



ENAR position paper

regarding the amended proposal for a

Council Directive on the right to family reunion
presented by the Commission
COM (2002) 225 final

‘The right to family reunion is a human right’ A step towards equal rights for third-country nationals in the EU

ENAR, the European Network Against Racism, is an EU-wide network of about 600 non-governmental organisations active in the fight against racism. The main focus of ENAR is to inform its constituency about EU initiatives concerning racism, to support networking amongst its members and to influence political and legal initiatives with the aim of combating racism and all forms of discrimination on the grounds of ethnicity or religion.

ENAR welcomes the initiative of a proposal for a unified right of family reunion in the European Union member countries.

ENAR wishes to recall that the right to live in a family is established in various international agreements, such as the Universal Declaration of Human Rights (1948), the European Social Charter (1961) and the International Pact on Economic, Social and Cultural Rights (1966). Furthermore, the International Convention on the Rights of the Child (1990) states that the right to live in a family must be granted ‘regardless of the status of his or her parents and that he or she shall not be separated from his or her parents against their will, unless the separation is in the best interests of the child’

In addition, ENAR considers that the right to live within the family and, in the first place, the right to reunite one’s family are fundamental human rights. As such, these fundamental human rights cannot be subject to changes in countries’ political strategies. Finally, a policy regarding family reunification must be based on the principle of equal treatment between those (third-country) citizens who legally reside in an EU Member State and citizens of an EU Member State.

For this reason we deeply regret that the first proposal published by the European Commission in 1999 did not find a consensus in the Council. The first draft included progressive and constructive proposals, which were strongly supported by the NGO community, as the draft represented real progress compared with the regulation in force in most Member States of the EU and all the above-mentioned international agreements were fully reflected.

We note with concern that individual member countries of the EU did not wish to find a common approach to this matter. National negotiations on immigration law have strongly influenced and dominated EU negotiations. A very progressive standpoint was taken during the special meeting of the European Council in October 1999 in Tampere and general guidelines were published, which indicated the intention to design a human rights oriented immigration policy for the EU.

Three years after Tampere the NGO community observes a tendency not to follow the standpoints taken in Tampere. The current developments concerning migration policy in various countries of the EU are a backward step for what is one of the world's central and guiding regions regarding immigration.

We observe increasingly that fundamental rights such as living in a family are more limited when third-country nationals are involved (e.g. the minimum age for marriage of 24 years for couples when at least one partner is a third-country national in Denmark). NGOs in the fight against racism feel that there is high potential for discrimination in these laws. The right to marry and to live in a family is one of the highest values in countries with a Christian background.

This text constitutes a backward step compared with the previous version regarding the respect of the right to family reunification. It authorises the States to go against several fundamental measures.

The changes made between the first and second drafts are breaches of the right to family reunification which contribute to weakening its content.

These changes concern specifically:

- The definition of the family members to whom these rights are granted;
- The criteria of integration that can be imposed on minors over 12 years;
- The condition of having sufficient resources, the possibility of establishing a waiting period before granting a residence permit and the duration of resident permits for family members;
- The respect of the right to a private life and to family as it is established in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is strongly compromised by this proposal;
- The increase of waiting periods for the application of family reunification;
- The status of family members being changed from the status of EU citizens to the status of the applicant.

The objective of the Directive is thus no longer to recognise a right in favour of third-country nationals legally residing in a Member State, but to “determine the conditions in which the right may be exercised” (Article 1).

Based on the amended draft Directive we nonetheless welcome the following provisions:

- The fact that the European Union intends to define a common minimum level of rights for third-country nationals concerning family reunion in the EU on the basis of the Tampere Conclusions.
- Based on the Tampere Conclusions it is stated in the draft Directive in relation to third-country nationals that a “more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the European Union”.
- The standstill clause that national legislation concerning family reunion cannot be weakened if stronger legislation existed at the time of the adoption of this Directive.
- We nevertheless wish to stress our fears that Member States may breach this clause by changing their legislation **before** the adoption of the Directive in order to introduce these new provisions into their national legislation afterwards.

- The formulation that family life and family reunification creates a socio-cultural stability facilitating the integration of third-country nationals.
- As stated in Article 3 (6), that countries may not introduce less favourable conditions than those which already exist in each member country on the date of adoption concerning Article 4 (1,2,3) Article 7 (1c) and Article 8.
- That the European Union included the priority to review the age limit of children to be reunified with their family two years after the Directive has been transposed (Article 5(1))
- That member countries signal that they will accept under appropriate circumstances that family reunion applications may be submitted when the family members are already in their territory. This provision will avoid long procedures related to applications made from outside the Member State, which cause long interruptions to family life.
- The specific inclusion of the provision under Article 6, point 4, that a renewal of the residence permit may not be withheld and removal from the territory may not be ordered by the competent authority of the Member State on the sole ground of illness or disability suffered after the issue of the residence permit. However, the formulation should not be a conditional clause rather an obligation in order to avoid discrimination on the grounds of physical conditions suffered by a third-country national.
- The specified anti-discrimination clause under Article 7 (2) concerning conditions relating to accommodation, sickness insurance and resources.
- Article 13, point 2, first paragraph, that family members shall be granted a renewable residence permit of the same duration as that held by the applicant for family reunification. However, the NGO community would suggest strengthening this paragraph by stating that family members shall be granted the same residence permit.
- The explicit mention of the entitlement of reunited family members to full access to education, employment and self-employment and also to vocational training (Article 14 point 1).

