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Annotation CJEU 4 March 2010, Case C-578/08, Chakroun

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1. The *Chakroun* judgment was the second time the Court of Justice of the European Union (CJEU) was asked to rule on the Directive 2003/86/EC on the right to family reunification (FRD). The case concerns the compatibility of the Dutch income requirement with Article 7(1)(c) FRD. In *Parliament v Council*, a case in which the European Parliament sought the annulment of the FRD because it believed it was incompatible with fundamental rights standards, the Court had held that the Directive would not be annulled because the Member States would in any way have to apply the contested provisions of the FRD in a manner in which fundamental rights would be respected (CJEU 27 June 2006, Case C-540/03, *Parliament v. Council*). The contested provisions were derogatory clauses which did not bind the Member States in their competence to act in a manner which is in compliance with fundamental rights. The *Chakroun* case came before the Court through the referral of preliminary questions by the Dutch Council of State, the court of highest instance in immigration law in the Netherlands. In this annotation, I will first sketch the facts of the case. After that, I will discuss the ruling of the CJEU. In my analysis, I will place the ruling of the Court in the context of the subsequent case law on the interpretation of the FRD and the views of the European Commission on this matter.

2. The facts of the case can be summarized as follows. The sponsor, Mr. Chakroun, was born in Morocco in 1944. He moved to the Netherlands in 1970. He holds Moroccan citizenship and has a permanent residence permit in the Netherlands. In 1972, Mr. Chakroun married the applicant, Mrs. Chakroun, also a Moroccan citizen. The applicant remained in Morocco. In 2006, the sponsor applied for the family reunification of his spouse. At that time, he received contribution-based unemployment benefits worth €1322,73 net per month. His application was rejected because he did not make the required €1441,44 net per month. The District Court of The Hague rejected the appeal against this negative decision on 15 October 2007. In appeal, the Council of State referred preliminary questions to the CJEU on 23 December 2008.

3. The dispute hinges on the implementation of Article 7(1)(c) FRD in the Netherlands. According to this provision, the Member States may require applicants for family reunification to substantiate that they have stable and regular resources which are sufficient to prevent the family to rely on the social assistance system of the Member States. At the time of the dispute, the Netherlands implemented this provision by imposing two different maintenance requirements on applicants for family reunification: a higher requirement for applicants who had never lived together in the country of origin of the applicant (labelled as family formation) and a lower requirement for applicants who had lived together in the country of origin (labelled as family reunification). The maintenance requirement for family formation was set at 120% of the minimum wage level. This was justified by the Dutch authorities with reference to income supplementing social assistance instruments, which were accessible for persons who had an income which was lower than 120% of the minimum wage

level. As the sponsor was considered to fall in the category of family formation because he had not lived with his spouse in Morocco before he arrived in the Netherlands, he was required to comply with the higher maintenance requirement. The Council of State asked the Court whether family reunification can be refused under Article 7(1)(c) FRD to applicants who had sufficient income to main their family, but who were still eligible to additional income support benefits and whether the distinction between family formation and family reunification was in accordance with the FRD.

4. The Court answered that as family reunification is to be considered as the general rule under the Directive, the competence of the Member State to impose requirements must be interpreted strictly. It may not be used to undermine the objective of the Directive, which is to promote family reunification. The Member States should take into account all individual circumstances of the case pursuant to Article 17 FRD, and may not use a reference amount in the sense that all applications in which the income level is lower than the reference amount are automatically rejected. The Court concluded that an income level which is set at 120% of the minimum wage level is excessive and is not in accordance with the objective of determining whether an applicant for family reunification has stable and regular resources to support his family without relying on the social assistance system of the Member State. Furthermore, the Court notes that the Netherlands uses a lower income level for applicants who did live together in the country of origin of the applicant. As this lower income level is seen as sufficient for the purpose of Article 7(1)(c) FRD, the higher level applying to cases of family formation is excessive. With regard to the distinction between family formation and family reunification, the Court observed that the Directive did not provide for this distinction. Considering that the Directive must not be applied restrictively, the CJEU held that the Netherlands does not have the discretion to differentiate between family formation and family reunification.

5. In *Chakroun*, the CJEU adopted a rather liberal approach in the interpretation of the maintenance requirement. The idea that possible conditions to family reunification must be interpreted restrictively, as it is the purpose of the Directive to promote family reunification as a facilitator for integration, has become an important guiding principle in the interpretation of the FRD. It is in that light that the Dutch income requirement, which was set above minimum wages to prevent possible eligibility for social assistance benefits was held not in accordance with Article 7(1)(c) FRD. Relevant for other Member States is also that the Court held that setting a reference amount of income, meaning that all applications in which the income of the sponsor is less than this reference amount are automatically rejected, is not allowed under the Directive. Instead, there should be attention for all individual circumstances of the case, as is also laid down in Article 17 FRD.

6. The European Commission also extensively used the principles set by the Court in the Administrative Guidelines on the FRD. These Administrative Guidelines (see European Commission, COM(2014)210 final), which were published in 2014, contain guidance for the implementation of the FRD by the Member States. Even though the guidelines are soft law and therefore do not have binding status, they are of high authority. The European Commission uses the formula that restrictions on family reunification may not undermine the effectiveness of the Directive also outside the context of income requirements.

