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JUDGMENT OF THE COURT (Grand Chamber)

27 June 2006 (*)

(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)

In Case C-540/03,

ACTION for annulment under Article 230 EC, brought on 22 December 2003,

European Parliament, represented by H. Duintjer Tebbens and A. Caiola, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by O. Petersen and M. Simm, acting as Agents,

defendant,

supported by

Commission of the European Communities, represented by C. O'Reilly and C. Ladenburger, acting as Agents, with an address for service in Luxembourg,

intervener,

and by

Federal Republic of Germany, represented by A. Tiemann, W.-D. Plessing and M. Lumma, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas (Rapporteur) and K. Schiemann, Presidents of Chambers, J.-P. Puissochet, K. Lenaerts, P. Kūris, E. Juhász, E. Levits and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 June 2005,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

1 By its application, the European Parliament seeks the annulment of the final subparagraph of Article 4(1), Article 4(6) and Article 8 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12; 'the Directive').

2 By order of the President of the Court of 5 May 2004, the Commission of the European Communities and the Federal Republic of Germany were granted leave to intervene in support of the form of order sought by the Council of the European Union.

The Directive

3 The Directive, founded on the EC Treaty and in particular Article 63(3)(a) thereof, determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

4 The second recital in the preamble to the Directive is worded as follows:

'Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union [OJ 2000 C 364, p. 1; 'the Charter'].'

5 The 12th recital states:

'The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.'

6 Article 3 provides that the Directive is to apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more and has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

7 Article 3(4) of the Directive states:

'This Directive is without prejudice to more favourable provisions of:

(a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other;

(b) the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the legal status of migrant workers of 24 November 1977.'

8 Article 4(1) of the Directive provides that the Member States are to authorise the entry and residence, pursuant to the Directive, of, in particular, the minor children, including adopted children, of the sponsor and his or her spouse, and those of the sponsor or of the sponsor's spouse where that parent has custody of the children and they are dependent on him or her. In accordance with the penultimate subparagraph of Article 4(1), the minor children referred to in this article must be below the age of majority set by the law of the Member State concerned and must not be married. The final subparagraph of Article 4(1) provides:

'By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.'

9 Article 4(6) of the Directive is worded as follows:

'By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.'

10 Article 5(5) of the Directive requires the Member States to have due regard to the best interests of minor children when examining an application.

11 Article 8 of the Directive provides:

'Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.'

12 Article 16 of the Directive lists some circumstances in which Member States may reject an application for entry and residence for the purpose of family reunification or, if appropriate, withdraw or refuse to renew a family member's residence permit.

13 Article 17 of the Directive is worded as follows:

'Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.'

14 Under Article 18 of the Directive, where an application for family reunification is rejected or a residence permit is either withdrawn or not renewed, the right must exist to mount a legal challenge in accordance with the procedure and the jurisdiction established by the Member States concerned.

Admissibility of the action

The plea alleging that the action does not actually concern an act of the institutions

15 The provisions whose annulment is sought are derogations from the obligations imposed by the Directive on the Member States, permitting them to apply national legislation which, according to the Parliament, does not respect fundamental rights. The Parliament submits, however, that, inasmuch as the Directive authorises such national legislation, it is the Directive itself which infringes fundamental rights. It cites in this connection the judgment in Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 84.

16 The Council, on the other hand, emphasises that the Directive gives the Member States leeway enabling them to retain or adopt national provisions compatible with respect for fundamental rights. In the Council's submission, the Parliament does not show how provisions adopted and applied by Member States which might be contrary to fundamental rights would constitute action of the institutions within the meaning of Article 46(d) EU that is subject to review by the Court so far as concerns respect for fundamental rights.

17 In any event, the Council wonders how the Court could review in purely abstract terms the legality of provisions of Community law which merely refer to national law whose content, and the manner in which it will be applied, are unknown. The need to take the specific circumstances into account is apparent from the judgments in Case C-60/00 *Carpenter* [2002] ECR I-6279 and in *Lindqvist*.

