Abstract

This study contrasts the normative claim of a fundamental and universal right to family life against the empirical evidence of unequal conditions and effects (both direct and indirect, intended and unintended) of family reunification policies for different groups and categories of third-country national migrants. Building on the concept of civic stratification and by systematically comparing policies in a wide range of Member States, the analysis shows that while specific conditions and requirements for reunification vary considerably in both scale and scope, the underlying logic of stratification as well as the main arguments for unequal treatment are rather uniform across the EU. The results suggest a positive correlation between the restrictiveness of family reunification policies, the overall complexity of immigration statuses, and the likelihood that they lead to instances of unequal treatment and discrimination, thereby institutionalising an unequal right to family-life.

Keywords

Family reunification, European Union, civic stratification, inequality, migration management

Introduction

In recent decades family-related migration has become one of the predominant modes of entry into the European Union (Lahav 1997; Groenendijk 2006; Ruffer 2011; European Commission 2008) after historically being either neglected or treated as a secondary aspect of cross-border movement in both migration research and policy-making (Kofman 2004). According to recent OECD (2013: 25) data, this form of migration currently represents 45% of all permanent immigration to the European Economic Area. Among third-country nationals (TCNs), family reunification even accounts for two-thirds of all immigration to the EU (Ruffer 2011). Clearly, this trend is a consequence of increasing restrictions imposed on labour migration, rendering marriage one of the last remaining means of legal entry and stay, especially for those lacking specific skills (Kofman et al. 2011). As a result, family migrants from outside the EU, and especially those joining other TCNs already residing in a Member State, face increasing levels of suspicion and rejection among host societies and ever-more restrictive immigration regimes. Although, in principle, their possibility to enter the European Union and reside in one of its Member States is underpinned by the fundamental right to family life,[1] in practice their admission is subject to an increasing number and variety of conditions through which states are trying to manage family-related migration flows. In this context, and for the purpose of this study, family reunification is understood as defined by the

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country national residing lawfully in that Member State in order [2]

Especially since the mid 2000s, family reunification policies in Europe underwent a restrictivv2mT E TJE

families one of the most intensely politicised issues within the sphere of both immigration and integration policy (Kraler 2010; Kofman et al. 2011; Scholten et al. 2012; Strik et al. 2013). Together with asylum seekers, family migrants have become emblematic of a kind of permanent immigration which is perceived as being 'imposed' on the receiving countries and their native societies instead of being 'chosen' according to their short-term labour demands.[3] From a legal-h
family reunification that migration has continued and grown, in the face of explicit attempts in the Joppke 1998). Contemporary government attempts to restrict immigration are thus increasingly targeting those who, in their sole capacity of having close family ties, want to accompany or join workers, refugees or other TCNs legally admitted to reside in the country.

However, the evolving set of rules and regulations that this type of migration is subjected to, appears far from uniform. On the one hand, as a number of recent country-comparative studies has shown, the specific conditions and requirements for family reunification vary considerably between EU Member States (Kraler 2010; Kraler et al. 2011; Pascouau and Labayle 2011; Strik et al. 2012). On the other hand and this is where the focus of this paper lies there is a variety of exceptions made for specific kinds of migrants and their families, so that behind the overall trend towards increasing restrictiveness, a complex system of differential rights and opportunities emerges (Morris 2002). While the basic distinction between own-country nationals, EU nationals and TCNs has been analysed extensively (Cholewinski 2002; Groenendijk 2006), far less attention has been paid to differentiations made within the latter. In principle, the legitimacy of these distinctions follows from the sovereign right of receiving states to ultimately control all immigration (including family

1997: 361). Increasingly, however, some of the instances of unequal treatment regarding access to family reunification are being analysed in the context of what has been described as 'repressive' or 'illiberal liberalism' (Joppke 2007a; Guild et al. 2009) and accused of undermining the principle of family unity (Ruffer 2011).

Departing from here, the present study contrasts the normative claim of a fundamental and universal right to family life against the empirical evidence of unequal conditions and effects both direct and indirect, intended and unintended of family reunification policies in Europe for different immigrant groups and categories. Building on the concept of civic stratification (Lockwood 1996; Morris 2002), and by using examples from a range of EU Member States,[4] the paper aims to confirm the following hypothesis: *While the specific national legal frameworks governing family reunification for TCNs vary considerably between EU Member States, the underlying system of stratification (i.e. the differentiation between specific groups and categories of migrants) is far more consistent across Europe.* In order to better understand not only the extent and complexity of this system of stratified rights and obligations, but also the rationales behind it, the empirical part of this research comprises several questions. Firstly, I will analyse which specific groups of TCN migrants are most commonly differentiated within family reunification policies, and through which concrete measures and requirements this differential treatment is put into effect. In a second step, I will ask how these different instances of unequal treatment are justified by state actors, and whether these justifications are based on empirical evidence. Before that, however, the

unequal access to this right is being justified. The results suggest that more restrictive family reunification policies building on more complex systems of immigration statuses increase the likelihood of unequal access to the right to family life.

