



SHOULD EUROPEAN COUNTRIES REFUSE ENTRANCE TO MIGRANTS THAT DO NOT SPEAK THEIR LANGUAGE? A CASE FOR THE RIGHT TO FAMILY LIFE

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This article analyses the recent case of an ECJ ruling concerning Member States' possibility to require third country nationals (TCNs) to pass a civic integration examination prior to family reunification. Following a description of the content of the right to family life for non-EU citizens residing in the EU, the article discusses the controversies surrounding the ECJ's ruling, as well as the ethical and policy implication of the decision. The article argues that, while the Court's decision is in line with the European Directive on Family Reunification, it does not take full consideration of the consequences of the Dutch policy regarding civic integration tests. In particular, the Court overlooks the fact that, while the test is hardly functional to state the capacity of integration, it acts as a form of ex-ante discrimination that contravenes Article 7 of the European Convention and Article 8 of the European Charter on the right to family life.

Parole chiave: Third-country nationals (TCNs), Family-reunification; ECJ, State sovereignty, Civic integration test.

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DOVREBBERO I PAESI EUROPEI RIFIUTARE L'INGRESSO AGLI IMMIGRATI CHE NON PARLANO LA PROPRIA LINGUA? IL CASO DEL DIRITTO ALLA VITA FAMILIARE

Silvia Cavasola, Daniele Santoro

2017, p. 19 IRPPS Working paper n. 102/2017

Questo articolo analizza il recente caso di una sentenza della Corte di Giustizia europea relativa alla possibilità per gli Stati membri dell'Unione Europea di vincolare l'ottenimento del visto per ricongiungimento familiare dei cittadini di paesi terzi (non appartenenti all'UE) al superamento di un esame di integrazione civica. L'articolo discute le problematiche relative alla sentenza, così come le sue implicazioni etiche e politiche. Si sostiene che la decisione della Corte, per quanto in linea con la Direttiva Europea sul ricongiungimento familiare, non tenga sufficientemente in conto le conseguenze negative della politica olandese che impone il test di integrazione civica. In particolare, la Corte appare trascurare il fatto che, non solo il test non rappresenta un metodo efficace per sondare la reale volontà/capacità di integrazione degli individui, ma che inoltre esso agisca come una forma di discriminazione ex-ante che viola l'articolo 7 della Convenzione europea e l'articolo 8 della Carta europea sulla diritto alla vita familiare.

Keywords: Cittadini di paesi terzi, Ricongiungimento familiare, Corte di Giustizia Europea, Sovranità nazionale, Test di integrazione civica.

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1. Introduction

The concept of citizenship is usually equated with nationality. A person in fact either acquires citizenship of a country by being born within its territory (*ius soli*) or in virtue of belonging to a family where one or more members are already citizens (*jus sanguinis*). Yet, the identity of the two concepts is only contingent. Citizenship is in fact a legal status, namely of a person being entitled to a set of rights and subject to certain duties. Nationality is instead a sociological concept, often referring to one's cultural upbringing and language within a community defined by a common history and heritage. Whereas language and culture are most often transmitted within a community historically residing in a certain territory, nationality can also be a feature of people belonging to communities residing abroad. The history of European emigration to the United States is just one example among the many of people who retained their nationality (partially or entirely) despite being born abroad. Likewise, people identifying themselves with a certain nationality by virtue of their cultural heritage, can nonetheless have a different or multiple citizenships. Standing by this distinction, European citizenship appears to be a peculiar kind of legal status, for three reasons. First, it depends on being a citizen of one of countries belonging to the Union: it is a second-order citizenship. Second, despite this, it does not depend on one's nationality, as we have defined it above. Third, and most importantly, it also encompasses, at least for certain rights, Third Country Nationals (TCNs) who seek recognition of their status within the Union. This holds for asylum seekers, long-term residents, and also people who apply for reunification with spouses or relatives already living within a Member State.

The dramatic expansion of the number of third-country nationals (TCNs) in the EU over the past twenty years has however presented society with fresh dilemmas regarding the balance of non-absolute fundamental rights, specifically the conflict between the right to non-discrimination and family life for non-EU residents on the one hand, and the right of States to decide who enters their national territory on the other. In this context, we analyse here a recent ECJ ruling concerning the possibility of Member States to require TCNs to pass a civic integration examination prior to family reunification.