18 The Commission submits that review by the Court of compliance with fundamental rights that are among the general principles of Community law cannot be limited solely to the situation where a provision of a directive obliges the Member States to adopt specified measures infringing those fundamental rights, but must also extend to the case where the directive expressly permits such measures. Member States should not be expected to realise by themselves that a given measure permitted by a Community directive is contrary to fundamental rights. The Commission concludes that review by the Court cannot be precluded on the ground that the contested provisions of the Directive merely refer to national law.

19 The Commission observes, however, that the Court should annul provisions such as those the subject of the present action only if it were impossible for it to interpret them in a manner consistent with fundamental rights. If, in light of the customary rules of interpretation, the provision at issue leaves a margin of appreciation, the Court should rather set out the interpretation thereof that respects fundamental rights.

20 The Parliament responds that to interpret the Directive in the abstract, as suggested by the Commission, would have the effect of establishing a preventive remedy which would encroach upon the powers of the Community legislature.

Findings of the Court

21 It is appropriate, as the Advocate General has done in points 43 to 45 of her Opinion, to address this issue from the point of view of the admissibility of the action. In essence, the Council denies that the action concerns an act of the institutions, pleading that only the application of national provisions retained or adopted in accordance with the Directive could, according to the circumstances, infringe fundamental rights.

22 As to that argument, the fact that the contested provisions of the Directive 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.

23 Furthermore, a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.

24 It follows that the plea of inadmissibility alleging that the action does not actually concern an act of the institutions must be dismissed.

Severability of the provisions whose annulment is sought

25 The Federal Republic of Germany stresses, first of all, the importance to it of the final subparagraph of Article 4(1) of the Directive, which contains one of the main points of the compromise allowing adoption of the Directive, for which a unanimous vote was required. It observes that partial annulment of an act can be envisaged only where the act comprises several elements which are severable from each other and only one of those elements is unlawful because it infringes Community law. In the present case, it is not possible to sever the rule relating to family reunification laid down in the final subparagraph of Article 4(1) of the Directive from the remainder of the Directive. Any judgment annulling the Directive in part would encroach upon the powers of the Community legislature, so that only annulment of the Directive in its entirety would be possible.

26 The Parliament contests the argument that the final subparagraph of Article 4(1) of the Directive is not an element severable from the Directive simply because its wording is the result of a political compromise which enabled the Directive to be adopted. In the Parliament's submission, what matters is simply whether severance of an element of a directive is legally possible. Inasmuch as the provisions referred to in the application constitute derogations from the general rules laid down by the Directive, their annulment would not undermine the scheme or the effectiveness of the Directive as a whole, whose importance for implementing the right to family reunification the Parliament recognises.

Findings of the Court

27 As follows from settled case-law, partial annulment of a Community act is possible only if the elements whose annulment is sought may be severed from the remainder of the act (see, inter alia, Case C-29/99 *Commission* v *Council* [2002] ECR I-11221, paragraphs 45 and 46; Case C-378/00 *Commission* v *Parliament and Council* [2003] ECR I-937, paragraph 29; Case C-239/01 *Germany* v *Commission* [2003] ECR I-10333, paragraph 33; Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, paragraph 12; and Case C-36/04 *Spain* v *Council* [2006] ECR I-0000, paragraph 9).

28 The Court has also repeatedly ruled that that requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 257; *Commission* v *Council*, paragraph 46; *Germany* v *Commission*, paragraph 34; *France* v *Parliament and Council*, paragraph 13; and *Spain* v *Council*, paragraph 13).

29 In the present case, review of whether the provisions whose annulment is sought are severable requires consideration of the substance of the case, that is to say of the scope of those provisions, in order to be able to assess whether their

annulment would alter the Directive's spirit and substance.

The action

The rules of law in whose light the Directive's legality may be reviewed

30 The Parliament contends that the contested provisions do not respect fundamental rights – in particular the right to family life and the right to non-discrimination – as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR') and as they result from the constitutional traditions common to the Member States of the European Union, as general principles of Community law; the Union has a duty to respect them pursuant to Article 6(2) EU, to which Article 46(d) EU refers with regard to action of the institutions.