Family reunification in Europe: between liberal human rights norms and restrictive immigration policy practice

> If international instruments delimit national authority to control borders, then how can we explain the failure to extend universal rights in the form of family reunification to migrants? (Lahav 1997: 352).

human rights issue, and, on the other, as an immigration matter which might place a strain on the

2002: 271). As a result, the underlying normative claim of a fundamental and universal right to family life faces two major challenges when translated into the legal-political practice of family reunification policies for TCNs, which many countries have only quite recently incorporated into their immigration regimes.[5] On the one hand, the precise conditions and requirements for

families of non-
between the underlying human right to family life and the individual application of this right in the

principle, while the latter is considered a means of impl

Any claim for family reunification derives its legal force either from the principle of freedom of movement[7]

of family-related migration, often associated with different sets of 'problems', i.e. implications for receiving states and communities. Kofman (2004) argues that *family reunification* in its strict sense (i.e. the process of being joint by immediate family members in the country of residence) should be distinguished from *family formation* or *marriage migration* (i.e. the migration of one partner with the intention to enter into a marriage) on the one hand, and *family migration* (i.e. the joint migration

or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national

turn.

Unequal treatment based on (a specific) nationality, 'race' or origin

As one form of civic stratification which directly stems from EU legislation, Bonizzoni (2011) identifies the common visa requirements for the Schengen area on the one hand, and the list of nationalities carefully selected for visa-free entry on the other.[27] In the case of **Spain**, it is particularly evident that family migrants holding nationalities not requiring a Schengen visa such as Argentinians and, until a visa requirement was introduced in 2007, also Bolivians often circumvent specific restrictions on reunification by entering as tourists and later regularising their stay in the country through the regular quotas for TCN workers (Araujo 2010). Another common line of stratification based on national belonging specifically relates to Turkish nationals, who are in a favourable position safeguarded by the Association Agreement concluded between Turkey and the EU in 1980 (see Strik et al. 2013). In **Austria** for example, Turkish family members joining Turkish sponsors are exempt from the minimum age and income requirement, as well as the obligation to pass otherwise mandatory pre- and post-entry language tests (Kraler et al. 2013).

Beyond this common pattern, unequal access to family reunification directly or indirectly follows from other forms of preferential treatment of certain nationalities by individual Member States, usually reflecting colonial or other historical ties. In **Spain**, for example, immigrants from parts of Latin America, the Philippines and Equatorial Guinea can become citizens after only two years of legal residence, allowing them to reunify with their relatives under much more favourable conditions than other TCNs (Araujo 2010), while in the **Netherlands** family migrants from Surinam are exempt from the otherwise obligatory civic integration test if they received prior education in Dutch (Bonjour 2008). In all four countries under study which implemented pre-entry language tests (**AT, D, DK, NL**), citizens of majority-white, wealthy countries like Australia, Canada, the US, New Zealand, South Korea and Japan are generally excluded from taking these tests.[28] In other cases, such as the **Czech Republic** and **Spain**, TCNs coming from these economically advanced and mostly 'Western' societies have been noted to receive favourable treatment at the level of routine application procedures (Szczepanikova 2008; Araujo 2010).

At the other end of the spectrum, obligatory integration requirements have often been shown to specifically target those segments of immigrants regarded as most unwanted, thereby becoming instruments of immigration selection (Bonjour 2010; Goodman 2010). In the **Dutch** case, the official evaluation of the pre-entry language tests introduced in 2006 shows that after their introduction the number of applicants sharply dropped from between 1,500 and 2,000 per month to

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addition, certain minimum-age regulations for marriages between a resid

temporary resident permit are equally eligible; however, while reunified family members of permanent residents are entitled to work immediately, those of temporary foreign residents need to apply for a work permit (Szczepanikova 2008). Again, the exception to the rule is **Portugal**, where, since an amendment in 2007, no minimum time of legal residence is required before applying for reunification and any type of residence permit (including study permits) enables the sponsor to apply (Oliveira et al. 2013). For the first two years, however, the duration of the permit granted to family members corresponds to that held by their sponsor.