However, ENAR wishes to make the following remarks concerning specific articles of the draft Directive:

General provisions

Article 3

- Persons *authorised to reside (...)* on the basis of temporary protection or on the basis of subsidiary forms of protection or awaiting a decision on their status are excluded from the scope of application of the proposed Directive.

It should be ensured that the Commission, which states that the right to family reunification will be granted to these persons in the context of specific legislation, harmonises as soon as possible the concept of subsidiary protection by the EU so that this right is granted.

- *A third-country national residing lawfully in a Member State who has reasonable prospects of obtaining the right of permanent residence* is included in the scope of application of the proposed Directive.

This condition, which was added in the modified proposal, introduces a further condition compared with the previous version. This condition aims at reducing the number of third-country nationals who may be joined by their family members.

We also fear that the imprecise terminology used will lead to a restrictive interpretation of the concept, especially in those Member States which are the least favourably disposed to accepting the right to family reunification.

Family Members

Article 4

Point 1 (c)

Regarding the term “minor children“, it would be preferable to substitute it with the term “children under 21 years of age”, considering the non-harmonisation of national legislation in the Member States in this field.

The Member States are not obliged to respect the right to family reunification for children, where custody is shared between the parents. This clause is in contradiction with Article 8 of the European Convention on Human Rights and with relevant legislation, which the Member States of the European Council are obliged to respect.

We feel that the formulation concerning the verification of whether a child aged over 12 years to be reunited with his or her family meets the condition for integration provided by the Member State’s existing legislation is very weak. We would like to see a more favourable formulation outlining under which circumstances children over 12 years meet the criteria for integration. We are concerned that the implementation of this clause into national legislation might not comply with the philosophy stated in this Article.

We are unsure about the precise content of the integration criteria that would be defined by the Member States, which adopt such derogation. The different interpretations, which could be made regarding these criteria, might give the Member States the possibility not to authorise the entry and residence of minors over 12 years of age based on subjective criteria. This could lead to the possibility for the administration to decide whether or not to respect this integration criterion.

The inclusion of a standstill clause in the proposal does not counter our fears, considering that various states could modify their legislation before the adoption of the Directive in order to introduce such an integration criteria clause into their national legislation afterwards.

Point 2

The Member States no longer have the obligation, but simply the option, to allow entry and residence:

- to the ascending line *of the person applying for reunification or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin.* This last condition could lead to difficulties in interpretation.
- *the adult unmarried children of the applicant or his or her spouse, where they are objectively unable to provide for their own needs due to a health condition.*

We would prefer to remove this last condition, which is restrictive compared to several national legislations and would recommend the following formulation: “ the children who are under 21 years of age or for whom their parents are responsible”.

Point 3

The authorisation of entry and residence by non-married partners and their children is no longer an obligation for the Member States, but is simply optional. In those states where the legislation does not assimilate the situation of non-married couples to that of married couples, the insertion of such a distinction would be discriminative.

Point 5

This paragraph refers to the minimum age of the spouse to be reunited. All countries have a minimum age of marriage, which should apply to all persons residing on the territory. We do not feel the need to introduce a different minimum age for third-country nationals, which would constitute a serious case of discrimination. Therefore we suggest introducing the minimum age of marriage under national law as the minimum age prerequisite for family reunification.

We are aware that some EU member countries have elevated the minimum age for marriage between persons where at least one of them is a third-country national to 24 years. We consider this law as a serious breach of international human rights standards.

Submission and examination of the application

Article 5

Point 2, first paragraph

Official documents providing proof of a marriage may vary considerably in different parts of the world. Therefore we would like to suggest the following amendment to this paragraph:
... and documentary evidence of the family relationship as provided for in the country of marriage and in compliance with...

Point 2, second paragraph

It is indicated that *in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the applicant and his/her family members and conduct **any investigation that is found necessary.***

We believe that this last provision does not justify disproportionate interference with respect to private and family life and pressure on the applicant and his/her family, being subject to questioning by the investigator. It should be sufficient to show proofs that establish the relationship. In fact, an examination of the legality and the validity of the documents is then executed.

Point 4, first paragraph

Concerning the notification period for family reunion we consider that the period of nine months is too long and we strongly suggest that it be modified to a period of six months, as initially foreseen in the previous version of the proposal.

Point 4 second paragraph

Concerning the maximum time limit of notification for family reunion, we consider the period of twelve months too long and strongly urge that it be modified to a period of nine months.

