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Stream 4: Linguistic diversity as a hindrance to the realisation of European citizenship rights?

Paper: Pre-language tests: means of integration or barrier to family reunification?

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Abstract

Language is a means to participate in society. Even more for migrants, the knowledge of the language of the host state is a fundamental instrument to attain integration. European Union member states seem to have fully comprehended its importance, and, in 2012, language has been the ambit with the most important expenditure related to migrants' integration. However, what are the possible consequences on individual rights when language proficiency is transformed in a requirement to be fulfilled in order to be allowed to migrate, i.e. in an admission condition? The question arises as regard language and civic tests which use is spreading across EU member states. The employment of integration-from-abroad instruments, in fact, risks to be discriminatory, especially in relation to the most vulnerable among would-be migrants, such as women, minors or illiterate persons.

The EU and the CoE guidelines on integration, and on admission schemes in particular, suggest to adopt a needs-based approach and tailor-made courses, recommendations which are not always followed in the use of pre-admission language tests. Therefore, it appears that more as an integration instrument, they are utilised as tools to select and curb the entry of *undesirable* third-country nationals. Eventually, the responsibility for integration is put on migrants' shoulders, and this demonstrates that member states demand integration to be an ex-ante result rather than a two-way process.

Particularly in the case of family reunification, pre-language tests could turn into a disproportionate obstacle in the exercise of a right which fundamental nature has been extensively recognised. The contrariety of such a requirement to EU law on family reunification and rights of EU citizens have been acknowledged by the European Commission and Parliamentary Assembly of the Council of Europe. Recently, the Court of Justice of the European Union has found the German pre-language test to put a disproportionate obstacle to family reunification in a case regarding a Turkish citizen, and a decision is awaited on a similar provision in Dutch legislation.

The paper aims to enter into details of the case-law just mentioned in order to describe the most problematic aspects of the matter that have been brought recently to the Court of Justice attention.

Keywords: pre-language test, family reunification, integration, discrimination.

Summary: 1. Introduction. - 2. Linguistic integration contextualised. - 2.1. Linguistic integration and family reunification. - 3. Lessons to be learned from the case-law on pre-admission language requirements. - 4. Conclusions.

1. Introduction.

"(1) Does Article 41(1) of the Additional Protocol […] preclude a provision of national law […] which makes the first entry [into the Federal Republic of Germany] of a member of the family of a Turkish national […] conditional on the requirement that, prior to entry, the family member can demonstrate the ability to communicate, in a basic way, in the German language?"[1]

"(1) (a) Can the term 'integration measures' […] be interpreted as meaning that the competent authorities of the Member States may require a member of a sponsor's family to demonstrate that he or she has knowledge of the official language of the Member State concerned at a level corresponding to level A1 of the Common European Framework of Reference for Languages, as well as a basic knowledge of the society of that Member State, before those authorities authorise that family member's entry and residence?

[…]

(2) Does the purpose of Directive 2003/86/EC, and in particular Article 7(2) thereof, given the proportionality test […], preclude costs of EUR 350 per attempt for the examination which assesses whether the family member complies with the aforementioned integration measures, and costs of EUR 110 as a single payment for the pack to prepare for the examination?"[2]

On 10th July 2014, the Court of Justice of the European Union (CJEU or the Court) has delivered a judgment in response to the request of a preliminary ruling on the compatibility between the German law on the residence of foreign nationals[3] and a provision of the Additional Protocol (AA) to the Association Agreement between the European Economic Community (EEC) and Turkey[4]. The German provision establishes the conditions under which a spouse of a third-country national (TCN) shall be granted a fixed-term residence permit, while art. 41(1) of the AA - a standstill clause - prevent member states (MSs) of the European Union to introduce new measures liable to restricting the exercise by Turkish citizens of certain fundamental freedoms. The object of the dispute was the dismissal of the application made by a Turkish national woman to reunite with the applicant's husband who is a Turkish citizen as well. He was residing on the basis of an unlimited residence permit in Germany, where he was exercising an economic activity that felt within the scope of the freedom of establishment. The permit was refused since she failed

[1] CJEU, *Naime Dogan v Bundesrepublik Deutschland*, C-138/13, judgment 10 July 2014, p.t 24.
[2] Request for a preliminary ruling from the Raad van State (Netherlands) lodged on 3 April 2014, *K and A v Minister van Buitenlandse Zaken*, C-153/14.
[3] Law on the residence of foreign nationals, version resulting from the notice of 25 February 2008 (BGBl. 2008 I, p. 162), as amended by Article 2 of the Law of 21 January 2013 (BGBl. 2013 I, p. 86).
[4] Council Decision 64/732/EEC of 23 December 1963, OJ 1973 C 133.

in demonstrating the possession of the required basic knowledge of the German language for being granted a visa for the purpose of family reunification. The applicant was illiterate[5].

The second question referred by the German judge was aimed at interrogating the Court on the preclusion of the same national provision on the basis of art. 7(2) of the 2003/86/EC Directive on the right to family reunification[6], i.e. on the possibility of MSs to "require third country nationals to comply with integration measures, in accordance with national law". This question has been left unanswered since it was possible to solve the case on the sole basis of the standstill clause referred to in the first question. Nevertheless, as reported in the opening of the article, the CJEU has been subsequently required to give judgment on the same issue as regard the Netherlands' similar provision.

The Dutch law - precisely, the Civic Integration Abroad Act[7] - makes family reunification for TCN spouses conditional on the demonstration, before being allowed to entry and reside in the national territory on a provisional basis, of having acquired a basic knowledge of the Dutch language (reading and speaking skills) as well as of the Dutch society. For this purpose, a civic integration test has to be taken at Dutch embassies and passed[8]. The applicants had asked to be exempted from such obligation by alleging disabilities. Nevertheless, these were evaluated not to be serious enough to be awarded the requested dispensation[9]. Furthermore, a second question has been put in order to understand if the fees to be payed to buy the official self-study pack *Naar Nederland* and in order to take the civic examination can be considered to put a disproportionate obstacle to the exercise of the right to family reunification[10].

Why family migration represents an interesting case study in relation to linguistic integration? Or, in other words, why the consequences on family members seeking reunion, rather than those on the generality of TCNs, are particularly telling of the potential exclusionary and discriminatory effects of pre-admission language requirements?

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[5] *Supra* note 1, p.ts 17-22. For the main points raised by the case see K. Eisele, *Are Pre-departure Language Requirements for Spouses of Turkish Nationals Unlawful?,* in *Maastricht Journal of European and Comparative Law*, (1) 2015, pp. 128-137.

[6] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification , OJ L 251 , 03/10/2003, p. 0012 – 0018.

[7] TK 2003-2004, 2900.

[8] Although this could appear to be an obvious statement – the necessity of a successful language and civic test in order to be granted entry and a temporary residence permit in the country – it is worth, anyway, to give this clarification since, in in the French case there is not a required language testing. Although the level of knowledge of the French language and society is evaluated (integration-from-abroad instruments are in place since 2007), it is not made conditional on the grant of the visa for family reunion. Nevertheless, those TCNs who have successfully passed an integration test in their country of origin are exempted from attending the, on the contrary, compulsory language training after arrival. Y. Pascouau (in collaboration with H. Labayle*), Conditions for Family Reunification under Strain. A comparative study in nine EU member states,* King Baudouin Foundation, European Policy Centre, Odysseus Network, November 2011, p. 91.

[9] Cfr. Opinion of the Advocate General Kokott delivered on 19 March 2015, C‑153/14, *Minister van Buitenlandse Zaken v K and A*, p.t 16.

[10] Ib., p.t 17.