Unequal treatment based on a specific immigration status of the sponsor

This form of differentiation most obviously applies to refugees and/or persons under subsidiary protection, who are usually exempt from many of the requirements for family reunification.[30] For example, while family reunification in **Austria** can in principle be rejected based on the expectation that the family member(s) may put a financial burden on the welfare state, the Austrian Administrative Court ruled in 2009 that this cannot be the sole ground for rejection in the case of refugees (Kraler et al. 2013). For persons under subsidiary protection, on the contrary, a general one-

[32] Accordingly, such workers and their family members are to be exempt from many of the requirements otherwise applied or suggested by the *Family Reunification Directive*; among them the requirement of having reasonable prospects of obtaining permanent residence or proving a minimum period of prior legal residence, as well as the obligation for foreign spouses to pass a pre-entry integration test or to wait for a certain period of time before enjoying full access to the host country's labour market.[33]

At the national level, specific income and other financial requirements most clearly represent measures of socio-economic selection, since they pose a far greater barrier for poorer migrants and their families than wealthier ones. Therefore, any rules relating to *adequate resources* have been argued to be incompatible with the idea of a *right* it is important to avoid limiting the right to family reunification to a privileged few (Cholewinski 2002: 283). In the **Netherlands** for example, Bonjour (2008: 20) notes that the mere administrative fees for the a are so high that they may be considered a condition for , while the increase in 2004 of the income level for sponsors to 120% of the statutory minimum wage was found to be in violation of the *Family Reunification Directive* (Groenendijk 2006). Even without such requirement, however, the overall required income for migrant families to live together can amount to over 130% of the disposable net earnings of the poorest 20% among them, as Kraler et al. (2013) show for the case of **Austria**. In addition, and most evident in the **Spanish** case, it has been shown that migrants working in specific (low-skilled) segments of the economy, and domestic workers in particular, are effected disproportionately by the requirement to prove stable incomes, due to the often informal character of this kind of employment (Araujo 2010). Once again, **Portugal**

exempting this group of family migrants from integration courses after entry, if their residence is expected to be only temporary (Triebl and Klindworth 2012: 23). In **Austria**, Kraler et al. (2013: 35) note that while family members generally have to prove basic language proficiency, those of highly- are considered to have completed the requirement by virtue of their .

the extension of language tests to family migrants as a way

members, or those of highly-skilled TCN workers in general, can be expected to always be unproblematic, even without them speaking the local language nor having any knowledge of the native society and predominant way of life in the country of settlement. Accordingly, as in the **German** case, these exceptions based on nationality have also the traditionally close economic ties that exist between Germ and Klindworth 2012: 23), while in **Denmark** they were officially explained by the country's interest to ensure that a qualified w (www.nyidanmark.dk, cited in Moeslung and Strasser 2008: 16). Similarly, **Austrian** politicians frequently point towards the general assumption of more self-sufficiency[35]

context i , while the **Danish** *24-year rule* clearly targeted at TCNs from Islamic countries and is claimed to protect people from entering into forced or arranged (Wiesbrock 2009: 301). Such automatic connection between cultural belonging and the capacity of individuals and groups to successfully integrate seems to be a rather common feature of family reunification policies across Europe.[36] At the same time, the basic liberal (or *civic*) values which family migrants are increasingly presented with a certain view of national identity re-inscribing these liberal val (Kofman 2005: 461). In all the countries under study, problems related to spousal abuse and forced marriages, or the need to empower women coming from rural areas and patriarchal family structures are among the specific concerns commonly related to family migrants, and particularly

Differential treatment as evidence-based policy?

Strik et al. (2013: 50) argue that, in principle, all these just can work both ways: towards more liber . The conceptualisation applied here, however, reveals a more differentiated picture. On the one hand, *pragmatic* and *moral* arguments are predominantly employed in order to justify more favourable treatment of certain groups or categories of migrants in the first case, those specifically wanted or needed (for mostly economic reasons); in the latter, those most in need (from a humanitarian perspective). On the other hand, arguments underpinned by *ethical* considerations more often justify additional restrictions specifically imposed on those groups not wanted by any particular state. The decisive question of whether the underlying

deliberately granted by an individual state to immigrants fulfilling certain conditions, such as the right to enter, reside, work or settle within its territory. Clearly, the *right to family reunification* marks a point of intersection between both spheres, since it is underpinned not only by the unconditional human right of the sponsor to have his or her private and family life respected, but also by the highly conditional right of the family member living abroad to enter and stay, work and/or settle in the same country as his or her sponsor. Thus, policies of family reunification reflect not only the obligations of states in relation to migrants' human rights, but also their own sovereign right to *manage* (most) immigration according to their own national interests. It is this particular context which leaves family reunification far from being a neutral application of a universal human rights norm, but instead renders it a *highly selective process* (Kofman et al. 2011).

Accordingly, any assessment of the legitimacy of making distinctions between different groups and categories of migrants or their sponsors ultimately depends on which of the two underlying principles (the migrant's right to family life vs. the host state's sovereignty to control immigration) is seen as predominant in any particular case. A comparative analysis of such instances in different EU Member States has shown that while specific conditions and requirements for reunification vary considerably in both scale and scope, they clearly reveal common patterns

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