Following a description of the content of the rights to non-discrimination and to family life for non-EU citizens residing in the EU, the article discusses the case, the implications, as well as the controversies surrounding the ECJ's ruling, especially in light of the general EU objective to enhance TCNs chances of integration in the host countries. In the light of this analysis, we will provide a normative evaluation of the Court's ruling, identifying the arguments underlying the decision. In particular, we will explore the role 'integration' measures play in the decision, and criticise their legitimacy on moral grounds. We argue that, while the Court's decision is in line with the European Directive on Family Reunification, it does not take into full consideration the consequences of the Dutch policy regarding the civic integration tests. In particular, the Court overlooks the fact that, while the test is hardly functional to state the capacity of integration, it acts as a form of ex-ante discrimination that contravenes Article 7 of the European Convention and Article 8 of the European Charter on the right to family life.

We conclude by providing some policy implications of the decision. Arguing that the ruling of the Court does not take into account the positive role that family life and unity can play in enabling integration, we hold that policy-makers in the EU might be interested in considering alternative “integration measures” that, instead of making family reunification more difficult on the grounds by imposing ex ante integration measures, facilitate it on the grounds that it represents a key to immigrants’ integration.

2. The protection of family life in European law

The right to family life has long been at the core of European legislation. The issue is dealt with by both the fundamental treaties of the European Union and Council of Europe, as well as in more specific EU regulations. However, the ever growing number of non-EU nationals permanently residing within EU borders has in more recent times led to the emergence of a legislative framework dealing with family related rights for third country nationals (TCNs) specifically. The rapid social transformations produced by immigration and the progressive stabilisation of immigrants in EU countries re-quires European law to constantly readapt its legal framework to grant the right to family life and unity to all of the individuals residing within EU borders, whilst at the same time still granting Member States the possibility to autonomously manage their national borders in accordance with their national priorities.

Within this framework, the right to family life was originally enshrined within the European Convention of Human Rights (ECHR), under Article 8, which establishes the right to respect for private and family life. Under EU primary law, family life acquired the status of a fundamental right under Article 7 of the Charter of Fundamental Rights. The two treaties also equally introduce a fundamental right to non-discrimination (Article 14 of the ECHR and Article 21 of the Charter), which is importantly related to, although distinct from, the right to family life. The link between the two rights represents a primary legal source for the assertion of a right to family life for non-EU legal residents. However, the social transformation produced by immigration especially since the 1990s has produced specific challenges with respect to the material conditions for granting the right to family life to non-EU legal residents, therefore generating a need for more specific conventions.

Table 1. Fundamental Rights enshrined in European Treaties (Source: authors’ elaboration)

Right to family life		
	EU	Council of Europe
Family life	Article 7 Charter of Fundamental Rights	Article 8 European Convention on Human Rights
Non-discrimination	Article 21 Charter of Fundamental Rights	Article 14 European Convention on Human Rights

The first EU Council meeting that specifically dealt with this issue took place on the 15-16 October 1999 in Tampere. In the presidency conclusions of that meeting, the importance of ensuring that TCNs legally residing within EU border are granted fair treatment is clearly stressed. In particular, the document underlines that TCNs should be granted “rights and obligations comparable to those of EU citizens”(EC 1999, par.18), and that discrimination in all aspects of their lives should be fought against. The Council calls for the fair treatment and non-discrimination objectives to be achieved through a “vigorous integration policy” to be implemented at the national level. The same objectives were then reasserted at the 2001 Laeken meeting, where the Council called for the establishment of anti-discrimination programs, together with a set of “common standard procedures”(EC 2001, par. 40) for family reunification. These two meetings set the guidelines for the translation of a right to family life for non-EU legal residents into more specific directives.

The main EU instrument of secondary law concerning the protection of the right to family life for TCNs, and the one that lies at the core of this case, is the Family Reunification Directive (2003/86/EC). Introduced in 2003, the Directive establishes a set of common criteria to grant the right to family reunification across Europe, which Member States are then responsible for implementing at the national level. The 2003 Family Reunification Directive provides TCNs with a strong right over the possibility to have their spouses and children join them in their country of residence, provided that the sponsor holds a residence permit of validity of at least one year (Art. 3). In the Directive, making family life possible is not only good per se, but also in as far as “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” (point 4). The Family Reunification Directive does however foresee the possibility for Member States to require third country nationals to comply with “integration measures,” in case national law requires it (Art. 7, 2).

The right to family life and unity is also to be found in Directives 2003/109/EC concerning the status of TCNs who are long-term residents and Directive 2009/50/EC concerning the conditions of entry and residence of TCNs for highly qualified employment. Directive 2003/109/EC provides for the preservation of the family unit in case the TCN who is a long-term residence moves to a second Member State (Art. 16). Directive 2009/50/EC grants EU Blue Card holders the possibility to be reunited with their family members independently of a minimum period of residence (Art. 15, 2) — which is instead required for all other TCNs.