Several reasons arise: firstly, it impacts on the right to family life, which fundamental nature has been extensively recognised[11]. Secondly, it highlights the contradiction between the requirement of language proficiency as a demonstration of an (at least a certain degree of) capacity of integration, or of having better prospects of an *ex-post* easily and fast integration, with the fact that family reunion itself, once realised, is a vehicle for the integration of the TCN sponsor already residing in the MS as well as for the reunited family members.

Thirdly, it induces to wonder if we will assist to a similar phenomenon to that observed in relation to Union citizens as regard the role assumed by the CJEU in the protection of family life. The reference is to the antecedents and the continuation of the *Zambrano*[12] line of cases through which the Court has impacted on MSs' immigration regimes. Will this case-law on pre-admission language requirements be the forerunner for the same kind of step in by the CJEU in protecting TCNs against the adverse effects of national immigration regimes on their fundamental rights[13]?

Lastly, it has become manifest relatively soon that the margin of appreciation left to MSs on (pre-admission but not only) national integration requirements, and their compatibility with the objectives of the family reunification Directive - the effective exercise of the right to family reunification and its instrumentality to TCNs' integration - would have been liable to raise concerns about human rights protection[14]. Precisely, such doubts on the possible infringements of fundamental rights were displayed as one of the main points of the action for annulment of the 2003/86/EC Directive brought by the European Parliament (EP) three months later its adoption by the Council[15]. The EP, specifically, claimed that MSs' permitted derogations from the Directive's obligations in combination with the national margin of appreciation could lead to a breach of human rights[16]. Although among the contested provisions there was not art. 7(2) - on which basis the compliance with integration measures can be required to TCNs - the Court has had the occasion to pronounce itself on a strictly related point. This was the (supposed) objective of integration which has been used to justify the possibility for MSs to ask for compliance with pre-admission integration requirements to children over twelve, who arrive independently from their

[11] Cfr. art. 16, Universal Declaration of Human Rights, United Nations; art. 8, European Convention on Human Rights, Council of Europe; art. 19.6, European Social Charter, Council of Europe, Strasbourg, 3.V.1996, ETS no. 163; art. 12, European Convention on the Legal Status of Migrant Workers, Strasbourg, 24.XI.1977, ETS no. 093.

[12] CJEU, *Ruiz Zambrano v Office national de l'emploi (ONEm)*, C-34/09, judgment of 8 March 2011, ECR 2011 I-01177.

[13] D. Thym, *EU migration policy and its constitutional rationale: A cosmopolitan outlook*, *in Common Market Law Review*, (50)2013, p. 725-726.

[14] It should be borne in mind the innovation brought by the Lisbon Treaty as regard the Court jurisdiction: since the entry into force of the Treaty, the Court has general jurisdiction in give preliminary rulings in the area of freedom, security and justice, thus in immigration matters. Cfr. Art. 10, Protocol No 36 on transitional provisions, TFEU, OJ C 326, 26.10.2012.

[15] CJEU, *EP v Council*, C-540/03, judgment of 27 June 2006, ECR 2006 I-05769. See also for an overview of the main critical points of the directive and of the relevant case law S. Peers, E. Guild, D. Acosta Arcarazo, K. Groenendijk, V. Moreno-Lax, *EU Immigration and Asylum Law (Text and Commentary): Second revised Edition, Volume 2: EU Immigration Law*, Leiden, 2012, pp. 247-286.

[16] The EP based its allegations on the possible breach of the right to family life ex art. 8 ECHR and art. 7 of the CFREU, and on the right to non-discrimination on grounds of age ex art. 14 ECHR and art. 21(1) CFREU. Cfr., in particular, pts. 30-32, *supra* note.

families, before being allowed to entry and reside in the country for purposes of family reunification[17].

This article focuses on the grey area of linguistic integration. It concerns the impact that the use of language proficiency as a pre-admission requirement has on TCNs' rights when seeking entry in the EU for purpose of family reunification. Specifically, it concentrates on the issues touched by the three cases briefly outlined above, and on the most controversial aspects of selected national integration policies as regard linguistic integration.

It may be objected that this has not a direct impact on a discourse aiming at exploring the possible impediments put by linguistic diversity to EU citizens' rights. Specifically to their right to family reunification[18] since to them is applicable the more favourable regime of the 2004/38/EC Directive[19]. However, this is (generally) the case only when the right of free movement has been previously exercised[20]. On the contrary, to sedentary EU citizens national rules on family reunification apply, thus cases of reverse discrimination are liable to arise[21].

At last, if we agree that the following assumption that is valid for the national level can also be transposed at the supranational level - i.e. the government of migration is a strategy of identity construction - this article contributes in exploring how the EU and MSs deal with the overlapping and simultaneous construction of an European and national identities, in the particular aspect of, and through, linguistic integration.

2. Linguistic integration contextualised.

Language is part of the identity construction of both individuals and groups. On this assumption is founded the connection between migration, language and integration in a community[22]. It is, in fact, on the basis of the well-known distinction between "us" and "them"[23],

[17] The authorship of the insertion of this provision is of the German delegation. Subsequently, Germany has reformed its national provisions on conditions for family reunification associating them with the related provisions of the Family Reunification Directive, to which restrictiveness (at least of "may clauses") it has importantly contributed during negotiations. L. Block, S. Bonjour, *Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands*, in *European Journal of Migration and Law*, (15) 2013, p. 212.

[18] Cfr. CJEU, *Murat Dereci et al. v Bundesministerium für Inneres*, C‑256/11, judgment of 15 November 2011, ECR 2011 I-11315, p.ts 54-58.

[19]Cfr. arts. 9 and ff., Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004.

[20] Keeping in mind the clarifications that has been made by the CJEU in the case *O. and B. v Minister voor Immigratie, Integratie en Asiel*, C-456/12, judgment 12 March 2014.

[21] For example, less favourable rules in relation to those are applicable to non-mobile Union citizens are in force in the Netherlands and Germany. Cfr. Report of the Commission to the European Parliament and the Council on the application of the Directive 2003/86/EC on the right to family reunification, COM(2008) 610 final, Brussels, 8.10.2008, p.4.

[22] It has been noted that precisely because, in reality, receiving societies are more and more experiencing the dilution of their (supposedly previous) homogeneous character, their efforts have concentrated in providing a legal definition of what distinguish them - fill with content the "us" - and of the shared values. C. Joppke, E.

where the "us" definition is based (also) on the (fictitious) domain by nationals of the (or of one of the) national language(s), that language proficiency can be used, firstly, as an indicator of, an already started, integration.

The master of a national language as a pre-admission requirement is part of the instruments adopted by some EU member states which, from the early 2000s, have started to utilise integration-from-abroad methods in order to better control migration flows of non-EU citizens[24]. The required linguistic integration is, in fact, part of the more general category of the, so called, civic requirements, i.e. the basic knowledge of host societies' language, history and basic institutions[25]. We could say that pre-admission language and, more generally, integration requirements to be fulfilled before being allowed to enter the country are just the most recent use that is made of these instruments which have been largely utilised as a condition to acquire the citizenship or a more secure residence status over time in the host country[26].

The increasing use of these means to (supposedly) pursue integration of TCNs stays at the crossroads between the spread of integration tests and courses in national citizenship policies, and the tightening of conditions for family reunification among European states[27]. Those states which have recently restrictively amended their legislation on family reunification have also acted on income requirements and minimum age of spouses[28]. These measures are, both at the national and at the EU level, based on integration objectives. However, the circumstance that these pre-admission integration requirements, where present, are directed (mainly, even if not always directly) at TCNs seeking entry for family reunification or formation raises doubts on the credibility of this explanation. On these basis, a much more realistic reason of such target seems to be the necessity for those MSs where family-migration flows were, or have been made, particularly problematic[29], to outsource the selective control that is made more difficult for the State to carry out once the TCN has been already admitted into the territory. A further argument in support the view of the use of integration requirements as an immigration control mechanism could be found in the conditionality established between their fulfilment, after the TCN has been

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Morawska, *Integrating Immigrants in Liberal Nation-States: Policies and Practices*, in C. Joppke, E. Morawska (eds), *Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States*, 2003, p. 16.

