



THE CRIMINALISATION OF FAMILY REUNION APPLICANTS IN FRANCE AND ENGLAND AND WALES: FACT OR FICTION?

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ABSTRACT

According to article 8 of the European Convention on Human Rights (ECHR) which is integrated into British and French law, “everyone has the right to respect for his [...] family life”. Family reunion immigration was a logical, and lawful follow-up to labour immigration which was encouraged by France and the United Kingdom after the second World War as a means to provide a workforce for their factories. More recently, a third category of migrants has emerged, often referred to as illegal immigrants, who are attracted by the French or British political system or social benefits. Over time, a confusion has arisen, and is sometimes entertained, between authorised and unauthorised migration. If article 8 makes it possible for the Member States to set some limits to the right to family reunion in order to take account of a prevailing national interest, it must remain a right. Family reunion applicants should not be assimilated to illegal immigrants, or even criminals, unless of course, they are. Recently, European Member States have become increasingly concerned about possible frauds and abuses of the right to family reunion. Any dismissal of an application for family reunion can be disputed in court. In the specific context of France's and the United Kingdom's legal, social and political cultures (and regarding the United Kingdom, by focusing mostly on England and Wales which have their own legal system), this study aims at determining how the lower national courts deal with family reunion litigation. More specifically we will see whether national judges depart from or try to restore the original spirit of article 8 and the right it protects to be reunited to one's family.

Key words: Article 8, criminalisation, European Convention on Human Rights (ECHR), England and Wales, human rights, immigration, family reunion, France.

RESUMEN

Según el artículo 8 del Convenio Europeo de los Derechos Humanos (CEDH), integrado en el derecho británico y francés, “toda persona tiene derecho al respeto de su vida [...] familiar”. Inmigración y reagrupación familiar eran un lógico y lícito seguimiento de la inmigración laboral alentada por Francia y el Reino Unido después de la Segunda Guerra Mundial como un medio para proporcionar una mano de obra para sus fábricas. Más recientemente, una tercera categoría de migrantes ha surgido, a menudo llamados inmigrantes ilegales, que son atraídos por el sistema político francés o británico de beneficios sociales. Con el tiempo, ha surgido una confusión, entre la migración autorizada y no autorizada. Si el artículo 8 permite a los Estados miembros fijar algunos límites al derecho a la reunificación familiar con el fin de tener en cuenta un interés nacional predominante, debe seguir siendo un derecho. Los solicitantes de reunificación familiar no deben ser asimilados a los inmigrantes ilegales, o incluso criminales, a menos que lo sean. Recientemente, los Estados miembros de Europa están cada vez más preocupados por posibles fraudes y abusos del derecho a la reagrupación familiar. Cualquier desestimación de una solicitud de reagrupación familiar se puede ser discutida en los tribunales. En el contexto específico de la cultura social, política y legal de Francia y del Reino Unido (y en relación con el Reino Unido, centrándose sobre todo en Inglaterra y Gales, que tienen su propio sistema legal), este estudio tiene como objetivo determinar cómo los tribunales inferiores nacionales operan respecto de los litigios de reunificación familiar. En concreto vamos a ver si los jueces nacionales parten de, o tratar de restaurar el espíritu original del artículo 8 y del derecho que protege a poder reunirse con su propia familia.

Palabras clave: Artículo 8 (CEDH), criminalización, Inglaterra y Gales, Francia, derechos humanos, inmigración, reunificación familiar.

I. INTRODUCTION

Immigration has long been a sensitive and controversial issue in France and the United Kingdom. Despite their legal, social, political and cultural backgrounds, they have had to tackle similar problems. After the second World War, both countries called on immigrants to work in their factories to help revitalise the economy (Cholewinsky 1997, p.16). This is usually known as primary migration. Although it was assumed that most of the immigrant workforce would return home when they were no longer needed, this was not the case (Hampshire County Council 2010, p.8). In France and as early as 1947, a Circular from the Ministry of Health and Population stressed the importance of family reunion as a way to integrate the immigrant labour force into French society (Jault-Seseke 1996, p.7). Family reunion migration, to which Andre Geddes referred as “secondary/family” migration, promptly developed. These first two categories of migration are referred to as authorised or legal migration. But after the end of the Cold War, a “third wave” of migration emerged, composed of unauthorised or illegal immigrants looking for asylum or attracted to the social benefit systems applicable in some European countries like France or the United Kingdom (2003, p.17).