31 The Parliament invokes, first, the right to respect for family life, set out in Article 8 of the ECHR, which the Court has interpreted as also covering the right to family reunification (*Carpenter*, paragraph 42, and Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 59). This principle has been repeated in Article 7 of the Charter which, the Parliament observes, is relevant to interpretation of the ECHR in so far as it draws up a list of existing fundamental rights even though it does not have binding legal effect. The Parliament also cites Article 24 of the Charter, devoted to rights of the child, which provides, in paragraph 2, that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration' and, in paragraph 3, that 'every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'.

32 The Parliament invokes, second, the principle of non-discrimination on grounds of age which, it submits, is taken into account by Article 14 of the ECHR and is expressly covered by Article 21(1) of the Charter.

33 The Parliament also cites a number of provisions of international Conventions signed under the aegis of the United Nations: Article 24 of the International Covenant on Civil and Political Rights, adopted on 19 December 1966, which entered into force on 23 March 1976; the Convention on the Rights of the Child, adopted on 20 November 1989, which entered into force on 2 September 1990; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted on 18 December 1990, which entered into force on 1 July 2003; and the Declaration of the Rights of the Child proclaimed by the General Assembly of the United Nations Organisation on 20 November 1959 (Resolution 1386(XIV)). The Parliament draws attention in addition to Recommendation No R (94) 14 of the Committee of Ministers of the Council of Europe to Member States of 22 November 1994 on coherent and integrated family policies and Recommendation No R (99) 23 of the Committee of Ministers to Member States of 15 December 1999 on family reunion for refugees and other persons in need of international protection. The Parliament invokes, finally, constitutions of several Member States of the European Union.

34 The Council observes that the Community is not a party to the various instruments of public international law invoked by the Parliament. In any event, those norms require merely that the children's interests be respected and taken into account, and do not establish any absolute right regarding family reunification. Nor should the application be examined in light of the Charter given that the Charter does not constitute a source of Community law.

Findings of the Court

35 Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Opinion 2/94 [1996] ECR I-1759, paragraph 33; 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).

36 In addition, Article 6(2) EU states that 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

37 The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law (see, inter alia, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 31; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 68; and Case C-249/96 *Grant* [1998] ECR I-621, paragraph 44). That is also true of the Convention on the Rights of the Child referred to above which, like the Covenant, binds each of the Member States.

38 The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court … and of the European Court of Human Rights'.

39 Subject to the European Social Charter which will be mentioned in paragraph 107 of this judgment, the remaining international instruments invoked by the Parliament do not in any event appear to contain provisions affording greater protection of rights of the child than those contained in the instruments already referred to.

The final subparagraph of Article 4(1) of the Directive

40 The Parliament contends that the reasoning for the final subparagraph of Article 4(1) of the Directive, set out in the 12th recital in the preamble, is not convincing and that the Community legislature has confused the concepts 'condition for integration' and 'objective of integration'. Since one of the most important means of successfully integrating a minor child is reunification with his or her family, it is incongruous to impose a condition for integration before the child, a member of the sponsor's family, joins the sponsor. That renders family reunification unachievable and negates this right.

41 The Parliament further submits that, since the concept of integration is not defined in the Directive, the Member States are authorised to restrict appreciably the right to family reunification.

42 It states that this right is protected by Article 8 of the ECHR, as interpreted by the

European Court of Human Rights, and a condition for integration laid down by national legislation does not fall within one of the legitimate objectives capable of justifying interference, as referred to in Article 8(2) of the ECHR, namely national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. Any interference must, in any event, be justified and proportionate. However, the final subparagraph of Article 4(1) of the Directive does not require any weighing of the respective interests at issue.

43 The Directive is, moreover, contradictory since it does not provide for any limitation founded on a condition for integration so far as concerns the sponsor's spouse.

44 Furthermore, the Directive establishes discrimination founded exclusively on the child's age which is not objectively justified and is contrary to Article 14 of the ECHR. The objective of encouraging parents to have their children come before they are 12 years old does not take account of the economic and social constraints which prevent a family from receiving a child for a short or long period of time. Also, the objective of integration was achievable by less radical means, such as measures for the minors' integration after they have been allowed to enter the host Member State.