[23] B. Anderson, *Us and Them?: The Dangerous Politics of Immigration Control*, Oxford, 2013.

[24] To date, the European states requiring to selected categories of third-country nationals the fulfilment of a language requirement before being allowed entry and residence into the national territory are: the Netherlands, Germany, Denmark, Austria, the United Kingdom, France, Luxembourg, Liechtenstein.

[25] Cfr. Commission's Communication on a Common Agenda for an Integration Framework for the Integration of TCNs in the EU, COM (2005) 389 final, Brussels, 1 September 2005.

[26] All member states having at date pre-admission language requirement ask for the fulfillment of the same also in order to be granted a permanent residence permit and for the acquisition of citizenship. Cfr. C. Extramiana, P. Van Avermaet, *Language requirements for adult migrants in Council of Europe member states: Report on a survey*, Language Policy Division, Education Department - DG II, Council of Europe, Strasbourg. pp. 11-12.

[27] C. Joppke, *Civic Integration Policies for Immigrants in Western Europe*, in *West European Politics*, (1)2007, p. 5.

[28] S. Bonjour, *The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union*, in *Comparative Migration Studies*, (2)2014, p. 209.

[29] *Ib.*

allowed to enter the MS territory, and the grant or upkeep of a social benefit[30]. Furthermore, it asserts this statement the exemption from the fulfilment of integration requirements of certain categories of TCNs with higher levels of education or professional qualification, or having selected (mostly Western) nationalities. Therefore, pre-admission integration requirements, by putting on migrants' shoulders – in terms of costs, time and organisation - the responsibility to demonstrate their pre-admission integration, transform these supposed means of integration in a self-selection and control mechanism at the benefit of the restrictive immigration policies of member states[31].

At last, even if the fulfilment of a language condition is not a novelty nor an unreasonable or discriminatory practice *per se*, it is a certain use of the same requirement that is liable to transform it into a gatekeeper device[32], i.e. into a tool for migration government and in a selection mechanism of the "others".

2.1. Linguistic integration and family reunification.

The possible use of the required learning of the (or of one of the) national language(s) as an obstacle to integration is particularly visible in cases where it is made a prerequisite to be granted the permit to enter the national territory for family reunification or formation purposes. Language as well as family reunification are, in fact, equally significant tools for migrants' integration in the host country[33]. Thus, requiring its (although at a very basic level – A1 of the CEFR[34]) pre-entry knowledge as a condition for being allowed the exercise of the right to family reunification amounts to put a double obstacle on the way of TCNs' integration.

In order to understand how the regulation of family reunification at the EU level encounters, is affected and prejudiced, by the development of pre-admission language proficiency requirements, we should try to consider, simultaneously, the content of EU acts on integration of TCNs, the discussion on the adoption and implementation of the family reunification Directive, and, at last, MSs' laws regulating pre-departure integration requirements.

The European Union has been developing an EU framework on the matter since migration-related issues were brought into the community pillar by the Amsterdam Treaty (1999). It is noteworthy that the family reunification Directive has been the first binding act to be adopted

[30] G. Baldi, S. Wallace Goodman, *Migrants into Members: Social Rights, Civic Requirements, and Citizenship in Western Europe*, in *West European Politics*, 2015(1), p. 5.
[31] S. Wallace Goodman, *Controlling Immigration through Language and Country Knowledge Requirements*p. cit., p. 240.
[32] *Supra* note, p. 235.
[33] The integration potential of family reunification for non-EU citizens already residing in an EU MS is recognised by the 2003/86/EC Directive on family reunification, where it is stated that it creates "(…) sociocultural stability facilitating the integration of third country nationals in the Member State". Cfr. preamble (4), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003.
[34] The Common European Framework of Reference for Languages (CEFR) The CEFR describes foreign language proficiency at six levels: A1 and A2, B1 and B2, C1 and C2. It also defines three 'plus' levels (A2+, B1+, B2+).

since the establishment of the area of Freedom, Security and Justice (AFSJ), as well as the first binding act on family migration at the EU level[35].

The European Commission original proposal of the Directive, dated back to 1st December 1999, recalled the principles of the Tampere Conclusions of a couple of months earlier[36]. This had tried to set the scene and to establish the principles on which an EU common policy on migration had to be based, and was the first of a series of multi-annual programs on the fields encompassed by the AFSJ. Although the Presidency conclusions did not make any precise reference to family reunification of TCNs, the connection with family reunion was traced back to the necessity to provide TCNs with a fair treatment, and rights and obligations near to those granted to EU citizens: these were identified as the aims of the EU integration policy[37].

Alongside the ongoing establishment of an EU common immigration policy, the EU has not developed a (binding) common unique agenda on integration, leaving mainly to MSs' the prominent role on the issue[38]. The EU, on the basis of the Treaties, in fact, may just incentive and support MSs' actions directed to TCNs' integration, avoiding any harmonisation of MSs' legislation or regulations[39]. Nevertheless, EU principles and guidelines, alongside those provided by the Council of Europe (CoE) institutions active on the subject of migration and integration of migrants[40], are present. Therefore, when investigating the relation migration- language-integration, national policies and measures as well EU[41] and CoE acts have to be jointly considered.

The Thessaloniki European Council of 2003, that established the "invitation" to the Commission to present an annual report on Migration and Integration, stressed some important points that will inform the development of the EU framework on immigration and integration of TCNs. Integration was described as a two-way process where the primarily role is played by MS, although national policies should develop within an EU common framework on the basis of common principles[42]. Nonetheless, it is in the Commission first *Annual Report on Immigration and Integration in Europe* released in 2004[43] that we find more useful elements to comprehend the development of MSs' policies on migration in the following years. Admission and integration policies are described as deeply related fields that have to advance in parallel. The acquisition of

[35] Cfr. art. 63(3)(a) TCE, OJ C 340, 10.11.1997.
[36] Presidency conclusions, Tampere European Council, 15-16 October 1999.
[37] Cfr., specifically, p. 18, *supra* note.
[38] G. Baldi, S. Wallace Goodman, *Migrants into Members: Social Rights, Civic Requirements, and Citizenship in Western Europe*, cit., p. 6
[39] Cfr. art. 79.4 TFEU, OJ C 326, 26.10.2012.
[40] It is worth to be notice that the necessity for host countries to promote and provide the means for migrant (workers) to learn the language was already emphasises already in 1968 by the Council of Europe. Cfr. Resolution (68)18 on the teaching of languages to migrant workers, Council of Europe.
[41] D. Kostakopoulou, *Introduction*, in Kostakopoulou, D., Ersbøll, E., Oers, R. van, *A Re-definition of Belonging?: Language and Integration Tests in Europe*, 2010, p. 16.
[42] Presidency conclusions of the Thessaloniki European Council, 19 and 20 June 2003, 11638/03, Brussels 1 October 2003, p.t 31.
[43] Communication from the Commission to the Council , the European Parliament, the European Economic and Social Committee and the Committee of Regions, *First Annual Report on Migration and Integration*, COM (2004) 508 Brussels 16.7.2004

language skills, in particular, is identified as a key challenge and as one of the major barriers impeding a proper entry of TCNs in MSs' labour markets. Interesting is to notice that although family migration and TCNs entering MSs for humanitarian reasons are identified as the main source of no-EU migration flows, the report is almost only focused on economic migration. Coherently, a trend towards the adoption of more selective employment-oriented approaches at the national level is identified[44].

