Churches´ Commission for Migrants in Europe
Commission des Eglises auprès des Migrants en Europe
Kommission der Kirchen für Migranten in Europa

Position on the Amended EU Commission Proposal for a Council Directive on the right to family reunification [COM (2002) 225 final]

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Our organisations represent Churches throughout Europe and Christian agencies particularly concerned with migrants and refugees. In March 2000 and November 2000 respectively, we contributed comments to the debate on the original Commission proposal on family reunion of December 1999 as well as on the amended version of October 2000. We have followed the debate around family reunification and intervened on several occasions at European and national levels, because we are convinced that family life is essential to societies, and that the right to family life is a cornerstone for integration of migrants.

I. General Comments

As we have underlined on various occasions, for Christian churches, safeguarding family is a priority: it constitutes a universally recognised human right of the family to protection by society and the state (Universal Declaration of Human Rights, Art. 16.3). The protection of the family is equally stipulated by the European Convention on Human Rights and spelled out in the jurisprudence of the European Court of Human Rights. It cannot be limited to citizens of a country; but must apply to all residents. Protection for children's right to live with their families is also contained in the Convention on the Rights of the Child (1989).

We had thus welcomed the European Commission's(1) proposals particularly as a contribution to a European immigration policy. We had underlined that family reunion is not only an integral part of a coherent immigration policy, but important to foster a coherent social policy throughout the European Union. With regard to the 2. amended version now proposed by the Commission, we have to express our great regret that the ambitious and necessary project of an EU-wide harmonisation of the right to family reunification has been downgraded to a less cohesive approach of identifying minimum standards at a low level with wide discretion for Member States. We recognise that it has been impossible to reach agreement in the Council of Justice and Home Affairs Ministers of the EU and that this proposal is therefore based on compromise reached in the Council negotiations. We are concerned that certain provisions have been changed in a way which raises serious concern about the full respect of the Human Rights standards referred to above.

We had supported some material conditions like requirements in housing and subsistence provided in the original proposal because they were related to a wider definition of family. The present proposal has a very narrow definition of the family. While we understand that no common definition beyond this could be agreed, we cannot understand that for this limited group material conditions are put forward in the same way. The European Convention on Human Rights as well as the International Convention on the Rights of the Child regards it as an obligation of the state to safeguard and protect family. This is found in most European Union Member States' constitutions as well. It is against all legal traditions in the European Union to have waiting periods for minor children before being able to live with their family.(2)

The exclusion of persons enjoying a subsidiary form of protection from the scope of the directive (Art. 3 No. 2 (c)) is regrettable, as these persons deserve a particular kind of protection. We share the views expressed by UNHCR in September 2002 that the humanitarian needs of persons enjoying subsidiary forms of protection do not differ from those of Convention refugees. Therefore, there is no reason to exclude this category from the right to live with their family. We had hoped that the Commission and the Council would provide for at least equivalent standards for family reunification, but there is no provision with this regard in the proposal for a directive for the qualification and status as refugees or as persons who otherwise need international protection.(3)

We are convinced that the wide discretion left to Member States in the application of this directive will not serve a harmonised approach and understanding of family reunification as a right and obligation. We would like to express our support for any future attempts to reach a higher level of coherence, which we regard as extremely necessary. However, if the directive was adopted in summer 2003as planned, it would be transposed into national legislation by 2005 and a review would start at the earliest by 2007.

In providing for families to live together, solidarity among family members is facilitated. While this is important emotionally as well as socially, it is also beneficial economically. All these aspects are important facets of integration. We deeply regret that certain provisions have been changed in the Commission proposal leading to a potential danger to the integrity of families.

II. Comments on certain provisions:

Children

The right of children to live with their parents is particularly foreseen in this proposal. Given the various situations in the Member States, we had particularly welcomed the clarification that considers as minors the children who have not reached the particular Member State's age of majority. We are now most concerned about the possibility for a Member State to derogate from this principle in the case of children aged over 12 years (Art 4 No 1 (c)). The right of minors to be united with their family is also provided in the International Convention on the Rights of the Child, and international law must take precedence over national legislation and considerations of migration control. Only one Member State has a legal provision to derogate from this principle at this point in time and has ratified the Convention on the Rights of the Child with this reservation. All other Member States have ratified it without reservations. Therefore, this provision for derogation would have to be clearly referred to the one State, not allowing others to follow this example.(4) We regard this derogation as a breach of international standards.(5) We appreciate that this is named as a priority for the future review.

We appreciate that the present proposal now allows for admission of children under shared custody of parents (Art. 4 No. 1 (c)), at least as optional with the agreement of the other parent.