3. Case description and ruling

Notwithstanding the existence of a legal framework that safeguards the right to family life of all individuals residing in the EU, there exist cases in which Member States have imposed specific conditions in order for family reunification applications to be accepted. In the case under analysis, the Kingdom of the Netherlands rejected a family reunification application by the spouse of a third country national legally residing in the territory of that State. The rejection of the Dutch Ministry of Foreign Affairs was based on the fact that the applicants had not fulfilled the requirement of passing an “integration test” in the country of origin. The applicants, Ms. K and Ms. A. respectively, had requested exemption from the test based on health problems

for which they provided a medical certificate. However, based on Dutch law, exemption from taking the integration test can only be granted in case of “very special individual circumstances” in which a TCNs is “permanently unable” to pass the examination (ECJ Judgment, Case C-153/14, point 23) — a condition was deemed not applicable to the case under analysis here.

Although the applicants lodged an objection against the rejection of their application, the Ministry of Foreign Affairs declared the challenges unfounded on the basis that their health problems did not justify exemption. The question was then referred to the national district court (Rechtbank’s-Gravenhage), which declared the appeals lodged by respective Ms. K and Ms. A. to be instead both well founded. But as the Ministry of Foreign Affairs appealed against the judgment of the national district court, the Council of State (Raad van State) referred to the European Court of Justice (ECJ) for a preliminary ruling.

The ECJ was consulted regarding the interpretation of the Family Reunification directive, and in particular, of Article 7, section 2 of the text, which foresees the possibility for Member States to require third country nationals to fulfil “integration measures” for the purpose of their residence permit. More specifically, the ECJ was asked to rule on whether:

- 1) The Dutch integration test is consistent with the “integration measures” mentioned by Article 7, section 2 of the Family Reunification Directive;
- 2) The “very special individual circumstances” mentioned by Dutch law as the only possible circumstances for granting exemption to the test should be interpreted as being excessively narrow in a way that infringes with the general purpose of the Family Reunification Directive;
- 3) The costs of the Dutch examination (350 Euros per attempt for the examination, plus 110 for the preparation pack) are consistent with the purpose of the Family Reunification Directive.

In its judgment, the ECJ upheld the right of Member States to “require third country nationals to pass a civic integration examination prior to family reunification (authorising...) before authorising that national’s entry into and residence in the territory of the Member State for the purposes of family reunification”. Integration measures like the Dutch test are considered to be acceptable in as far as they are meant to facilitate the integration of the sponsor’s family members.

For this conclusion to be reached, the ruling recognised that the Dutch regulation that subjects the granting of the authorisation of entry into its territory of individuals applying for a residence permit based on the family reunification could be interpreted as being consistent with the terminology of “integration measures” foreseen by Article 7, section 2 of the Family Reunification Directive, in as far as holding a basic knowledge of Dutch language and society does encourage integration by facilitating interactions, social exchanges and, ultimately, access to the labour market and vocational training. The Court ruled that provided that the conditions of application of the test do not exceed what is necessary to achieve the aim of integration — for example by systematically preventing family reunification in the case of an applicant showing willingness to pass the examination despite repeated failed attempts to do so due to specific individual circumstances — the integration test might well be considered a useful measure of integration. Similarly, with regard to the fees, the Court ruled that Member States are free to

require third country nationals to pay fees related to integration measures in as far as the level of those fees does not make it impossible or excessively difficult to exercise the right to family reunification.

Moreover, the Court did not raise any issue regarding non-discrimination. Partly the reason seems to be that the Dutch policy was discussed with regard to the European Directive on family reunification, which does not refer to the articles on non-discrimination. We will discuss in next section whether a link should have indeed been established.

After the closing of the case, in 2014, a Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family re-unification was published. The purpose of the Communication was to provide Member States with guidance on how to apply the directive, clarifying some of the “grey zones” — including that of the possible inclusion of “integration measures” as a requirement for third country nationals — also based on precedent rulings of the ECJ on the matter.

4. Integration and Family life: Should we strike a balance?

Is the ECJ ruling in the Dutch case consistent with the right to family life as stated in both the Charter and the European Convention?