7. Since the *Chakroun* ruling, the CJEU has ruled on the interpretation of different provisions of the FRD. Below, I will discuss the developments in the case law regarding the

maintenance requirement (Article 7(1)(c) FRD), integration measures (Article 7(2) FRD) and the minimum age requirement (Article 4(5) FRD).

8. As discussed above, the *Chakroun* ruling concerns the interpretation of the maintenance requirement in Article 7(1)(c) FRD. The CJEU has ruled on the interpretation of this provision cases in two later cases. The ruling in *O., S. & L.*, concerns two cases in which third country national mothers of Finnish national children, who had lawful residence in Finland themselves, were seeking the family reunification of their new third country national partner (CJEU 6 December 2012, Joined cases C-356/11 and C-357/11, *O., S., & L.*). Even though the main issue in the case relates to a derived right of residence based on the EU citizenship of the Finnish children (see for further analysis the annotation to the *Chavez Vilchez* ruling in this collection), the CJEU remarked that the FRD is applicable to this case, considering that the sponsors are third country nationals lawfully residing in an EU Member State. The Court held that even though Member States may impose an income requirement under Article 7(1)(c) FRD, this may not undermine the objective of the FRD, which is to promote family reunification. The CJEU seems to suggest that even though the applicants do not comply with the maintenance requirement – the applicants are dependent on social assistance – this may not automatically mean that an application for family reunification is rejected on this basis. The CJEU provided further clarity on the maintenance requirement in *Khachab* (CJEU 21 April 2016, Case C-558/14, *Khachab*). In that ruling, the CJEU held that the Member States should make a prospective assessment of the income of the sponsor. In line with *Chakroun* and *O., S. & L.*, the CJEU held that the Member States must make a balanced and reasonable assessment of all the interests involved.

9. The Member States may require third country nationals to comply with integration measures. In the Netherlands, passing a pre-entry integration exam – consisting of a Dutch language and cultural orientation element – must be passed in order to qualify for family reunification. The CJEU held that the Member States may impose such requirement in *K. & A.* (CJEU 9 July 2015, Case C-153/14, *K. & A.*). That case concerns two third country national applicants who claim that they are unable to pass the exam for medical reasons. The Court held that the requirement to pass an integration exam is “undeniably useful” for integration in the host Member State. However, the integration exam may not be used to select which persons are allowed family reunification. According to the CJEU, a hardship clause should apply to persons who are permanently unable to pass the integration exam. The fees charged to take the exam may not have the effect that they make exercising the right to family reunification impossible or excessively difficult. In this regard, the CJEU refers to its ruling in *Commission v. Netherlands*, in which it held that even though the FRD does not mention administrative fees, the Member States are allowed to impose an administrative fee for an application for family reunification, but this may not have the effect that exercising the right to family reunification is made impossible or excessively difficult (CJEU 26 April 2012, Case C-508/10, *Commission v. Netherlands*).

10. In *Noorzia*, an Austrian Court asked the CJEU at which moment of time the age requirement of Article 4(5) FRD must be complied with: at the moment of application or at the moment of the administrative decision (CJEU 17 July 2014, Case C-338/13, *Noorzia*). The dispute concerned the application for family unification of an Afghan national born on 1 January 1989 who seeks to join her husband, also an Afghan national born on 1 January 1990 who resides lawfully in Austria. The application was made on 3 September 2010. The application was rejected by the Austrian authorities on 9 March 2011 because the sponsor had not reached the required age of 21 on the moment of the application, even though he

fulfilled the requirement on the date of the administrative decision. Without any reference to the *Chakroun* ruling or the obligation to have due consideration of the individual circumstances of each case, the CJEU held that the age requirement should be complied with on the moment of application. It motivated this by stating that the purpose of the age requirement is to make sure that both partners are mature enough to make the decision to move to another country and that the obligation to comply with the age requirement at the moment of application does not prevent the exercise of the right to family unification or to render it excessively difficult. This conclusion of the CJEU is surprising considering the approach adopted in *Chakroun*, as there is no mentioning of the principles which were highlighted in that ruling. The Court does not discuss that this interpretation of the age requirement in practice means that the age requirement is set at an even higher age, as applicants have to wait for the outcome of an application in their country of origin, separating them from their spouse for an additional period of time.

11. The Member States may impose the substantive conditions for family reunification as laid down in Article 7 FRD and in doing so they have a certain margin of manoeuvre. The ruling of the CJEU in *Chakroun* prescribes that this margin may not be used in a manner which makes the exercise of the right to family reunification impossible or excessively difficult. This is in line with the general principle of effectiveness and applies to all substantive requirements in the FRD. However, in *Noorzia* the CJEU did not follow this approach. This could be explained by the fact that *Noorzia* essentially concerns a procedural issue, namely on which moment in time the minimum age requirement should be complied with. It could be argued that the minimum age requirement does not make the exercise of the right to family reunification impossible as family reunification is still possible after both spouses have reached the required age. However, I would argue that also in cases in which the minimum age requirement is not complied with, the Member States must still make an individual assessment of all circumstances before rejecting an application, as Article 17 FRD does not specify that this provision only applies to certain provisions of the Directive.

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