45 Finally, the Parliament observes that the standstill clause is less strict than customary standstill clauses, since the national legislation needs to exist only on the date of implementation of the Directive. The leeway which the Member States are allowed runs counter to the Directive's objective, which is to lay down common criteria for exercise of the right to family reunification.

46 The Council, supported by the German Government and the Commission, submits that the right to respect for family life is not equivalent, in itself, to a right to family reunification. According to the case-law of the European Court of Human Rights, it is sufficient that family life be possible, for example, in the State of origin.

47 The Council also observes that, in its case-law, the European Court of Human Rights has recognised that refusals, in implementation of immigration policy, to allow family reunification have been justified by at least one of the aims listed in Article 8(2) of the ECHR. In the Council's submission, such a refusal may be founded on the objective of the final subparagraph of Article 4(1) of the Directive, namely the effective integration of migrants who are minors by encouraging migrant families which are separated to have their minor children come to the host Member State before they are 12 years of age.

48 The choice of the age of 12 years is not arbitrary, but was based on the fact that, before that age, children are in a phase of their development which is important for their capacity to integrate into society. That is what the 12th recital in the preamble to the Directive expresses. The Council observes in this connection that the European Court of Human Rights has found there to be no breach of Article 8 of the ECHR in reunification cases concerning minors below 12 years of age.

49 It is justified to apply a condition for integration to children over 12 years of age and not to the sponsor's spouse because children will, as a general rule, spend a greater proportion of their lives in the host Member State than their parents.

50 The Council observes that the Directive does not prejudge the outcome of the weighing of the individual and collective interests present in individual cases and that Articles 17 and 5(5) of the Directive oblige the Member States to have regard to the interests protected by the ECHR and the Convention on the Rights of the Child.

51 It also maintains that the standstill clause in the final subparagraph of Article 4(1) of the Directive does not call into question the legality of that provision. The reference which is made to the 'date of implementation' of the Directive constitutes a legitimate political choice on the part of the Community legislature, the reason for which was the fact that the Member State which wished to rely on that derogation had not completed the legislative process for adoption of the national rules in question. It was preferable to opt for the criterion ultimately selected than to await completion of that process before adopting the Directive.

Findings of the Court

52 The right to respect for family life within the meaning of Article 8 of the ECHR is among the fundamental rights which, according to the Court's settled case-law, are protected in Community law (*Carpenter*, paragraph 41, and *Akrich*, paragraphs 58 and 59). 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.

53 Thus, the Court had held that, 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 (*Carpenter*, paragraph 42, and *Akrich*, paragraph 59).

54 In addition, as the European Court of Human Rights held in *Senv.the Netherlands*, no. 31465/96, § 31, 21 December 2001, 'Article 8 [of the ECHR] may create positive obligations inherent in effective "respect" for family life. The principles applicable to such obligations are comparable to those which govern negative obligations. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a margin of appreciation (*Gül* [*v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I], p. 174, § 38, and *Ahmut* [*v. the Netherlands*, judgment of 28 November 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2030], § 63)'.

55 In paragraph 36 of *Sen v. the Netherlands*, the European Court of Human Rights set out in the following manner the principles applicable to family reunification as laid down in *Gül v. Switzerland*, § 38, and *Ahmut v. the Netherlands*, § 67:

'(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.

(b) 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.

(c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.'

56 The European Court of Human Rights has stated that, in its analysis, it takes account of the age of the children concerned, their circumstances in the country of origin and the extent to which they are dependent on relatives (*Sen v. the Netherlands*, § 37; see also *Rodriguesda Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 39, 31 January 2006).

57 The Convention on the Rights of the Child also recognises the principle of respect for family life. The 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.

58 The Charter recognises, in Article 7, the same 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 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents.

59 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.

60 Going beyond those provisions, Article 4(1) of the Directive 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.

61 The final subparagraph of Article 4(1) of the Directive 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.

62 In so doing, the final subparagraph of Article 4(1) of the Directive 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 relating to that right, for weighing, in each factual situation, the competing interests.

63 Furthermore, as required by Article 5(5) of the Directive, the Member States must when weighing those interests have due regard to the best interests of minor children.