Before digging into the details of the Court’s ruling, we should first address a general issue concerning immigration policies. Specifically, it should be noticed that Member States still retain within the legal framework of the European Union their traditional legal power to grant access to foreigners. The recent limitation of the ‘Schengen area’ free movement by Denmark and Sweden are an example of this ultimate power. In the context of the current refugee crisis in fact, States are called upon by their own citizens to prevent an uncontrolled flow of immigration that is thought to be destabilising the peace and security of their own citizens. The State’s legitimacy in controlling their borders is — in other words — a matter of necessity, the alternative being social and political chaos that would not even serve the cause of helping immigrants. Containment policies of immigration flows seem to have then a presumptive legitimacy in citizens’ constitutional rights to a peaceful and secure existence. Thus, while the European Convention on Human Rights provides a ground for asylum rights¹, it also seems to justify some containment claims. For instance, Article 2 of the Convention, after stating that everyone (EU nationals and aliens alike) have a right to liberty and security, specifies that that exceptions to unconditional rights are yet admitted in several cases, including “noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law” (section b), “reasonable suspicion of having committed an offence” (section c), and especially “the lawful arrest or detention ... to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition” (section f). The term law refers here to national legislations. Since many of the EU Member States have adopted restrictive measures on this matter during the last decade, (Italy, UK, Germany, and France have all passed laws establishing the crime of illegal immigration),

¹ See also Art. 3 of the Protocol No. 4 to the Convention.

containment seems to fall within the scope of Article 2, especially under section f.² Moreover, Article 8 of the Convention restricts the right to respect and family life in cases of “interests of national security, public safety or the economic wellbeing 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.” (section 2). Finally, Article 15 admits derogations from the obligations under the Convention to the extent strictly required by the exigencies of the situation.

The European Charter of Fundamental Rights, while it grants to right to asylum (Article 18), and prohibits collective expulsions (Article 19, sub 1), it also allows States to deport aliens seeking asylum in those cases where no serious risk of death penalty, torture or inhuman treatment is envisaged (Art. 19, sub 2).

Since fundamental rights are subject to limitation and balance against interests of public safety or security, it follows that also more specific rights, such as that to family reunification, should be balanced against those interests. In the Dutch case, the legitimacy of containment policies seems to be even more urgent, given the demographic pressure caused by the number of reunification requests in a Country which already host large communities of foreigners. If containment policies — we may add — are de facto enacted in the case of asylum requests as the recent crisis shows, even more they are in the case of family reunification³.

The legitimacy argument has important consequences for our understanding of the legal status of the European citizenship, especially with regard to the non-discrimination principle that we mentioned in the first section. There are at least two issues that need a brief discussion. First, does the legitimate prerogative of the Member States to control their borders imply the power to unilaterally contain immigration flows? Despite the general argument that unrestricted flow would destabilise peaceful living, other considerations run against it unrestricted power of States. One consideration concerns the rights of those affected by containment policies. It must be noticed in fact those who apply for reunification are already legal residents of the country where they submit they request. Therefore, a justification of the containment policy should explain why only foreign residents should suffer from a potential curbing of rights, whereas the same containment does not apply to nationals. To give an example: why is it the case that a Dutch national can marry a foreigner and ask for family reunification without passing any civic integration test, whereas legal residents are required to take it?

2 Notice that many have criticised the introduction of such measures as punishing the mere condition of being an irregular alien subject. See, for instance the statement issued by Italian Democratic Party Senator Luigi Manconi in a recent press release from January 8, 2016 (available at: <http://www.senatoripd.it/giustizia/manconi-cancellare-reato-di-clandestinit/>). In Italy the crime of illegal immigration is regulated by the Law 94/2009, “Disposizioni in materia di sicurezza pubblica”. In Germany (“Siebtes Gesetz zur Änderung des Bundesvertriebenengesetzes,” May 16, 2007), United Kingdom (Immigration, Asylum and Nationality Act 2006) and France (Loi n. 2007-1631, relative à la maîtrise de l’immigration, à l’intégration et à l’asile, November 20, 2007) illegal entrance can also be punished by imprisonment. For an overview on other EU Country Members, see *Laws for Legal Immigration in the 27 EU Member States For an overview on the European Law - Edition 2009* edited by the International Organization for Migration (IOM), available at: http://publications.iom.int/system/files/pdf/iml_16.pdf. For a survey on the European Law on immigration, see *The Handbook on European Law relating to Asylum, Borders, and Immigration - Edition 2014*, edited by the European Union Agency for Fundamental Rights, and the Council of Europe, available at: http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf.

