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THE COUNCIL

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ASIM 106

NOTE

from : the Presidency

to : Migration Working Party

Subject: Family Reunification

On 1 June 1993, Immigration Ministers adopted a Resolution on the harmonisation of national policies on family reunification (WGI 149). This has been the first instrument of this nature in the field of general, i.e. non-asylum related, admission policies.

On 7 February 1997, the Council Secretariat submitted to the Working Party on Migration a report (doc. 10669/1/96 ASIM 140 REV 1) drawn up, pursuant to Article 3 of Council Decision of 22 December 1995 on monitoring the implementation of instruments already adopted concerning the admission of third-country nationals (OJ No C 11 of 16.1.1995, p. 1), on the basis of the replies received from Member States.

On the basis of this report, the Presidency submits to the Working Party on Migration a number of items for discussion in order to establish whether:

1. the implementation of the 1993 Resolution has given rise to any difficulties;
2. there have been differences of interpretation of the various provisions of the Resolution;
3. in light of Member States' actual practices, it may be possible to further strengthen the Resolution.

It should be emphasized that the Presidency does not intend at this stage to submit any formal proposals for amending the 1993 Resolution, but it merely wishes to give a follow-up to the pluriannual working programme's conclusion that attention should be paid to the issue of family reunification. It will entirely depend on the discussion as envisaged for the Working Party, whether there may be a need for such amendments.

Discussion Note
with regard to the implementation of
the 1993 Resolution on the harmonisation of national policies on family
reunification

The discussion note follows the relevant provisions of the 1993 Resolution on the harmonisation of national policies on family reunification, in each case formulating precise questions for the debate in the Working Party.

Introduction - paragraphs 6 and 7

According to paragraph 6 of the Resolution, its scope is confined to family reunification in respect of persons who are not nationals of a Member State but who are lawfully resident within the territory of a Member State on a basis which affords them an expectation of permanent or long-term residence. Paragraph 7 spells out that a number of Member States have different policies in respect of the family members of their own nationals, whilst others treat non EC-nationals settled in their territories on the same basis as their own nationals for the purpose of family reunification. It adds that this question is not affected by the present Resolution.

These paragraphs show the somewhat limited scope of the Resolution. The following questions emerge:

1. How do Member States interpret the notion of "expectation of permanent or long-term residence"? According to the Council Secretariat's report, France, for example, requires a period of lawful residence of at least two years as a necessary condition of family reunification as opposed to Austria requiring a period of six months only. The question therefore arises whether Member States have similar conditions and whether it makes a difference on which ground the legal stay is based (compare, for example, the situation of asylum applicants with a provisional residence permit or beneficiaries of temporary protection with those having been admitted as workers or self-employed).
2. What, if any, are the differences between the rights of nationals as compared with the rights of other EC-nationals and non-EC-nationals? Perhaps, the Commission could usefully explain in this regard the relevant provisions of Community law. Would it be justified to aim at reducing any such differences?

Introduction - paragraph 9

In paragraph 9, the reason for excluding non EC-nationals who do not have an expectation of permanent or long-term residence is explained by referring to the separate policies Member States may have for these categories. The Resolution also does not apply to persons who have been granted refugee status. The paragraph concludes by saying that the harmonisation of policy in respect of the families of persons in these categories will be further examined in the course of considering admissions policies in respect of them. However, only in case of students a reference to family reunification is to be found, but this reference leaves it entirely to national provisions to determine the possible admission of family members, whereas in case of the self-employed point 9 of the Resolution refers back to the 1993 Resolution on family reunification.

3. Leaving aside categories of persons, who are admitted for a short stay (in principle, for a period not exceeding three months), these categories would primarily seem to consist of: students, workers under a short-term contract, persons admitted for medical treatment. Are these categories of persons altogether excluded from family reunification or are there any (limited) rights in this respect?
4. What are the conditions of family reunification for refugees? Would it be useful to harmonise policies in this respect?

Principle 2

Principle 2 limits the scope of the right to family reunification by defining family members normally entitled to enter and remain in a Member State. In this respect, reference is made to the resident's spouse (that is, a person bound to him or her in a marriage recognised by the host Member State) and the children. In the Council Secretariat's report it is stated, however, that the Netherlands legislation also recognises forms of family formation and of admission of unmarried partners in general. Similarly, Sweden and Denmark allow for the admission of cohabitation partners. This leads to the following questions:

5. Do Member States recognise the right to family formation, i.e. the admission of partners with a view to getting married, and if so, under what conditions?
6. Do Member States recognise the right to family reunification of unmarried partners, if the persons concerned do not wish to marry or cannot enter into a legally recognised marriage (for example, same sex partnerships), and if so, under what conditions?