The followed Commission's Communication on *A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union* of 2005, setting down the above mentioned EU common principles, considers language as part of those pre-departure measures that would strengthened the potential for integration of admission schemes and of introductory programmes for newly-arrived migrants[45].

What emerges from EU acts on integration of TCNs above mentioned, and that would be confirmed by those which will follow, is the progressive endorsement at the EU level of national trends towards the establishment and justifiability of pre-admission integration requirements as a means to assure a better "starting point" for future integration. In other words, there has been, so to speak, a phenomenon of cross-fertilisation between MSs' integration policies and EU acts adopted on the matter in the last fifteen years[46]. Although the paradigm of integration as a two-way, than reciprocal, process has never been officially abandoned, the focus and the content of the measures proposed have, on the contrary, progressively shifted and concentrated on the receiving societies' demands. MSs' concerns on the adverse effects of immigration – especially as regard the high levels of unemployment among migrants and their reliance on social assistance schemes above average in comparison with the native population - on the failure of previous integration policies, and focus on their values, identities and receiving capacities have (been let to) become the drivers of national integration policies.

Meaningful is the release in the same year - 2008 - of the EU Council *European Pact on Migration and Asylum* and of the first report of the Commission on the implementation of the family reunification Directive[47]. These two acts symbolise the interplay and creeping contrast between (certain MSs within) the EU Council and the Commission. Their disagreement on the direction to be given at family migration policies at the EU level was already visible in the difficult negotiations of the Directive itself. Thus, if we agree in identifying a process of policy learning in the spreading of pre-admission integration requirements in certain EU MSs' laws

[44] *Supra* note, pp. 4-5.
[45] See, in particular, the fourth common principle: "Basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration".Cfr. Communication from the Commission to the Council , the European Parliament, the European Economic and Social Committee and the Committee of Regions, *A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union*, COM (2005) 389 final, Brussels, 1.9. 2005, p. 7.
[46] Partially contrary to the idea of looking at EU acts on integration as having been a driving force and a source of legitimation of MSs' legislation establishing pre-admission integration - linguistic and civic - requirements see S. Bonjour, *The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union*, cit., pp. 216-217.
[47] Cfr. art. 19, 2003/86/EC Directive.

regulating family reunification[48], the 2008 Pact could be looked at as a codification of such restrictive practices at the EU level[49]. The following communications of the Commission, as the CJUE case-law which has tried to re-draw some boundaries to MSs' discretion and margin of appreciation, consequently, could be seen as a response to those restrictive tendencies and as an attempt to readdress the implementation of the right to family reunification again towards its initial aim: an instrument to enhance TCNs' integration in the host country.

As anticipated above, the Family Reunification Directive was the first EU secondary law adopted in the post-Amsterdam Treaty era on the immigration matter. Since its genesis, its adoption, transposition and application have raised a number of concerns, lately exemplified by the 2008 Commission's critical report[50], the Green paper that has followed in 2011[51], which eventually resulted in the Commission's guidance for application of the Directive published last April[52]. The Commission's 1999 first proposal of the Directive, in fact, did not encounter the favour of some MSs within the Council. This led to the necessity to present a second proposal to find a way out of the negotiations' impasse by introducing a series of derogations, so called, "may" clauses, as that established at art. 7(2) on the possibility to require the fulfilment of integration conditions to TCN seeking family reunification in a EU MS. Even though pre-departure measures are not specifically mentioned by art. 7(2), the possibility for MSs to ask for their fulfilment as a pre-admission condition is deducible *a contrario* from the second subparagraph of the same article. Precisely, by relying on the provision establishing that to refugees' family members asking for family reunion the compliance with integration measures may be required only after family reunification - thus entry in the MS territory - has been granted[53].

Not surprisingly, those same EU MSs which, currently, ask for the compliance with pre-admission integration conditions to be allowed entry in their territories for family reunification

[48] It has been observed that the European Integration Fund established by the Council in 2007 has included among the TCNs that could benefit from national initiatives adopted by MS also those still in their country of origin who are complying with pre-admission measures. This has been seen as a further acknowledgement of these national practices by making them eligible for EU funding. Cfr. European Commission, Directorate-General for Justice, Freedom and Security, Final report June 2010, Synthesis of the Multi-annual and annual programs of the member states: priorities and actions of the European Fund for the integration of Third-country Nationals, 16/06/2010.

[49] The 2008 Pact, in fact, has been adopted under the French Presidency. By 2008 France, with Germany and the Netherland were the only MSs to have adopted pre-admission language requirements for the exercise of the right to family reunification of TCNs. These has been followed by the United Kingdom, Denmark and Austria in 2010 and 2012, respectively. Y. Pascouau, cit., p. 5; S. Bonjour, *The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union*, cit., p. 213.

[50] Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM/2008/0610 final, Brussels 8.10.2008.

[51] Green paper on the right to family reunification of third-country nationals living in the EU (Directive 2003/86/EC), COM(2011) 735 final, Brussels, 15.11.2011.

[52] The Communication followed the emerged unwillingness during the consultations of Member States (except for the Netherlands) to re-open negotiations, thus, to reform the Directive. Cfr. Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014)210 final, Brussels 3.4.2014.

[53] Cfr. art. 7.2, 2003/86/EC Directive: "[…]. With regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification.".

purposes, were all among those same MSs which have supported the introduction of such measures within the Directive[54]. Contrary to what has been identified as the main dynamic of Europeanisation of national immigration policies - the use of the intergovernmental mechanism at the EU level to introduce restrictive immigration laws which adoption were impeded at the national level, particularly through the action of the judiciary – the process that led to the adoption of the family reunification directive led to a different scenario. With prospects to amend national laws determining the conditions for family migration, certain MSs have used the EU level, thus, have influenced and directed the negotiations of the Family reunification Directive, in order to provide the basis and the legitimation for the national restrictive policies that they had already in program to adopt. Furthermore, MS interested in introducing integration-from abroad conditions for family migration, have not only relied on the Directive to legitimize national acts but have also frequently quoted the examples, presented as virtuous and wise, of other MS that were going into the same direction or were more ahead in the process of implementation of such policies[55].

In order to better understand the relevance of the cases that will be looked at in the next paragraph, a brief look at the Dutch and German laws establishing family reunification conditions could be useful. In the Dutch case the target of integration-from-abroad measures is general: applicants aged between 18 and 65 years old who need to ask for a temporary residence permit to enter the country. Nevertheless, deducted the categories of non-nationals exempted, those measures are mainly directed to third-country nationals asking for family reunification (or formation) with a Dutch citizen or with a TCN already residing in the country. On the contrary, the German Immigration Act (2005) has been amended introducing the specific obligation for spouses, aiming at reunite with a German citizen or with a TCN permanently residing in Germany, to demonstrate a basic knowledge of the German language in the moment in which the application for a permanent residence permit for family reunification purposes is filled in. Therefore, it seems, overall, that the main target group is, in both countries, TCN spouses asking for family reunification[56].

Interestingly, the categories of TCNs exempt from the obligation to pass the pre-admission language and civic tests are almost similar in the Netherlands and Germany. They include TCNs in possession of high educational or professional qualifications, TCNs from developed countries[57], as well as those who have a work permit or are self-employed in the Dutch case. At last, both countries do not include illiteracy among the cases in which an exemption is granted.