3 Notice however that, strictly speaking, containment policies are not allowed in the case of asylum, since when an asylum seeker has accessed one of the countries of Refugee Convention, authorities are legally obliged to provide temporary shelter until the request is assessed. We owe this point to Jackson Oldfield.

Of course legal residents and nationals are not equal in many regards. Residents do not usually have voting rights, which is certainly true for Parliamentary or European elections. However, in many other respects, they do enjoy a right to equal treatment before the law. Why is it then that in the case of family reunification equal treatment does not apply? The arbitrariness of the test does not consist in discriminating between nationals and TCNs, but in the lack of a justification for this discrimination.

The argument again, cannot not be inferred from the status of the joining spouse or relative, for again in the case of the Dutch resident the joining party does not have to pass any test. Absent a justification for such differential treatment, we are left with two options: either the right to family reunification holds equally both for nationals and TCNs when they submit a request of reunification with a non-EU citizen; or it does not. On one hand, if we argue that all aliens — regardless of the nationality of their spouses or relatives — should pass the test, a further question arise: wouldn't the national law after all discriminate against aliens qua aliens, regardless of their family or marital status? On the other hand, If we argue that there should be a differential treatment, the ground for a justified discrimination should be made clearer. To this purpose, we propose to analyse more in detail the arguments provided by the Court.

Within the framework of this general argument, the Court's ruling seems to fall within the presumptive legitimacy of States to retain control of their borders. As we just saw, the Court judged the term "measure" was sufficiently broad to be considered both as a measure of 'integration' as specified by Article 7, section 2 of the Family Reunification Directive. The Court also ruled that the test did not exceed what is necessary to achieve the aim of integration — for example by systematically preventing family reunification in the case of an applicant showing willingness to pass the examination despite repeated failed attempts to do so due to specific individual circumstances. Since failed attempts (unless due to specific circumstances, which the Court didn't envisage in the *Buitenlandse Zaken vs. K and A* case) would prove the insufficient motivation of the applicant, they were not prejudicial to her.

Therefore, the integration test might well be considered a reasonable requirement that falls within the scope of integration and it is proportionate to the right of family reunification. Similarly, with regard to the fees, the Court ruled that Member States are free to require third country nationals to pay fees related to integration measures in as far as the level of those fees does not make it impossible or excessively difficult to exercise that same right. The Court concluded that the measure could be legitimately demanded for before the applicant can enter the Country.

We can identify three main arguments underlying the Court's ruling: first, the test is an effective measure for the purpose of integration; second, the right to family reunification should be balanced against the integration requirements; third, that integration is an over-arching value that should be promoted at European level. We will elaborate these three arguments in turn and then provide some criticisms.

4.1 Language test as an effective measure

We will consider first some of the reasons in favour of the test as an effective measure to grant family reunification. First, language tests are just a proxy for the potential of integration.

They are not a measure of actual integration, but offer a prediction of the capacity of a TCNs to effectively function in a foreign community in ways that are not of detriment to the peaceful life of the receiving community. Language tests for prospective immigrants follow the same logic of other entry tests, such as those adopted by public institutions, including schools and universities, to assess the level of proficiency sufficient to perform successfully in the work activities.

Second, according to the Court, the civic integration test is reasonably easy to take and does not constitute an unsurmountable burden for the prospective migrant. In its judgment, the ECJ upheld the right of Member States to “require third country nationals to pass a civic integration examination prior to family reunification (...) before authorising that national’s entry into and residence in the territory of the Member State for the purposes of family reunification” (Point 41). Integration measures like the Dutch test are considered to be acceptable in as far as they are meant to facilitate the integration of the sponsor’s family members.

Third, the aim of the test is meant to facilitate the integration of the sponsor’s family members. Thus, a family member who desires to move to a different country for the purpose of a long term establishment following the reunification, should also be willing to seek integration.

Fourth, the language entry test is a reasonable threshold in assessing the potential for integration. The Court refers to the ‘willingness to pass the examination’ as one aspect of this threshold. Since failed attempts (unless due to specific circumstances, which the Court didn’t envisage in the *Buitenlandse Zaken vs. K and A* case) would prove the insufficient motivation of the applicant, they were not prejudicial to her. In a similar vein, the Court ruled with regard to the fees that Member States are free to require third country nationals to pay, fees related to integration measures in as far as they are not too expensive is not an excessive measure.