64 Note should also be taken of Article 17 of the Directive which requires Member States to take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his country of origin. As is apparent from paragraph 56 of the present judgment, such criteria correspond to those taken into consideration by the European Court of Human Rights when it reviews whether a State which has refused an application for family reunification has correctly weighed the competing interests.

65 Finally, a child's age and the fact that a child arrives independently from his or her family are also factors taken into consideration by the European Court of Human

Rights, which has regard to the ties which a child has with family members in his or her country of origin, and also to the child's links with the cultural and linguistic environment of that country (see, inter alia, *Ahmut v. the Netherlands*, § 69, and *Gül v. Switzerland*, § 42).

66 As regards conditions for integration, it does not appear that such a condition is, in itself, contrary to the right to respect for family life set out in Article 8 of the ECHR. As has been noted, 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 ECHR.

67 Contrary to the Parliament's submissions, the Community legislature has not confused conditions for integration referred to in the final subparagraph of Article 4(1) of the Directive and the objective of integration of minors which could, according to the Parliament, be achieved by means such as measures facilitating their integration after they have been allowed to enter. Two different matters are indeed involved. As follows from the 12th recital in the preamble to the Directive, the possibility of limiting the right to family reunification of children over the age of 12 whose primary residence is not with the sponsor is intended to reflect the children's capacity for integration at early ages and is to ensure that they acquire the necessary education and language skills in school.

68 The Community legislature thus considered that, beyond 12 years of age, the objective of integration cannot be achieved as easily and, consequently, provided that a Member State has the right to have regard to a minimum level of capacity for integration when deciding whether to authorise entry and residence under the Directive.

69 A condition for integration within the meaning of the final subparagraph of Article 4(1) of the Directive may therefore be taken into account when considering an application for family reunification and the Community legislature did not contradict itself by authorising Member States, in the specific circumstances envisaged by that provision, to consider applications in the light of such a condition in the context of a directive which, as is apparent from the fourth recital in its preamble, has the general objective of facilitating the integration of third country nationals in Member States by making family life possible through reunification.

70 The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular 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.

71 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.

72 The Parliament has not shown how the standstill clause in the final subparagraph of Article 4(1) of the Directive is contrary to a superior rule of law. Since the Community legislature did not infringe the right to respect for family life by

authorising the Member States, in certain circumstances, to have regard to a condition for integration, it was lawful for it to set limits on that authorisation. Consequently, it does not matter that the national legislation specifying the condition for integration that can be taken into account had to exist only on the date of implementation of the Directive and not on the date on which it entered into force or was adopted.

73 Nor does it appear that the Community legislature failed to pay sufficient attention to children's interests. The content of Article 4(1) of the Directive 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, as recalled in paragraph 63 of the present judgment, Article 5(5) of the Directive requires the Member States to have due regard to the best interests of minor children.

74 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.

75 Likewise, the fact that a spouse and a child over 12 years of age are not treated in the same way cannot be regarded as unjustified discrimination against the minor child. The very objective of marriage is long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents. It was therefore justifiable for the Community legislature to take account of those different situations, and it adopted different rules concerning them without contradicting itself.

76 It follows from all of the foregoing that 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.

Article 4(6) of the Directive

77 For reasons similar to those relied upon when the final subparagraph of Article 4(1) of the Directive was being examined, the Parliament submits that Article 4(6) of the Directive, which permits the Member States to require applications for family reunification of minor children to be submitted before the age of 15, also infringes the right to respect for family life and the prohibition on discrimination on grounds of age. It also observes that the Member States remain free to adopt new, restrictive, derogating provisions until the date of implementation of the Directive. Finally, the obligation on Member States which apply this derogation to examine applications for entry and residence submitted by minor children over 15 years of age on the basis of 'grounds other than' family reunification which are not defined leaves much to the discretion of the national authorities and creates legal uncertainty.

78 Just as in the case of the final subparagraph of Article 4(1) of the Directive, the Parliament states that the objective of integration was achievable by means less radical than discrimination on grounds of age, which is not objectively justified and is consequently arbitrary.