Although we agree to the principles set out in Art. 4 No. 4, there may be a contradiction to Art. 4 No. 1 (c): It ought to be the privileged right of the parents to decide whether the child should live with either of them. From practical experience, we would say that this applies to a very small number of persons; therefore we feel it could be termed more generously without fear of uncontrollable influx. There should remain no difference in legal status between children of the uniting person, regardless of their parents being married, unmarried, divorced or in a polygamous situation. We consider it crucial to give opportunity to the minor to provide his or her opinion.

If the age of the child is a predominant criterion for family reunification, as set out in Art. 4 Nor. 1 (c), and as the duration for procedures are longer than originally foreseen, clear formulations are necessary for cases where the children may reach majority age during the waiting period until a decision is taken. In our opinion, the age of the child at the time of the application for family reunification should determine the eligibility. This is of particular importance if the derogation clause is applied.

While we are aware, that the concept of extended family is not so common in European countries, we would wish to point to the fact, that in many countries children are - often as a result of AIDS or civil war - raised by persons not belonging to their own family, but considered to be part of the family they live in. While the proposed directive would provide for adopted children, the above-mentioned category is not included. We feel that some provision should be made for such cases, e.g. in case of no other family link.

Family

While remaining optional, we appreciate that the formulation in (Art. 4 No. 2 (a) and (b) for other family members has improved and is no longer depending on full dependency but rather the lack of family support in the country of origin. However, it is still not in line with the interpretation of family by the European Court of Human Rights.(6) As this remains optional for Member States and is depending on the proof by the uniting person that he/she has sufficient means to take care of his or her relatives, we wish to argue that this conditionality is not at all necessary. Such practices of family solidarity should not be prevented but rather promoted.

The same principle should apply to unmarried children who have reached the majority age and who are dependent on their parents, regardless of the reason for this. Art. 4 No. 2 (b) should therefore not be limited to the reason of the child's state of health, which would be in coherence with the existing legislation concerning the family reunification of EU nationals.

We regret that the directive in its current form is unclear about the right to found a family: the old Art. 2 (e) included under family reunification the right to form a family community and is now omitted. We had pointed out that even in the previous proposal the rights of the fiancé(e) were not explicitly mentioned. We do not regard it as sufficient to leave the situation of fiancée solely to the legislation of the Member State. Without providing for the founding of the family, any legal text on family reunification would be incomplete and incoherent. It would even fall short of the general aims of the directive. In order to prevent misuse, a trial period could be foreseen for these cases.

Given present debates about marriages of third country nationals in some Member States, we would recommend that Art. 4 No. 5 be formulated more clearly "to require a minimum age below majority". In the present form it could be understood also as a possibility to require any age (such as 24 years). It is stated clearly in the explanatory memorandum that this refers to an age of marriage below majority age, but the Article could be interpreted differently.

Refugees

We appreciate that the special needs for family reunification for refugees are recognised. We are however concerned that Member States may confine the

application to refugees whose family relationships predate their refugee status. This stipulation does not recognise families who may have married in a refugee camp or during an asylum procedure. We wish to remind the Commission and the Council that as refugees are sometimes for years in determination procedures, relationships starting during this period need to be considered as important as predated relationships. We cannot understand that refugee children born in a refugee camp should not be entitled to family life. This could be a violation of the right to found a family. It certainly is against humanitarian principles.

The exclusion from the scope of the directive of persons enjoying a subsidiary form of protection (Art. 3 No. 2 (c) and Chapter V) is regrettable, as these persons deserve a particular kind of protection. We trust that the Council will maintain standards proposed by the Commission to accommodate special protection needs in the frame of rules on family reunification that will be part of the harmonised concept regarding the admission and residence of persons in need of subsidiary protection. However, in the current proposal this is not contained. We would urge that family reunification is included also for persons granted a residence on the ground of subsidiary form of protection.

The humanitarian value of accommodating other family members as provided in Art. 10 No. 2 has been proved during the Kosovo crisis. In addition to the action undertaken by Member States many refugees have been welcomed and taken care of by family members already residing in one of the EU Member States.

The protection of unaccompanied minors as provided for by Art. 10 No. 3 reflects the particular attention these children deserve which is also outlined in the UN Convention on children's rights. This provision should be maintained and complemented by a provision to the effect that the reunification of these minors with their families should be treated as a matter of urgency and, to this effect, the tracing of the family should be undertaken as soon as possible.

Residence permit

The changes in Art. 15 No. 1 are logical. We support the stipulations of Art. 15 to grant an autonomous residence permit for a spouse and adult children.

Art. 15 (3) is an important tool to deal with injustices arising from certain situations. As it refers to extreme hardships, we support that no minimum period is mentioned and hope that Member States will apply this provision generously. We would appreciate if at least in the explanatory memorandum, this could again be explained through examples like divorce following violent or degrading treatment by the spouse. In such cases, we would urge member states to provide for generous application of this clause.