4.2 Balance of interests

The second argument concerns the balance of interests: although integration is a reasonable requirement Member States can set for long term residents, countervailing considerations may apply in the light of Articles 7 of the Charter, as well Articles 8 of the Convention. Such considerations stem from the idea that the meaning of fundamental rights consists in having the power of trumping other interests in cases of conflictual claims. Quite interestingly, the Court established that long-term residence due to family reunification should be balanced against the value of integration, and perhaps even the legitimate interests of the Dutch community attached to the value of integration. Is the Court in conflict with those fundamental rights then? The issue is debatable, but surely the answer cannot be a straight-forward yes. Some important considerations run in favour of the Court’s decision. For instance, among these interests a Member State may wish to preserve in setting an entry test is in a society where new residents are able to communicate in the native language so as to contain the risk of social conflicts, foster recognition and respects of the newcomers, and also avoid the costs of excluding groups from social life. These interests are therefore not selfish, let alone chauvinist; they rather are collective interests of concern also for the prospective new members of a social community. Another consideration that runs in favour of balancing interests is that balancing interests fosters the inclusion of those very newcomers, and therefore is an interest that also they should seek. In sum, the Court presumed that the test was both useful and consistent with the aim of integration,

it was not too difficult to pass, and it was a legitimate measure of balancing countervailing interests.

4.3 The value of integration

But is integration a value *per se*, for instance a value that European institutions should promote? Often, those defending the politics of integration claim that integration is good because it furthers the aims of autonomy, recognition and respect. Whether a person who moves to another country will not only seek to join her family, but also find a job, establish a career, have richer opportunities. Thus, along with the fundamental right to family life, migrants should also be able to effectively socialise within their country of arrival. Integration is a legitimate interest of the hosting community because it lowers the chances of exclusion and of costs involved therein; it is also an interest long-term applicants should value as their life chances would be enhanced in a community they belong to. Thus, besides willingness to develop skills for basic communication, the Court reasoned that integration should also be sought as an aim for those willing to move, along with the desire to be reunited with one's own family. Integration is an over-arching social good that encompasses both citizens and new residents.

A different argument takes integration as an instrumental value: integration is necessary for the effective enjoyment of the right to family life. A migrant who is unable to interact with the social environment will be subjected to all possible kinds of abuse and be unable to access a vast array of services that are meant to fulfil the social conditions for the effective realisation of family life. Third parties should not necessarily be involved in judging whether integration should be upheld. Integration is valuable for the very realisation of the fundamental rights.

4.4 Some arguments against the Court's ruling

Along with the arguments in favour of the Court's ruling, we may raise some points against it. First, the test puts an undue burden on the migrant for a condition he/she is not responsible for. Such burden consists — *inter alia* — in the costs carried by the prospective migrant to take the test. Although the Court judged this burden not to be excessive in this particular case, Article 7(2) of Directive 2003/86 explicitly states that the integration measures must be aimed not at filtering those persons who will be able to exercise their right to family reunification, but at facilitating the integration of such persons within the Member States. Yet, as the test is provided *ex ante*, failing to pass the test acts as a *de facto* filter. This is even more so if we consider that the Advocate General, in his opinion on this case, stated that failing to pass the test did not imply automatic refusal of the family reunification request. The Court did not find the applicant to be “permanently unable to pass that examination” (point 19, c), which is the main condition when the hardship clause applies. Since hardship applies only to permanent inability, the Court reasoned that the right to family reunification was just conditional on the requirement to pass the civic integration examination even in all those possible cases where maintaining that requirement would make family reunification impossible or excessively difficult (point 63).

The same general reasoning that excludes non-permanent hardship applied in the further question posed to the Court, that is whether the costs relating to the civic integration examination should be considered as a sufficient ground for exemption from the test. The Court

stated that “the fact remains that, in accordance with the principle of proportionality, the level at which those costs are determined must not aim, nor have the effect of, making family reunification impossible or excessively difficult,” yet leaving competence to the national authorities to determine the fee costs without considering the particular circumstances of TCNs from countries where 350 euros can often correspond to several months salary.

Second, it is dubious whether the test is a suitable proxy for evaluating willingness to integrate, as it contradicts straightforwardly the aim of facilitating the integration of the applicant. One may argue that integration should be taken as a general policy towards communities as a whole. Admittedly, both the Directive and the Court’s decisions do utilise the term integration as a general term, but the right to family life on which the Directive is based is an individual, not a communal or collective right. In other words, if integration is value that should be pursued, it seems quite unreasonable to deny access to applicants whose integration we seek on the basis that they would not further this aim. We should keep in mind that failing the test has more far reaching negative consequences for migrants than any up-holding of an abstract value of integration.