79 The Council maintains that Article 4(6) of the Directive is open to use, at national level, that is compatible with fundamental rights and, in particular, proportionate to the objective pursued. The objective is to encourage immigrant families to have their minor children come at a very young age, in order to facilitate their integration. This is a legitimate objective, forming part of immigration policy and falling within the scope of Article 8(2) of the ECHR.

80 The broad wording of 'grounds other than' family reunification should not be criticised as a source of legal uncertainty, since it is designed to favour a positive decision on the majority of the applications concerned.

81 The age of 15 years was chosen in order to cover the greatest number of cases while not precluding the minor's attending school in the host Member State. There is thus no arbitrary discrimination. The Council maintains that such a choice falls within its margin of appreciation as legislator.

82 The Commission submits that Article 4(6) of the Directive does not infringe Article 8 of the ECHR because the rights which the persons concerned could derive from the Convention remain entirely preserved. Article 4(6) of the Directive requires Member States to consider every other possible legal basis for an application by the child concerned to be admitted to their territory, and to grant such entry if the legal conditions are met. This must include a right founded directly on Article 8 of the ECHR and thus allow consideration on a case-by-case basis of applications for entry submitted by children who are 15 or older.

83 The age limit set at 15 years is not unreasonable and can be explained by the link that exists between Article 4(6) of the Directive and the waiting period of three years in Article 8 of the Directive. The point is not to issue residence permits to persons who in the meantime have reached the age of majority.

Findings of the Court

84 In the present action, the review conducted by the Court concerns whether the contested provision, in itself, respects fundamental rights and, in particular, the right to respect for family life, the obligation to have regard to the best interests of children and the principle of non-discrimination on grounds of age. It must be determined in particular whether Article 4(6) of the Directive expressly or impliedly authorises the Member States not to observe those fundamental principles in that it allows them, in derogation from the other provisions of Article 4 of the Directive, to formulate a requirement by reference to the age of a minor child for whom application is made for entry into, and residence in, national territory in the context of family reunification.

85 It does not appear that the contested provision infringes the right to respect for family life set out in Article 8 of the ECHR as interpreted by the European Court of Human Rights. Article 4(6) of the Directive does give 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.

86 It does not matter that the final sentence of the contested provision 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.

87 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.

88 It follows that, while Article 4(6) of the Directive has the effect of authorising a Member State not to apply the general conditions of Article 4(1) of the Directive to applications submitted by minor children over 15 years of age, the Member State is still obliged to examine the application in the interests of the child and with a view to promoting family life.

89 For the reason set out in paragraph 74 of the present judgment, it does not appear, a fortiori, that the choice of the age of 15 years constitutes a criterion contrary to the principle of non-discrimination on grounds of age. Nor, for the reason set out in paragraph 72 of the present judgment, does it appear that the standstill clause, as formulated, infringes any superior rule of law.

90 It follows from all of the foregoing that 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.

Article 8 of the Directive

91 The Parliament observes that the periods of two and three years provided for in Article 8 of the Directive significantly restrict the right to family reunification. This article, which does not require applications to be considered on a case-by-case basis, authorises the Member States to retain measures which are disproportionate in relation to the balance that should exist between the competing interests.

92 The Parliament further submits that the derogation authorised in the second paragraph of Article 8 of the Directive could well give rise to different treatment in similar cases, depending on whether or not the Member State concerned has legislation which takes its reception capacity into account. Finally, a criterion founded on the Member State's reception capacity is equivalent to a quota system, which is incompatible with Article 8 of the ECHR. The Parliament notes in this regard that the restrictive annual quota system applied by the Republic of Austria was held by the Verfassungsgerichtshof (Constitutional Court, Austria) to be contrary to the Austrian Constitution (judgment of 8 October 2003, Case G 119, 120/03-13).

93 The Council observes that Article 8 of the Directive does not in itself require a waiting period and that a waiting period is not equivalent to a refusal of family reunification. The Council also submits that a waiting period is a classical element of immigration policy which exists in most Member States and has not been held unlawful by the competent courts. It pursues a legitimate objective of immigration policy, namely the effective integration of the members of the family in the host community, by ensuring that family reunification does not take place until the sponsor has found in the host State a solid base, both economic and domestic, for settling a family there.