[54] S. Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Brill, 2009, p. 170-171.
[55] L. Block, S. Bonjour, cit., p. 213-215. S. Bonjour, op. cit., p. 211-214.
[56] T. Strik, A. Böcker, M. Luiten, R. van Oers, *The INTEC Project: Synthesis Report, Integration and Naturalisation tests: the new way to European Citizenship*, Centre for Migration and Law (CMR), Radboud University Nijmegen, The Netherlands, December 2010, p. 17-19.
[57] EU and EEA, Surinam, Australia, Canada, USA, Switzerland, New Zealand, Iceland, Japan and North Korea, for the Netherlands, plus Israel, Andorra, Monaco, San Marino, Honduras, Brazil and El Salvador, and spouses of the nationals who may enter the country without having to obtain a visa, for Germany.

3. Lessons to be learned from the case-law on pre-admission language requirements.

The above presented cases deserve to be analysed in further details since they provide useful insights on the current state of the relations between EU law on family reunification and of certain MSs' laws establishing admission and integration conditions of selected categories of TCNs.

The EP action asking for the annullment of some provisions of the 2003/86/EC Directive, and the Court's decision on the action, could be looked at as an, not at all, unexpected outcome considering the troubled process that has led to the Directive's adoption[58]. Moreover, it could also be considered as a fair prediction of what has been the destiny of the Directive itself in the following years and, somehow, of the Court's future decisions on the matter. This affirmation preserves its validity despite the circumstance that on the *K and A* case, for now, only the Advocate General opinion is available but the Court's decision is still awaited. Moreover, the *Dogan* case has, in comparison, a limited material and personal scope. In any case, it should help in predict a possible outcome of the expected *K and A* decision, that the AG of the case C-540/03, *EP v Council* was again AG Kokott[59], and that the decision of the Court was mainly in line with his opinion. In brief, the limits to the family reunification right and the discretion left to MSs are admissible in light of the circumstance that, on the contrary, an "unconditional" family reunification right would be granted. Thus, it is realistic to expect that the *K and A* judgment will not contradict the previous case-law.

The Court in the *EP v. Council* case found the provisions object of the case not to be in breach of fundamental rights as, on the contrary, argued by the EP. Nevertheless, a number of statements made in this judgement could be of interest for the purposes of this article.

The first provision of the Directive to be considered is the final subparagraph of art. 4(1). On its basis MSs, by way of derogation, are allowed to ask children over the age of twelve, arriving independently from their families, to comply with integration conditions before admission[60]. In this regard the EP claimed that a pre-admission condition make the right to family reunification not exercisable, and the lack of an EU definition of integration leave to MS a too broad possibility to restrict the right. Furthermore, integration cannot be considered to be included in the list of objectives that, if proportionally pursued, can justify a restriction of the right to family life ex art. 8(2) ECHR.

[58] Extensively on this point see S. Carrera, *In Search of the Perfect Citizen?*, cit., chapter 4 and the literature recalled at footnotes 23 and 24.
[59] Opinion of the Advocate General Kokott, 8 September 2005, C-540/03. In particular, p.ts 83-89.
[60] The thesis that put forward the influence of specific MSs on the content, derogations and standstill clauses of the Family Reunification Directive - Germany, Austria and the Netherlands - in order to legitimise their national legislations, specifically in this case of integration conditions to be applied to children over 12, could be confirmed by the provision of a German regulation requiring to children between the age of 16 to 18 to prove their capacity to integrate in the German society by demonstrating an already acquired language proficiency or, by other means, to prove that they will be able to integrate. Cfr. T. Strik, A. Böcker, M. Luiten, R. van Oers, cit., p. 19.

The Court, on the contrary, was not in line with the EP reasoning. It founds, by recalling the ECtHR's case-law[61], that although the right to family life and family reunion are protected by Community law, States dispose of a margin of appreciation in balancing the rights of the individual and those of the community when a decision on the entry and residence of a TCN for family reunion purposes is under consideration[62]. The Court, in particular, considers the age of the minor as a relevant factor significant when assessing, among other elements, the child's link with the cultural and linguistic environment of its country of origin. It follows that since the applicant's age is an element capable of influencing its capacity for integration, MSs have to right to assure that it possesses at least a minimum level of integration capacity when considering the admissibility of a family reunification application. Therefore, we deduce that a pre-admission integration condition should be considered even more justifiable in the case of adult applicants. Anyway, in the following point, the Court states that the evaluation by MSs of the fulfilment of a pre-entry integration requirement should be done having due consideration for the objective of the Directive: to facilitate integration through reunification with family members[63].

A couple of final remarks on this first judgment lead us to the analysis of the following two cases. The first - obvious - consideration is that the discretion awarded to MSs cannot lead to the infringement of fundamental rights. Nevertheless, the task of filling with content integration conditions is substantially left to MSs, and a not clear guidance on the content of the right to family reunification on the basis of EU law is provided[64]. By so doing, the Court delivers the control of the effective non infringement of fundamental rights to the later uncertain circumstance that a national court eventually will question the compatibility of national provisions on family reunification with the Directive through a preliminary ruling. Thus, when a breach of fundamental rights of the applicants and of their right to family life and reunification has already occurred[65]. Although this possibility is obviously inherent in the preliminary ruling proceeding, the seriousness of the consequences in cases of family reunification is effectively exemplified in the following cases[66]. Although this possibility is obviously inherent in the preliminary ruling proceeding, the seriousness of the consequences in cases of family reunification is effectively exemplified in the following cases.

[61] Cfr. ECtHR, *Sen v.the Netherlands*, no. 31465/96, p.t 31, 21 December 2001; *Gül v. Switzerland*, judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 174, p.t 38; *Ahmut v. the Netherlands*, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2030, p.t 63.
[62] CJEU, *EP v Council*, supra note 7, p.ts 52, 54 and 66.
[63] *Ib.* p.ts. 68-69.
[64] D. Martin, *Comments on European Parliament v. Council*, in *European Journal of Migration and Law*, (9)2007, p. 148.
[65] Y. Pascouau cit., p. 109.
[66] This statement is even more alarming if we consider that national administrations concerned by cases liable to be made object of a CJEU judgement has acted in what have seemed to be a non-collaborative way, by solving the individual case at the national level, by providing the visa to the applicant, in order to deprive the preliminary ruling request of its object and necessity to be answered. In this sense see L. Block, S. Bonjour, cit., p. 221.

In the meanwhile the Commission released the first report on the implementation of the family reunification Directive, where it states that pre-admission language and civic requirements are admissible as long as they serve the purpose of being a tool of integration and respect the proportionality principle[67].

The 2011 Green Paper on the right to family reunification of TCNs living in EU MSs[68], followed by the public consultation, recalls what had been already said in the report but, significantly, makes an additional reference to the 2011 (new) European Agenda for the Integration of TCNs. The Agenda specifically refers to the learning of the host MS language by the TCN as a one of the modes of "socio-economic contributions" that the migrant could provide to the integration process and, more generally, as a means of participation. Precisely, the possession of language skills are directly connected with TCNs' job opportunities and participation in the job market[69]. Not by chance, TCNs' unemployment rates are listed among the challenges of migration and, by the Dutch government in particular, are considered as one of the main concerns as regard the adverse effects of a uncontrolled migration, we should add, of low skilled TCNs. However, a reference to pre-departure language courses as an instrument of integration is only named under the provisions that countries of origin could provide to those migrants willing to migrate to EU MSs[70].