Third, valuing integration in general seems to underline a view of the societies we live in as culturally defined by a set of values prospective immigrants should be assimilated into. This point is shown by the phrasing of the Court’s decision referring to the integration test as a civic measure meant to evaluate the knowledge of the hosting country. But European societies are now far from being closed communities defined by one unique set of values. The very criteria for granting citizenship (whether based on birth or parent’s nationality) does not imply the citizen should share any particular value of the community she is part of. Of course being a lawful citizen of a country comes with the possession of rights and the duty to respect the laws and abide by the fundamental principles entrenched in the constitutions. Yet, rights and duties are not values in the sense we are discussing here. Rights and duties empower people with the capacity to make choices according to their moral and personal aims, and their limit comes — as it is usually recalled — with the equal rights and duties of other members of that community. The language of rights does not overlap, and sometimes clearly diverges, from the language of values. Values have rather strong moral connotations, in that they constitute beliefs that provide a foundation for our personal lives, not public life. Thus, if we want to say that integration is a value, it cannot be that sort of moral value that we associate with our strongest moral convictions, whether religious, ethnic or cultural. We must think of integration along different lines, more closely to which rights integration furthers.

We argued above that we may think of integration not as a value per se, but as an instrumental value aimed at enhancing autonomy, recognition and respect for newcomers. We can certainly express autonomy, recognition and respect as values, but what they really consist in are claims of rights individuals have. They are part of what being a citizen means, quite apart from what moral convictions she or he may have.

An important consequence of the previous argument is that balancing between integration and the right to family life is an ill-posed issue, because we can hardly weigh-up abstract values or general policies with specific right claims or requests. The Court’s very decision is indecisive in this sense, referring to the authority of the Member States to set measures that would not

contradict the general aim of the Long Term Residents Directive. The consequence is that, when the right to family life is made conditional on the general value of integration or the manifest willingness to integrate, authorities can more easily find a way around to couch otherwise political measures in moral language.

To sum up: abiding by the moral values of a given community cannot be the aim of integration because current European societies are all more or less multicultural, so no set of defined values would be a good criterion of inclusion.

In conclusion, all things considered, the entry test per se is either insufficient to establish a proper capacity for integration (for whatever reason integration is upheld) or it can represent in some cases an undue burden against migrants for a condition they are not responsible for. A culture of integration should not be selective in the sense required by the test as set out by the Dutch legislation.

However, we do not want to claim that integration measures should be abolished, neither that language abilities are unnecessary to the aim of integration. Language abilities do have positive consequences overall in favouring subjects' autonomy and a richer social life, and a politics of inclusion should adopt measures that would facilitate the legitimate aims of integration such as autonomy, respect and recognition. However strengthening these abilities should not (a) require the imposition of entry tests before arrival; (b) be evaluated in the form of selective examinations. In the next section we set out some recommendations to this end.

5. Policy analysis and considerations

The Minister van Buitenlandse Zaken vs. K and A case features a conflict between two sets of fundamental social values, namely, the right to family life and family reunification on the one hand, and the objective of promoting integration of immigrants into society on the other. Such conflict of values poses serious challenges to the possibility of third country nationals to exercise their right to family reunification in some EU Member States countries. In each country, the reasons accounting for the prioritisation of family life over immigrant integration stretches far beyond the legal sphere, as indeed the factors explaining the particular way in which a balance is reached have to be found in the country's historical, cultural and social roots.

All EU initiatives on the matter of the right to family reunification pertain to a policy area that the Treaty of Lisbon refers to as one of "shared competence" (Treaty on Functioning of the EU 2010, 51-2). National policymaking should be restricted to areas in which the Union has not previously exercised its competence, meaning that, at least in theory, the EU has a large room for manoeuvre in this field. However, due to the interpretability of some of the wording of the 2003/86 Directive on the right to family reunification, States are left in practice with ample autonomy in deciding how to balance the objective of protecting family life with that of promoting integration.

A 2008 Commission report on the implementation of the Directive (COM 2008/610) had already rightly highlighted the problems generated by some of the uncertain boundaries created by the "optional clauses" in the Directive, and in particular, that of Article 7 (2) regarding States' possibility to require third-country nationals to comply with "integration measures". In a 2011 document aimed at providing some guidelines on this issue, the admissibility of

integration measures was made to depend on an evaluation of whether the measures “serve the purpose of facilitating integration” (COM 2011/735, sect. 2.1). The ECJ ruling of the Minister van Buitenlandse Zaken vs. K and A case does indeed make repeated references to such document.