94 The Council states that the difference in treatment among Member States is only

the consequence of the process of gradual harmonisation of laws and that, contrary to the Parliament's assertions, Article 8 of the Directive harmonises Member State laws substantially, given the strict nature of the standstill clause that it contains.

95 It disputes that the reference in the second paragraph of Article 8 of the Directive to a Member State's reception capacity is the equivalent of a quota system. That criterion serves solely to identify the Member States which may extend the waiting period to three years. Moreover, the Parliament's submissions on how that provision is implemented in the Member States are speculative.

96 According to the Commission, the waiting period introduced by Article 8 of the Directive is in the nature of a rule of administrative procedure which does not have the effect of excluding the right to reunification. Such a rule pursues a legitimate objective, and does so proportionately. The Commission states in this regard that the length of the period for which the sponsor has resided in the host Member State is an important factor taken into consideration in the case-law of the European Court of Human Rights in the weighing of the interests, as is the country's reception capacity. National legislation must in any event, as the Verfassungsgerichtshof has acknowledged, allow the possibility of submission of applications for reunification that are founded directly on Article 8 of the ECHR before the waiting period has expired.

Findings of the Court

97 Like the other provisions contested in the present action, Article 8 of the Directive authorises the Member States to derogate from the rules governing family reunification laid down by the Directive. The first paragraph of Article 8 authorises the Member States to require a maximum of two years' lawful residence before the sponsor may be joined by his/her family members. The second paragraph of Article 8 authorises Member States whose legislation takes their reception capacity into account to provide for a waiting period of no more than three years between the application for reunification and the issue of a residence permit to the family members.

98 That provision does not therefore 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 rights set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.

99 It should, however, be remembered that, 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 that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors.

100 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.

101 When carrying out that analysis, the Member States must, as is pointed out in paragraph 63 of the present judgment, also have due regard to the best interests of minor children.

102 The coexistence of different situations, according to whether or not Member States choose to make use of the possibility of imposing a waiting period of two years, or of three years where their legislation in force on the date of adoption of the Directive takes their reception capacity into account, merely reflects the difficulty of harmonising laws in a field which hitherto fell within the competence of the Member States alone. As the Parliament itself acknowledges, the Directive is important for applying the right to family reunification in a harmonised fashion. In the present instance, it does not appear that the Community legislature exceeded the limits imposed by fundamental rights in permitting Member States which had, or wished to adopt, specific legislation to adjust certain aspects of the right to reunification.

103 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.

104 In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights (see, to this effect, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 22).

105 It should be remembered that, in accordance with settled case-law, the requirements flowing from the protection of general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements (see Case C-2/92 *Bostock* [1994] ECR I-955, paragraph 16; Case C-107/97 *Rombi andArkopharma* [2000] ECR I-3367, paragraph 65; and, to this effect, *ERT*, paragraph 43).

106 Implementation of the Directive is subject to review by the national courts since, as provided in Article 18 thereof, 'the Member States shall ensure that the sponsor and/or the members of his/her family have the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered'. If those courts encounter difficulties relating to the interpretation or validity of the Directive, it is incumbent upon them to refer a question to the Court for a preliminary ruling in the circumstances set out in Articles 68 EC and 234 EC.

107 So far as concerns the Member States bound by these instruments, it is also to be remembered that the Directive provides, in Article 3(4), that it is without prejudice to more favourable provisions of the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987, the European Convention on the legal status of migrant workers of 24 November 1977 and bilateral and multilateral agreements between the Community or the Community and the Member States, on the one hand, and third countries, on the other.

108 Since the action is not well founded, there is no need to consider whether the contested provisions are severable from the rest of the Directive.

109 Consequently, the action must be dismissed.

Costs

110 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the Parliament has been unsuccessful, the Parliament must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Federal Republic of Germany and the Commission, which have intervened in the proceedings, are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the action;

2. Orders the European Parliament to pay the costs;

3. Orders the Federal Republic of Germany and the Commission of the European Communities to bear their own costs.

[Signatures]

* Language of the case: French.