Principle 2 in conjunction with Principle 12

Principle 2 also stipulates that the spouse and the children may be admitted only for the purpose of living together with the resident. However, in practice there may be circumstances in which it would be difficult to fully stick to this condition, for example, when the woman is forced to prostitution or is victim of sexual violence. Against this background, it seems highly relevant that Principle 12 states that within a reasonable period of time following their admission, family members, in accordance with the national legislation in each Member State, may be authorised to stay on a personal basis independently from the person whom they joined on the basis of family reunification and, if appropriate, be authorised to work.

7. After which period of time family members obtain such an independent residence right? Are there any specific conditions for obtaining such a right other than the mere elapse of a period of time?
8. Have Member States formulated specific policies with a view to avoiding the spouse being in a vulnerable position vis-à-vis her husband? Do they admit for humanitarian reasons victims of sexual harassment, abuse or exploitation? Do they otherwise provide for temporary admission, for example, to enable the persons concerned to file suit?
9. What are the conditions for family members to obtain the right to engage in a remunerated activity?

Principle 3

This principle establishes the right of Member States to require from non-EC nationals to be lawfully present in their territory for certain periods of time before family members may be reunited with them. There seems to be a potential overlap with Principle 1, i.e. the requirement of "an expectation of permanent or long-term stay", if the latter criterion is interpreted as implying a minimum duration of the right of residence.

It also seems possible to require family reunification to take place within a given period after admission, in order to stimulate integration (for example, in order to encourage children to follow education in the host country rather than in the country of origin).

10. Is not there a need for clarification of the relationship between on the one hand the introduction of a waiting period, as permitted under Principle 3, and on the other hand the requirement under Principle 1 that the principles will only be applied in respect of the family members of non-EC nationals who are lawfully resident within the territory of a Member State on a basis which affords them an expectation of permanent or long-term residence?
11. What should be the general minimum duration of past lawful residence, before the right to family reunification is granted?
12. Have Member States introduced a requirement to the effect that family reunification must take place within a given period after admission?

Principles 4 and 9

These principles relate to the situation of marriages contracted and of adoptions arranged solely or principally for the purpose of enabling the spouse or child to enter and take up residence in a Member State. Since this issue is already subject of a questionnaire issued by the in-coming Presidency, it is left aside here.

Principle 5

This principle excludes family reunification in case of polygamous marriages, where the resident has already a wife resident in the territory of a Member State. The Council Secretariat's report addresses this particular question when reference is made to the Finnish practice. It is then explained that, since information about a wife living in another Member State is not easily available, admission of a wife and her children is refused only if there is already one wife resident in Finland.

13. Have Member States experienced difficulties in applying the exclusion of family reunification in the above-mentioned circumstances? Would the situation change, if the spouse has obtained an independent right of residence and lives apart from her husband? In case of the first admission, is the husband free to choose the spouse to be admitted?
14. With regard to the problem raised by Finland, would not it be justified to assume that the Resolution did not intend to apply to situations where the wife lives in one Member State and the husband who applies for family reunification with another wife living outside the Union, lives in another Member State?

Principles 6 and 7

These principles concern the admission of children who are the offspring of the resident or of his/her spouse but not of the couple involved and of adopted children. The principles do not require States to favourably consider such admission, but Member States simply reserve the possibility of admitting these categories.

15. Have Member States used the possibility offered by these Principles to admit the above-mentioned categories of children and if so, under what conditions?

Principle 8

According to this Principle, in order to qualify for family reunification, children must, *inter alia*, be below a maximum age, which should be between 16 and 18 years. Although at the time of the elaboration of the Resolution, most Member States could agree to an age limit of 18 years, other Member States attached great value to the age limit being fixed at 16 years.

16. The question therefore arises whether national legislation and practices have changed in this respect and whether a fixed age limit could now be agreed upon.

Principle 10

This principle deals with family members who do not meet the general conditions laid down in Principles 2, 6 and 7 of the Resolution. According to the principle, Member States reserve the possibility of permitting the entry and stay of such family members for compelling reasons which justify the presence of the person concerned. However, the Resolution does not contain any interpretation of this concept of "compelling reasons". In order to obtain an idea of the practical importance of this Principle, the following questions come to the fore:

17. Have Member States often availed themselves of the opportunity to grant admission for "compelling reasons"?
18. If so, would it be possible to capture the beneficiaries into specific categories? Which specific criteria, if any, have been used in order to evaluate the existence of "compelling reasons"?
19. Has there been any jurisprudence based on Article 8 of the European Convention on Human Rights which is of relevance in this regard?

Principles 14 through 17

The final Principles of the Resolution establish general conditions of entry and stay. Principles 14, 15 and 17 contain well-known concepts and do not seem to require any further discussion. However, Principle 16 may well merit some further thought, as this provision has been developed after elaborate negotiations only which at the time made it clear that it would be difficult to reach consensus on any more specific wording than the general criteria it contains at present.

20. Could Member States indicate how they normally interpret the notion of "availability of adequate accommodation"?

21. Could Member States indicate how they normally interpret the notion of "sufficient resources to avoid a burden being placed on the public funds of the Member State concerned"?
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