Equal Treatment

We had supported the previous stipulation that family members should have access to employment, education and training in the same way as citizens of the Union. We do not follow the argument that equal treatment within a family unit is more important than that of equal treatment within society. In fact, we fear that

even more persons could be excluded from society and thus this stipulation could lead to disintegration rather than integration. We cannot see any good reason to exclude families from gaining self-sufficiency and access to education and training.

Conditions and Procedures

We regard these conditions which are now applicable to the core family, as extremely difficult. These conditions place material conditions on a right which means that the poor among the third country nationals may no longer be able to exercise it. While the conditions in previous proposals could be understood with a wider family definition and the fear of more influx, to maintain or even restrict conditions for the core family could result in depriving particularly the poor from fundamental human rights. This could be seen as a breach of Article 14 of the European Convention on Human Rights, if the right to live in family unity is depending on the available property or the status.(7) The universally recognised rights of the family should be a priority over Member States' budgetary concerns.

We regret that in Article 13 the former provision in Art. 11 to grant visa to family members free of charges has been omitted. With regard to Art. 13 (2), we would ask for more clarification with regard to children reaching the age of majority during such a period. They should not lose their right to stay with their family, if their residence permit has been issued for only one year.

We are aware that the conditions outlined in Art. 7 are a very difficult sphere due to the very different present regulations in Member States. However, we would urge that these conditions should be valid and proven at the time of application. If a person cannot meet them at a later stage of the procedure, this should not be to the disadvantage of the family.

We regret the changes made in Art. 7, 1 (a), which in the criteria of accommodation to be proved reintroduce the concept of "normal accommodation", thus making them once again difficult to measure. The European Parliament's formulation in this respect has been more objective. We would also still recommend that Art. 7, 1 (b) is complemented by the obligation to provide access to affordable insurance schemes.

As long as sufficient means are a prerequisite to family reunification (see above, point 2.1.) we cannot see any good reason for a waiting period of now even up to three years in which persons are deprived of their right to family life. A waiting period of two years (derogation even three years) with an additional administrative procedure of up to one year could lead to a waiting period of 3-4 years which can cause serious damage to family life. From social experience, separation often leads to estrangement and break-up of families. In order to secure the values of family communities, we regard it as of utmost importance to let the family unite as quickly as possible. Particularly for minor children such a long period is intolerable.

While we have no objections to the exclusion from family reunification based on grounds of national security and public order (Art. 6) given the entire context of the current proposal, we consider that reasons of health should not be invoked to deny the right to family reunification. We also wish to underline that the public order and

domestic security reasons eventually given for a rejection would have to be specified. In any case, the principle of proportionality is of utmost importance in this context.

With regard to Art. 16 No. 1 (a), a time limit should be introduced. If a person entitled to family reunification, having reunited with the family after three years becomes unemployed after one year, he or she has in most cases been working and paying social security for four years. If he or she is entitled to unemployment benefits not sufficient to sustain the family, the family should still have a right to stay and not be sent back.

In our opinion, Member States may undertake specific checks as stipulated in Art. 16 No 4 only in case of well founded suspicion. A legal clarification along this line would assure the protection of the universally recognised respect for privacy and family life (Art. 8 (1) European Convention of Human Rights). While the wording for the cases of fraud is acceptable, we are concerned of the checks in the case of stipulation Art. 16 No 1 (b) and (c).

We consider the right of appeal as provided for in Art. 18 of great importance. However, this right would be incomplete - and also meaningless - without the explicit statement of a suspensive effect for this appeal.

We once again would like to underline that as "minimum standard for the right to family reunification" the directive should not exclude more generous regulations existing in most Member States. Therefore, the standstill clause constitutes an essential element of this directive.

In conclusion we wish to recall that the Council of Europe's Committee of Minister adopted Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification. This recommendation provides important guidelines for the rights and status granted to family members. We would like to urge the European Parliament and the Council of Justice and Home Affairs Ministers to negotiate this directive with an understanding of fostering family life of third country nationals.

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(1) Proposal for a Council Directive on the right to family reunification [COM (1999) 638 final] and [COM (2000) 624 final] respectively
(2) e.g. Sen c/ Netherlands, No. 31465/96, Judgement of the European Court for Human Rights 21 December 2001.
(3) COM (2001) 510 final
(4) Research by JRS Germany proves that one reason for illegal immigration is the legitimate interest to create a family unit.
(5) See the Judgement of the European Court for Human Rights of 21 December 2001, Sen c/ Netherlands (No. 31465/96). The Human Rights Court regards the provisions by the Netherlands to prohibit reunification as a contravention of Art. 8 of the European Convention on Human Rights.
(6) See: Frowein/Peukert, EMRK-Kommentar, 1996, p. 422
(7) It certainly contravenes Art. 9 of the International Covenant on Economic, Social and Cultural Rights