At last, the 2014 *Commission guidance for application of the Family Reunification Directive* confirms the admissibility of integration measures and MSs' margin of discretion as regard their content and frame as long as they facilitate integration and do not amount to a limit to the effective exercise of the right. Interesting is to note that those measures are described as instruments at disposal of MSs to frame their legitimate requests to TCN, who are required to make the "necessary efforts" to integrate. Consequently, they are means to verify their willingness to do so. What is largely stressed is the necessity for MSs to consider the personal circumstances of the applicant when verifying the fulfilment of such measures, as well as in framing language and integration conditions and courses. Precisely, these should be accessible, affordable and, as long as possible, tailored on TCNs' needs. Pre-admission measures are referred to just (and timidly) at the very end of the paragraph dedicated to integration measures, where it is observed that "integration measures may often be more effective in the host country"[71].

At last, a fil rouge starting from *the EP v. Council* case and passing through the two last EU acts just analysed can be found. It highlights the progressive emergence of a coherent thought originating from the admissibility of pre-admission integration requirements addressed to children

[67] Cfr. *Supra* note 33, pp- 7-8.
[68] Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735 final, Brussels, 15.11.2011.
[69] Although previous studies have pointed out that the impact of language courses on the access and success of TCNs on the labour market is open to question. Cfr. OECD (2007), *The Labour Market Integration of Immigrants in Germany*, in OECD, *Jobs for Immigrants (Vol. 1): Labour Market Integration in Australia, Denmark, Germany and Sweden*, OECD Publishing, Paris, pp. 208-210.
[70] Cfr. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Agenda for the Integration of Third-Country Nationals, COM(2011) 455 final, Brussels, 20.7.2011, pp. 4-5, 10.
[71] See *supra* note 34, p. 15-16.

over twelve seeking entry for purposes of family reunification and passing through the increasing use by MS of the margin of manoeuvre left them in determining the content and procedures of integration-from-abroad instruments. As we will see in a moment through the example of the following cases, the wind seems to have started to partially change its direction, at least for what concerns the most visible unreasonable and disproportionate outcomes of national provisions.

In both the *Dogan* and *K and A* cases, the applicants' requests to be granted a visa to entry and reside in Germany and the Netherlands respectively for purpose of family reunification were dismissed because they failed in demonstrating the fulfilment of the pre-admission language requirement.

However, before entering into details of the cases, a further contextualisation of the issue is needed, since the events regarding the German and Dutch pre-admission language conditions are tellingly intertwined[72]. In fact, in a number of occasions, the attention of national courts and of the CJEU had been brought to the question of the compatibility with the family reunification Directive of both countries pre-admission language conditions. Moreover, a number of *signs* coming from other MSs with similar pre-admission language requirements, and similarly not exempting Turkish citizens, make predictable the outcome of the *Dogan* judgment. In fact, a Dutch and an Austrian court had already ruled that national requirements on integration and family reunification were not compatible with the EU/Turkey Association Agreement[73]. Subsequently, Turkish citizens had been exempted in both countries from the necessity to comply with pre-admission integration requirements in order to be granted family reunification. Secondly, in March 2011 a Dutch case - the *Imran* case - has been decided in favour of an Afghan woman, mother of eight children, of which seven were already lawfully residing in the host MS0. Her visa to reunify with her family already residing in the Netherlands has been refused because she was unable, for health reasons and because of her illiteracy, to take and pass the integration test. National authorities, before the CJEU has the chance to rule on the case, have granted the required visa, therefore, the case was closed since the decision was no longer necessary. However, the first question referred is worth of being recalled, since it regarded the compatibility with the Directive of the automatic effect of refusal that follow a failed or not taken integration test in the country of origin. Furthermore, although the Court has decided not to rule on the case, the opinion of the Commission was straightforward in affirming the incompatibility with the Directive of an automatic dismissal of a visa application for family reunification purposes solely on the basis of a failed or not taken

[72] Not by chance, these same countries have been recognised as the main drivers of the negotiations, and to share the same final scope: i.e. to provide grounds to legitimise their own (restrictive) national policies in the matter of family reunification and pre-departure admission requirements. Cfr. P. W.A.Scholten, H. Entzinger, E. Kofman, C. Hollomey C. Lechner, *Integration from abroad? Perception and impacts of pre-entry tests for third country nationals*, April 2012, p. 90, available at http://research.icmpd.org/fileadmin/Research-Website/Project_material/PROSINT/Reports/WP4_CompRep_Final_submitted.pdf

[73] Cfr. the Dutch case: LJN BR4959, and the Austrian case: VwGH 2008/22/0180.

integration tests, without taking in proper consideration the personal circumstances of the applicant[74].

The *Imran* case has had important effects at the national. In a similar case, the German Federal Administrative Court has ruled in favour of a TCN applicant who did not fulfil the pre-entry language requirement by granting him anyway a visa for family reunification. Secondly, this judgement came after a case in which, on the contrary, the compatibility of the same requirements with the Constitution and EU law was affirmed[75]. Nevertheless, what is relevant is that the German Administrative Federal Court, although it ruled in favour of the grant of the permit, expressly quoted the Commission's opinion on the above mentioned case and added that a preliminary reference is needed as regard the compatibility of the pre-admission language requirement with the family reunification Directive[76]. Similarly happened in the first grade of a Dutch case where the national court found the national pre-entry language requirements not to be compatible with the Family Reunification Directive[77]. Lastly, soon after the *Dogan* case reached the CJEU, the Commission started an infringement procedure against Germany, precisely on the compatibility of the pre-entry language requirement with the 2003/86/EC Directive[78]. Nevertheless, by now, the government continues to insist on its compatibility.

As anticipated, the *Dogan* judgment is not relevant *per se*, as it represents a *sui generis* case, considered that the decision has a limited personal and material scope because of Turkish citizens' privileged status under the EU/Turkey Association Agreement. Moreover, the Court has ruled against the German pre-admission language requirement almost only on the basis of the standstill clause ex art. 41(1) of the Additional Protocol to the AA[79]. This regards, specifically, the prohibition for contracting parties to introduce new restrictions to the freedom of establishment and to provide services granted to Turkish citizens. On the contrary, the Court found that the German pre-admission language requirement has had the effect of precisely worsen the conditions under which those economic fundamental freedoms could be exercised. The pejorative effect derives from the tightening of the conditions to exercise the right to family reunification for Turkish spouses of Turkish citizens exercising the above mentioned fundamental freedoms in the German territory. As the AD Mengozzi pointed out in its opinion, there is a relation of dependence between the integrity of the family and the exercise of a fundamental freedom. The Court, thus, has (implicitly) relied on the *Carpenter* case-law[80], to affirm that such an integration condition has

[74] CJUE, *Bibi Mohammad Imran v Minister van Buitenlandse Zaken*, C-155/11 PPU, order of the Court of 10 June 2011.
[75] Cfr. BVerwG, 1 C 8.09, judgement of 30 March 2010.
[76] Cfr. BVerwG 1 C 9.10, judgement of 28 October 2011. The Court did not referred the question itself since it decided in favour of the applicant, thus the CJEU judgement was deemed not to be needed.
[77] AWb 12/9408.
[78] Cfr. Infringement n. 2013/2009, of 30.05.2013 on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification of 22 September 2003 on the right to family reunification.
[79] Cfr. art. 41(1), Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey, OJ C113, 24.12.1973, p. 28.
[80] Cfr. CJEU, *Mary Carpenter v Secretary of State for the Home Department*, C-60/00, judgment of 11 July 2002, ECR 2002 I-06279, in particular p.ts 38-39.

the effect to "render less attractive" the exercise of the fundamental freedom, since the applicant would have been obliged to choose between preserving its family unity and the exercise of the economic activity[81].