Successive waves of economic difficulties in Europe have now reduced primary immigration to quasi-nothingness as the conditions imposed on would-be workers have been made more drastic by governments. Regarding secondary migration and according to a recent European Commission report, “for the past 20 years family reunion has been one of the main sources of immigration to the European Union.”¹ If today family reunion only accounts for one third of all immigration to Europe as opposed to half in the early 2000s², this does not necessarily mean that there are less applications for family reunion but maybe that host countries are more reluctant to grant the applications. As for the third wave of migration, it is fast developing.

European countries have gradually toughened their immigration policies, mostly with a view to tackling unauthorised immigration. The United Kingdom, unlike France, refused to sign the Schengen Agreement of 14th June 1985, to better control entries into the country. With the creation of Frontex³ European borders were gradually meant to

1 European Commission, 2008. Report to the European Parliament and the Council on the Application of Directive 2003/86/EC on the Right to Family reunion. <[http://www.ulb.ac.be/assoc/odysseus/CEAS/COM\(2008\)610.3.pdf](http://www.ulb.ac.be/assoc/odysseus/CEAS/COM(2008)610.3.pdf)>.

2 European Commission, 15/11/2011. COM (2011) 735. Final Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC). <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0735:FIN:EN:PDF>>.

3 Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

supersede national borders with a view to facilitating economic and subsequently human movements within Europe. However, this has made it easier for immigrants, including illegal ones, to circulate around Europe.

Since the Treaty of Lisbon (signed by all the European Member States) came into force in December 2009, amending the Treaty of Maastricht and the Treaty of Rome, immigration policies have been governed “by the principle of solidarity and fair division of responsibility” between the Member States.⁴ At the same time, the European Pact on Immigration and Asylum, initiated by the French former conservative President Nicolas Sarkozy in the context of the Stockholm programme (2009-2014), aimed at restricting “illegal” immigration through the stricter control of borders.

The right to family reunion is protected by article 8 of the European Convention on Human Rights (“ECHR”) and by the European Council Directive 2003/86/EC on the right to family reunification (hereafter called the “2003 Directive”).⁵ France was one of the European Union's founding members, unlike the United Kingdom which only joined in 1973. The United Kingdom and France respectively ratified the European Convention on Human Rights (“ECHR”) in 1951 and 1974. However the ECHR was only integrated into British law when the Human Rights Act 1998 came into force in 2000. In France “direct actions” to the European Court of Human Rights were only allowed from 1981⁶ which delayed the easy enforceability of the ECHR. Regarding the 2003 Directive, it sets out common European immigration rules to regulate the conditions which third-country nationals (i.e. non-Europeans) must fulfil to exercise the right to family reunion in a European Member State. France is a signatory to it unlike the United Kingdom which chose to opt-out.

If article 8 of the ECHR and the 2003 Directive allowed the Member States to set some limits to family reunion, being reunited to a family member who is established in Europe does remain a right. It is not subject to the governments' discretionary power. Authorised immigration, like family reunion immigration, is a civil or administrative concept, as opposed to illegal immigration, which may lead to the application of criminal law when an offence was committed.

<http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33216_fr.htm>.

4 European Commission, January 2012. Immigration policy. <http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.3.pdf>.

5 Council Directive (EC) 2003/86/EC of 22 September 2003 on the right to family reunification. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:en:PDF>>.

6 See the conference paper given at Grenoble university by Tavernier, P., 2003. L'influence de la CEDH sur le droit français. <http://cejm.upmf-grenoble.fr/index.php?dossier_nav=766> (access: August, 28th, 2012).

However, the worldwide economic difficulties which led to the emergence of abuses or frauds, combined with the greater protectionism of European borders, have led to confusion between authorised (or legal) and unauthorised (or illegal) immigration. Juliet Stumpf talked about the new concept of “crimmigration” (2006). The danger of such a confusion is obvious. It antagonises those living in the Member State against the prospective immigrant and revives xenophobia.