The Court’s final ruling declared the pre-arrival integration test as admissible on the grounds that it facilitates integration while at the same time not undermining the broader purpose of the family reunification Directive. However, the ruling still does not solve the issue of the overall lack of clarity surrounding the “right to family life” and the conditions at which the latter can be rightfully claimed by TCNs wishing to reunite with their family members in the host country. In particular, not specifying what does (not) constitute an acceptable “integration measure” that a state can introduce in order to restrict family reunification, the Court’s ruling seems to prioritise — rather than balance — integration over family life. More stringent guidelines concerning the interpretation of the concept of acceptable “integration measures” would be necessary if the objective is that of reducing Member States’ ability to use integration tests as instruments for immigrant selection or border management.

Furthermore, the ECJ’s ruling about the usefulness of integration measures has been contested on the grounds of those measures actually being counter-productive with regard to the purpose they are meant to serve. In a report on the impact of family reunification tests in several EU countries (MPG, 2011), the Migration Policy Group argues that pre-entry language tests do not carry significant positive effects on linguistic and cultural integration. The report indicates that language-learning benefits are only marginal, as applicants tend to forget what they learned as soon as the test is passed. Further, the fact of having passed a test appears in the report not to be positively correlated with comparatively increased integration in the education system or labour market of the host country. All things considered, the report suggests that there exists indeed no significant evidence that passing a test actually ameliorates the conditions for integration. However, while the passing of the test is not related to individuals’ willingness and potential to integrate, risks exist that not passing the test— and being refused a family reunification visa on those grounds — might reduce the psychological and material resources necessary for the applicants’ and their family to seek integration in the future.

The ECJ ruling on the case rightly underlines that integration and family reunification are both top priorities at the level of the EU. What it does not seem to sufficiently consider, however, is the difference in status that characterises the two objectives. Indeed, while family life represents a fundamental right of individuals and therefore carries an intrinsic value, the same cannot be said of integration, whose desirability relies instead on the fact of it being an instrument to achieve some other goods (for example social cohesion, as spelled out clearly in EU documents⁴). Adding to this, the ruling of the Court also does not seem to take in sufficient account the significant positive role that family life and reunification can play in enabling individuals’ integration into society, through the creation of the conditions for individuals to enjoy a more stable and fulfilling life.

⁴ See European Council, *Presidency Conclusions*, Tampere, 15-16 October 1999. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm.

Integration and family unity are indeed strictly related. However, since their relationship is mainly unidirectional — as family life can foster integration, but integration does not foster family life — it seems reasonable to expect that policies aimed at achieving integration be dependent on the encouragement and facilitation of family life and reunification. Based on this, the decision of the Court to declare the admissibility of an “integration measure” which denies family reunification on the grounds of promoting integration can appear short-sighted and paradoxical. For this reason, policy-makers in the EU might be interested in considering alternative “integration measures” that, instead of making family reunification more difficult on the grounds by imposing *ex ante* integration measures, facilitate family reunification on the grounds that it represents a key to immigrant integration. What this implies, in practice, is for member states to consider requiring third country nationals to attend language and culture courses in the country of destination in order to motivate and facilitate the integration of the reunified spouses. To be effective, such courses should be accessible, well-organised and designed around the real needs of those who attend them.

Conclusion

In this paper we have argued that the Court’s Decision in the *van Buitenlandse Zaken vs. K and A* case addresses focal issues in the present European legislation on immigration policies, rights to family life, and non-discrimination. We have argued that the practice of employing civic tests as selective measures of integration does not further the proper aims of integration, conflicts with fundamental rights to family life and non-discrimination, and does not take into due consideration the proportionality principle required for the adoption of these selective measures.

We have also defended the idea that the right to family life is a fundamental right which should trump considerations of balancing it with unspecified values of integration. Yet, as we have said, integration has the instrumental value of facilitating the promotion of other values, such as autonomy, recognition and respect, which can be translated in actionable rights. This is indeed not a new idea. Jean Jacques Rousseau thought of recognition as the sentiment of being an equal among equals (Rousseau 1755).

A society of equals is one in which the standards of acceptance depend on participation in public life, and participation is an expression of freedom, for it grants collective self-government. In this sense, integration has an important function, as it favours the recognition and respect of migrants as political subjects, and indeed as citizens in the sense of potential participants in the public life of the community they live in. We did not argue however that immigration policies should be unrestrained. Conflicts of rights may arise at such a level when unrestrained access compromises the welfare entitlements of nationals. But such considerations cannot be taken as presumptive arguments in favour of selective measures based on civic integration.

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