A series of further statements made in the judgment are also relevant. Firstly, it is affirmed the instrumentality of family reunification for the integration of those TCNs (in the case under consideration limited to Turkish citizens) already residing in the MS[82]. It derives that obstacles to family reunification could negatively affect its residence status and its economic activity. An argument that goes in favour of the relevance for integration of family reunification, therefore, contrary to its possible impediment by a disproportionate use of pre-admission integration requirements. However, it is significant also, in the attempt of predicting the outcome of the *K and A* case, that the Court has recognised that the objective of integration promotion, justifying the adoption of pre-admission language requirements, is legitimate and "justified by an overriding reason in the public interest"[83]. It is (just) the automatic dismissal of the application because of the failure in demonstrating the level of language knowledge required for being granted a visa, without considering the specific circumstance of the applicant - illiteracy - that make the measure not proportionate to attain what has been considered, *per se*, to be a legitimate aim. Therefore, although the aim is legitimate, it is pursued in a disproportionate manner, thus, it undermines the object of the Directive[84].

The second question referred dealt with the compatibility of the language requirement with the family reunification Directive. However, the Court has not responded since it was not needed, but it will deal with this issue in deciding the *K and A* case. Therefore, the judgement should be awaited with great interest, also because the limitations of the personal and material scope of the *Dogan* case are not present. This means that the findings of the Court will be applicable to all TCNs who found themselves in the same situation.

From all what have been said above, and on the basis of the opinion of the AD Kokott, it is unlikely that we will assist to a departure from the previous case-law of the Court on the compatibility of the pre-admission language requirements with art. 7(2) of the Directive. In fact, it is worth to highlight again that the admissibility of pre-admission language requirements have not been questioned as such in the previous cases, although, as in this last case, the first question referred has always had this content. Instead, all cases previously quoted have concerned the cases of exemption, of automatic dismissal of the application in cases of a failed or not taken test, and

[81] Opinion of Mr Advocate General Mengozzi delivered on 30 April 2014, *Naime Dogan v Bundesrepublik Deutschland*, Case C-138/13, p.ts 31-33.
[82] CJEU, *Naime Dogan v Bundesrepublik Deutschland*, cit., p.t 34.
[83] *Supra* note p.t 37.
[84] It should be kept in mind, in fact, that the Court has already stated that the general rule if the Family Reunification Directive is family reunification, therefore, derogations have to be interpreted strictly and the margin of discretion left to MS should not be used in a way that undermine the objective of the same. Cfr. CJEU, *Rhimou Chakroun v Minister van Buitenlandse Zaken*, C-578/08, judgment of 4 March 2010, para. 43.

the respect of the proportionality principle in relation to the evaluation of the applicants' personal circumstances.

The Commission's reports and opinions, and the CJEU case-law, so far, have progressively tried to dismantle the discriminatory use and lack of respect of the proportionality principle of integration-from-abroad instruments. Nonetheless, the extent to which these measures can be questioned as such finds a limit in MSs' autonomy as regard integration of TCNs ex art. 79(4) TFEU. Thus, the content and the procedures through which ex-ante and ex-post TCNs' integration is verified fall within MSs' discretion. That does not alter the fact that MSs are, in turn, limited in their autonomy by the respect of fundamental rights, general principles of EU law, and by the non-binding instruments that the EU has been adopting to progressively build an EU common framework in this matter.

The main issues for the Court to decide, thus, will be, the first, the proportionality of the automatic rejection of the admission request if the test is not taken or failed, in consideration of the strict and limited cases foreseen by the national law in which the TCN can, therefore, be exempted. The second, the respect of the proportionality principle of the test's costs and of the preparatory study material made available by Dutch authorities, costs that have to be sustained *in toto* by the TCN every time the test is taken.

The AD has been very concise and formalistic in responding to the first issue – compatibility of pre-admission language and civic tests as such with the Directive - and has suggested to leave the *hot issues* to be determined by the national court[85]. Nevertheless, trying to avoid divinatory exercises as much as possible, on the basis of the *Dogan* judgment, on those already decided by national courts, and on a very recent judgment dealing with integration requirements imposed on (would-be or already) long-term residents[86], we can attempt to make some hypothesis on the outcome of the *K and A* case. It is reasonable to expect that the Court will be more precise than the AD in determine if the potential discriminatory effects and not proportional outcomes that a too limited range of exemption cases and their excessively rigid application can lead to an infringement of the Directive's objectives. In fact, although integration requirements are not contrary to the Directive as such, a concrete consideration of the applicants' personal circumstances by national authorities are the means through which the effectiveness of the Directive is preserved.

It is fair to expect that the Court will rule in line with the AD as regard the second question, i.e. by stating that the amount of the fees imposed on TCNs to prepare and take the test are excessive and liable to put a disproportionate obstacle to the exercise of the right. This possible outcome is anticipated by the above quoted *P and S* judgment, in which the Court found the high fines imposed by the Dutch law on TCNs who failed or did not take the civic test are liable to undermine the achievement of the objectives of the Long-Term Resident Directive[87]. Therefore,

[85] Cfr. Opinion of the Advocate General Kokott, cit., p.ts 39-47.
[86] CJEU, *P and S v. Commissie Sociale Zekerheid Breda, College van Burgemeester en Wethouders van de gemeente Amstelveen*, C‑579/13, judgment of 4 June 2015.
[87] *Ib*., p.t 50.

even though these two cases do not regard the same Directive, as well as in one case ex-ante requirements are concerned while in the other ex-post language and integration requirements are under consideration, they share the objective of integration of TCNs in their MS of residence. Furthermore, the Court affirms that language is fundamental, and that the obligation to pass a test in order to demonstrate the possession of the related knowledge is not incompatible with the objective of integration. Nonetheless, for the test to effectively serve as a means to achieve the Directive's objective, MSs have to have due regard "in particular, to the level of knowledge required to pass the civic integration examination, to the accessibility of the courses and material necessary to prepare for that examination, to the amount of fees applicable to third-country nationals as registration fees to sit that examination, or to the consideration of specific individual circumstances, such as age, illiteracy or level of education"[88].

It further supports this possible outcome the founding of the Court in the *Chackroun* case. It has been stated that it is contrary to the Directive to refuse family reunification without considering the personal circumstances of the sponsor when evaluating the fulfilment of the pre-admission income requirement – have stable and regular resources which are sufficient to maintain himself/herself and the members of the his/her family, without recourse to the social assistance system of the member state concerned - imposed in order for the application to be let family members to enter the country to be accepted[89].

As the AD has stated, the amount of the fees imposed on TCNs in order (to try) to comply with the pre-admission language and civic requirements risks to put a disproportionate obstacle to the exercise of their right to family reunification. This assertion is even more founded if the context and motivations for the adoption of integration-from-abroad instruments by Dutch authorities are recalled. In fact, the Dutch policy on integration has at its explicit target family migrants from selected third-countries, Turkey and Morocco, in particular. Furthermore, the government expected to reduce family migration of a precise percentage through the use or pre-admission instruments, which are expressly considered to be a selection mechanism of only "integrable" migrants[90]. Therefore, they clearly appear to be an implicit instrument of self-selection of would-be migrants on the basis of their economic situation and educational background, although the government affirms that these are surmountable obstacles by motivated and perseverant migrants. Eventually, it appears that the MS sets the conditions but the responsibility of pre-admission integration and the means are totally left in charge of the migrant.

4. Conclusions.

This article has attempted to provide some examples, derived from the development of EU law on TCNs' integration and from the CJEU case-law, on how language could be used by MSs as a

[88] *Supra* note p.ts 48-49.
[89] CJEU, *Chakroun*, C-578/08, cit., para.48.
[90] P. W. A. Scholten, H. Entzinger, E. Kofman, C. Hollomey C. Lechner, *Integration from abroad? Perception and impacts of pre-entry tests for third country nationals*, cit., p. 12.

selective instrument, and could amount to an obstacle to the exercise of a right. Specifically, it has looked at the modes in which the framing of pre-admission linguistic and civic requirements by some MSs can hamper the exercise of the right to family reunification granted to TCNs willing to entry and reside in these MSs.