In 2008 the Council of Europe Commissioner for Human Rights expressed his concern over the “criminal stamp” which now tends to apply to immigrants in general (Hammarberg 2008). Talking of the “language of criminalisation” he opposed the “fairly neutral terminology” used by the Council of Europe to that of Member States for which “being an immigrant becomes associated, through the use of language, with illegal acts under the criminal law” (CECHR 2010). In 2011, the European Commission published a Green Paper on the right to family reunification of third-country nationals living in the European Union.⁷ This report raised the issue of the future of the 2003 Directive and a wide consultation was launched to identify, amongst other things, cases of fraud or criminality which may arise amongst applicants to family reunion.

This study focuses on France and England and Wales (which have their own legal system). Through the consideration of the relevant countries' respective cultural, political and social backgrounds, it aims at determining to what extent lower national courts (as opposed to higher national courts or European courts) apply the original spirit of article 8 and protect the right to family reunion as opposed to national – or European – interests.

There are two reasons for focusing on France and England and Wales. Both have attractive social systems which may prompt illegal immigrants to make bogus applications for family reunion. Moreover and although England and Wales, like France, are bound by the provisions of article 8 of the ECHR, France is a signatory to the 2003 Directive as opposed to England and Wales. This may reflect on the way their respective national courts deal with family reunion litigation.

For the purposes of this study the family nucleus will consist of one spouse and children, to the exclusion of any other people such as other spouses from a polygamous relationship.

7 Ibid, 2.

II. INTERNATIONAL AND EUROPEAN PROTECTION OF FAMILY REUNION

A number of texts have, since the second World War, protected the right to family reunion, at an international and then, European level. Although this study is focused on the approach to family reunion litigation made by the lower national courts of France and England and Wales, a few words must be said about European caselaw which provides a framework within which national caselaw must fit in. Moreover, recent measures have been taken at European level to determine how the right to family reunion should continue being protected in the future.

1. The existing protection at international and European level

At an international level and as early as 1948, article 16(3) of the Universal Declaration of Human Rights provided that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁸ Since 1949, specialised United Nations (“UN”) agencies such as the International Labour Organisation (“ILO”) or the Office of the High Commissioner for Human Rights (“OHCHR”) have been involved in protecting the right to family life, either directly or indirectly.⁹ However this international protection is insufficient in two ways. Few of these documents have a binding effect and a lot of leeway is given to the possible host countries on how they may interpret the right to family reunion.

8 United Nations, 1948. Universal Declaration of Human Rights. <<http://www.un.org/en/documents/udhr/index.shtml>>.

9 See ILO's R86 Migration for Employment Recommendation (Revised) of 1949: “(1) [...] authorisation [should] be granted for a migrant for employment introduced on a permanent basis to be accompanied or joined by the members of his family”, <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?R086>>. Art. 13(1) of ILO's Migrant Workers (Supplementary Provisions) Convention of 1975: member states should work together “to facilitate the reunion of the families of all migrant workers legally residing in its territory”, <http://www.ilocarib.org.tt/projects/cariblex/conventions_7.shtml>. Art. 5(4) of the UN (A/RES/40/144) Declaration on the Human Rights of Individuals who are Not Nationals of the Country they Live In of 13/12/1985: “Subject to national legislation and due authorisation, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien”, <<http://www.un.org/documents/ga/res/40/a40r144.htm>>. Art.10(1) of the OHCHR's Convention on the Rights of a Child of 1989: “[...] applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunion shall be dealt with by States Parties in a positive, humane and expeditious manner [...]”, <<http://www2.ohchr.org/english/law/crc.htm>>. Art. 44 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (A/RES/45/158) of 18/12/1990 (which took thirteen years to be implemented): “States Parties shall take measures [...] to facilitate the reunion of migrant workers with their spouses [...] as well as with their minor dependent unmarried children”, <<http://www.un.org/documents/ga/res/45/a45r158.htm>> (all access: August, 12th, 2012).

At European level, article 8 of the ECHR provides for the “respect” of the right to family life as opposed to its “inviolability” (Sykiotou-Androulakis 2001, p.218). It is a “qualified” right and not an “absolute” one. This means that “interference can be justified [...] on the grounds and under the conditions named in the second paragraph” (Van Walsum 2009, p. 238). According to the second paragraph of article 8:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Therefore the drafters of the ECHR made it possible for the legislators of the Member States to strike a balance between the right of immigrants to family life and the interests of their countries. “National security”, “prevention of disorder and crime” and “public safety” are logical and fair limits, aimed at restricting the entry into Europe of people with a criminal record or who are suspected members of a terrorist organisation. However criminals may find an alternative way of settling down in Europe, by first coming without a prior authorisation and subsequently making an application under article 3 of the ECHR which prohibits torture, and “inhuman or degrading treatment or punishment” to which they might be subjected if deported back to their native country. This is outside the scope of this study.