Family reunion can be applied for after a maximum of two years' legal residence in a country. Another maximum period of twelve months for notification could mean a total of three years, which we consider to be too long. We advise that the period when families are separated be kept as short as possible so as not to endanger the stability of the family.

Concerning the formulation: *the consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation...* ENAR considers that this formulation is too weak and would suggest that no official confirmation or refusal of the application be automatically considered as confirmation.

Requirements for the exercise of the right to family reunification

Article 7

Point 1 (c), first and second paragraph

EU member countries have clearly stated and individual states have already implemented immigration legislation allowing mainly highly skilled labour. This has a major impact on the kind of persons receiving permission to migrate to the EU. For such highly skilled immigrants, as much as for any others, conditions for family reunion should be more favourable in order to attract such highly skilled persons. Other regions of the world also seeking highly skilled immigrants offer better conditions.

Under these circumstances, non-governmental organisations believe that this paragraph does not take this into account by specifying the financial minimum requirements in these paragraphs. This expectation constitutes discrimination in the exercise of the right to family life, as the exercise of this right is thereby founded on wealth.

Point 2

Even though ENAR as a network combating racism welcomes the specific anti-discrimination clause covering conditions relating to accommodation, sickness insurance and resources, we

would be pleased to see a more general anti-discrimination clause as already exists in other directives.

Article 8

Paragraph 2

ENAR does not feel that the formulation “... *this Directive has regard for its reception capacities, the Member State may provide for a waiting period of no more than three years....*” is acceptable. This leaves the possibility of family reunification to the discretion of formal and not specified admission capacities of a country.

Additionally, one may question the sense of such a measure: a state that has exceeded its capacity to receive will not be able to resolve this situation within three years. The possibility to use this measure creates the risk that it will be applied in a quasi-automatic way in order to discourage the family members of the applicant to exercise this right.

Family reunification of refugees

Article 9

We support the clauses regarding family reunification of refugees and we consider that it is legitimate to set out more favourable provisions for them. But we regret that these clauses do not apply to all third-country nationals.

Additionally, we have reservations about limitations that the Member States may add, by excluding from these clauses the refugees whose family relationships existed before the recognition of their status (Article 9, paragraph 2).

Entry and Residence of Family Members

Article 14

Article 14 states that the family members of the applicant have the right *in the same way as the applicant, to (a) access to education; (b) access to employment ...; (c) access to vocational guidance, initial and further training and retraining.*

In the previous version, the rights granted to the family members of the applicant were accorded “*in the same way as citizens of the European Union*”. This provision constituted a step towards equality of rights between third-country nationals legally residing in a Member State and nationals of EU Member States.

This modification is therefore a backward step compared with the initial proposal, considering that the rights granted to the applicant in most Member States are not as generous as those accorded to citizens of the EU, especially regarding the access to paid work or an independent activity.

Article 15

Point 1

Under the conditions discussed in the context of the Directive regarding the conditions for long-term residence status (COM(2001) 0127) the maximum period of five years is inappropriately long and should be reduced to three years. A maximum period of five years will result in unreasonable hardship for families. Since such a waiting period is already foreseen for independent third-country nationals in the above-mentioned Directive on long-term residents, family members who apply for family reunification should have a somewhat better opportunities for an autonomous residence permit.

Point 3

ENAR strongly supports the intention to establish provisions ensuring the granting of an independent residence permit in the event of particularly difficult circumstances, such as widowhood, divorce, separation or death. We would request that such provisions under this Directive be clarified in order to avoid any sort of discrimination or different treatment of persons in such situations within the EU.

Penalties and redress

Article 16

Point 1, specifically (b)

ENAR feels strongly that this Article and Article 15 contradict one another in the point *...withdraw or refuse to renew a family member's residence permit*. We strongly advise the Commission, Parliament and Council to cross check these clauses in order not to contradict measures and to avoid interpretations that could lead to discrimination or acts of arbitrariness.

Point 2 (a)

We would like to invite the Commission to formulate clearly the possible *other unlawful means* in order to clarify this paragraph.

Point 4

As mentioned above under Article 5, point 2, second paragraph, this paragraph again should guarantee that the fundamental right of privacy is respected at all times.

Furthermore ENAR calls upon Member States:

- As stated in recital 11, to extend the possibility for family reunion from the nuclear family to other relatives in the ascending line, such as adult children and unmarried partners, if the country of residence wish to do so.
- Not only to promote the integration of family members who are reunited but to do all in their powers to offer services to make such integration possible (free language courses, courses in

national culture and traditions on a voluntary basis) with full respect for the cultural and religious traditions immigrants may have.

- To allow more favourable provisions for persons covered by this Directive as stated in Article 3 (5)
- As mentioned in the comment under Article 5, point 4, and Article 8, paragraph 1, we strongly urge governments to implement better conditions in national legislation, since we are convinced that a maximum period of two years to wait until family reunification can be applied is too long to guarantee that the family connection can be kept stable.

ENAR will communicate with all relevant policy makers in the process for adopting this Directive to make the voice of the NGO community heard.

Brussels, 20 October 2002