The benefits of pre-admission measures have proved scarce in provide the knowledge and the means to better and more rapidly integrate in the host country after admission[91]. However, a spread of these measures is observable in the last decade among certain MSs. The obligation of these requirements to be fulfilled before being allowed to enter in the country is particularly problematic in the first place because it is not possible to tailor the courses and the tests on the persons' characteristics and needs. Therefore, more than be an integration instrument they are transformed into a self-selection mechanism and into a control instruments of migration flows.

The promotion of integration of TCNs is the explicit and formal objective of such measures. However, it is possible to deduce from their being targeted on family migration, and by the exemptions on the basis of nationality, the professional qualification or the economic status of applicants, that their main hidden objective is to provide MSs with a mechanism of pre-selection of *desirable* and *undesirable* migrants before they are allowed entry and residence in the country's territory.

Considering the evolution of the matter of family reunification since the first draft of the Directive adopted by the Commission in 1999, a (not so) secret dispute is ongoing between the Commission and the CJEU conception of the right of family reunification, at one side, and that of certain MSs on the other. It appears that these MSs, from the very beginning, despite the progressive development of EU law on family reunification, and on migration in general, are, more than looking for effective ways to promote integration of TCNs, searching for, and sharing modes, to legitimate their restrictive national practices.

At last, important will be for the times to come to observe the evolution of the dynamics between the EU and the national level in the matters of integration-from-abroad instruments in general, and in relation to family migration in particular. Even more considering the process of policy learning among MSs that have been observed in this field so far and the instrumental use of the EU level to legitimise restrictive national provisions. Not by chance, MSs that have adopted such measures at the national level are those where previous migration policies have been strongly criticised. Where this backlash has not taken place already but where anti-immigration political forces are getting stronger, will these examples of possible modes of immigration control be taken into consideration and followed?

[91] *Ib.*, p. 88.

References

B. Anderson, *Us and Them?: The Dangerous Politics of Immigration Control*, Oxford, 2013.

P. van Avermaet, M. Spotti, G. Extra, *Language Testing, Migration and Citizenship: Cross-national Perspectives on Integration Regimes*, 2009.

G. Baldi, S. Wallace Goodman, *Migrants into Members: Social Rights, Civic Requirements, and Citizenship in Western Europe*, in *West European Politics*, (1) 2015.

L. Block, S. Bonjour, *Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and the Netherlands*, in *European Journal of Migration and Law*, (15) 2013.

S. Bonjour, *The Transfer of Pre-departure Integration Requirements for Family Migrants Among Member States of the European Union*, in *Comparative Migration Studies*, (2) 2014.

S. Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, 2009.

Council of Europe, 2014. *Linguistic Integration of Adult Migrants: Final Report on the 3rd Council of Europe Survey.* Language Policy Unit, Strasbourg. Project LIAM: www.coe.int/lang-migrants.

K. Eisele, *Are Pre-departure Language Requirements for Spouses of Turkish Nationals Unlawful?*, in *Maastricht Journal of European and Comparative Law*, (1) 2015.

C. Extramiana, P. Van Avermaet, *Language requirements for adult migrants in Council of Europe member states: Report on a survey*, Language Policy Division, Education Department - DG II, Council of Europe, Strasbourg.

S. Wallace Goodmann, *Controlling Immigration through Language and Country Knowledge Requirements*, in *West European Politics*, (2) 2011.

C. Joppke, E. Morawska (eds), *Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States*, 2003.

C. Joppke, *Civic Integration Policies for Immigrants in Western Europe*, in *West European Politics*, (30) 2007.

D. Kostakopoulou, E. Ersbøll,, R. van Oers, *A Re-definition of Belonging?: Language and Integration Tests in Europe*, 2010.

D. Martin, *Comments on European Parliament v. Council*, in *European Journal of Migration and Law*, (9) 2007.

Y. Pascouau (in collaboration with H. Labayle), *Conditions for Family Reunification under Strain. A comparative study in nine EU member states*, King Baudouin Foundation, European Policy Centre, Odysseus Network, November 2011.

S. Peers, E. Guild, D. Acosta Arcarazo, K. Groenendijk, V. Moreno-Lax, *EU Immigration and Asylum Law (Text and Commentary): Second revised Edition, Volume 2: EU Immigration Law*, Leiden, 2012.

P. W. A. Scholten, H. Entzinger, E. Kofman, C. Hollomey C. Lechner, *Integration from abroad? Perception and impacts of pre-entry tests for third country nationals*, April 2012, available at http://research.icmpd.org/fileadmin/Research-Website/Project_material/PROSINT/Reports/WP4_CompRep_Final_submitted.pdf

T. Strik, A. Böcker, M. Luiten, R. van Oers, *The INTEC Project: Synthesis Report, Integration and Naturalisation tests: the new way to European Citizenship*, Centre for Migration and Law (CMR), Radboud University Nijmegen, The Netherlands, 2010.

D. Thym, *EU migration policy and its constitutional rationale: A cosmopolitan outlook*, *in Common Market Law Review*, (50)2013, pp. 709–736.

Documents

Resolution (68)18 on the teaching of languages to migrant workers, Council of Europe.

Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM/2008/0610 final, Brussels 8.10.2008.

European Commission, Directorate-General for Justice, Freedom and Security, Final report June 2010, Synthesis of the Multi-annual and annual programmes of the member states: priorities and actions of the European Fund for the integration of Third-country Nationals, 16.06.2010.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, European Agenda for the Integration of Third-Country Nationals, COM(2011) 455 final, Brussels, 20.7.2011.

Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735 final, Brussels, 15.11.2011.

Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014)210 final, Brussels 3.4.2014.

Table of cases

CJEU, *Mary Carpenter v Secretary of State for the Home Department*, C-60/00, judgment of 11 July 2002, ECR 2002 I-06279.

CJEU, *EP v Council*, C‑540/03, judgment of 27 June 2006, ECR 2006 I-05769.

CJEU, *Rhimou Chakroun v Minister van Buitenlandse Zaken*, C-578/08, judgment of 4 March 2010, ECR 2010 I-01839.

CJEU, *Ruiz Zambrano v Office national de l'emploi (ONEm)*, C-34/09, judgment of 8 March 2011, ECR 2011 I-01177.

CJUE, *Bibi Mohammad Imran v Minister van Buitenlandse Zaken*, C-155/11 PPU, order of the Court of 10 June 2011.

CJEU, *Murat Dereci et al. v Bundesministerium für Inneres*, C‑256/11, judgment of 15 November 2011, ECR 2011 I-11315.

Opinion of Mr Advocate General Mengozzi delivered on 30 April 2014, *Naime Dogan v Bundesrepublik Deutschland*, Case C-138/13.

Opinion of the Advocate General Kokott delivered on 19 March 2015, C‑153/14, *Minister van Buitenlandse Zaken v K and A.*

CJEU, *P and S v. Commissie Sociale Zekerheid Breda, College van Burgemeester en Wethouders van de gemeente Amstelveen*, C‑579/13, judgment of 4 June 2015, not yet published.

ECtHR *Gül v. Switzerland*, judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 174.

ECtHR *Ahmut v. the Netherlands*, judgment of 28 November 1996, Reports of Judgments and Decisions 1996-VI, p. 2030.

ECtHR, *Sen v.the Netherlands*, no. 31465/96, 21 December 2001.