Likewise and bearing in mind that polygamy is illegal in Europe, the “protection of morals” is also a logical and fair reason to refuse an applicant’s entry under article 8 if the applicant has a polygamous relationship with various spouses whom he wants to bring into the host country. The protection of “health” is understandable if an applicant is likely to start an epidemic in Europe. But here again unauthorised immigrants may subsequently be granted the right to stay in a European country (and thus become authorised immigrants) if they suffer from an illness which cannot be cured in their native country. This also falls outside the scope of this study.

The reference made in article 8 to the “economic well-being of the country” is ambiguous: it seems to mean that the economic health of Member States takes precedence over the right to family reunion. Family related immigration would therefore be subject to a “market” similar to the economic market. Does it mean that what the drafters of the ECHR had in mind was that a possible host country should put its nationals first, thus relegating immigrants seeking family reunion to second class ones? It is not that simple but the priority approach seems to be corroborated by the “visa

cap’’ (applying to all types of immigration) in force in the United Kingdom¹⁰ and in France since April 2011¹¹ under former right wing President Sarkozy. Nine months after his election, newly elected socialist President Hollande has not yet announced any drastic reform to his predecessor's immigration policy. So the right to family reunion is important, it is protected by article 8 but not absolutely. This means that restrictions (albeit limited) may apply.

Although the aim of this study is to focus on lower national courts' caselaw relating to family reunion, this study would not be complete without mentioning a few recent decisions rendered by the European Court of Human Rights (‘‘ECtHR’’) in connection with article 8.

In *Rodriguez da Silva and Hoogkamer v. Netherlands*¹², the ECtHR held that it was disproportionate to refuse to regularise the situation of a child's Brazilian mother, with whom the little girl had regular contact, after the domestic courts ruled that it was in the best interest of the child to remain in the Netherlands with her Dutch father.

In *Omoregie v. Norway*¹³, a Norwegian wife had a child with her Nigerian husband. The ECtHR did not take into account the ties which the wife and child had with Norway, but did take into account the ties which the husband had with his native country, to find that the wife should not have had a reasonable expectation that her husband would be allowed to be reunited with her and their child in Norway. The ECtHR chose to ignore the fact that the wife had given up her studies and started to work to fulfil the financial requirements for family reunion.

In *Osman v Denmark*,¹⁴ the ECtHR found that the Danish authorities breached article 8 after they dismissed the application for family reunion made by a teenage girl born in Somali but who resided and went to school for years in Denmark with her whole family. The girl's application was made after two years which she spent in a refuge camp in Kenya, away from her family which stayed in Denmark, to be the sole carer to her elderly grandmother.

In these few examples revolving around the application of article 8, the ECtHR took into account the interests of the child, the duration of his or her stay in Europe and his or her existing ties in Europe.

10 UK Visa Bureau, 19/11/2010. Report published on annual UK immigration limit. <<http://www.visabureau.com/uk/news/19-11-10/report-published-on-annual-uk-immigration-limit.aspx>> (access: July, 7th, 2012).

11 117/4/2011. Le PS dénonce le ‘contresens’ de Guéant sur l'immigration légale. *L'Express*. <http://www.lexpress.fr/actualites/2/actualite/le-ps-denonce-le-contresens-de-gueant-sur-l-immigration-legale_980340.html> (access: July, 5th, 2012).

12 [2006] ECHR 86 (31 January 2006).

13 [2008] ECHR 265/07 (31 July 2008).

14 [2011] ECHR 38058/09 (14 June 2011).

As for the 2003 Directive, to which the United Kingdom is not a signatory, it sets out common rules for the exercise of the right to family reunion by third-country nationals residing lawfully in Member States. It requires the sponsor (the person who would welcome his family) ‘‘to have accommodation that meets general safety and health standards, sickness insurance and stable resources sufficient to maintain himself/herself and the members of his/her family without recourse to the social assistance system of the Member State concerned [...].’’ Applications for family reunion are therefore likely to be dismissed if the applicant does not provide evidence that he/she ‘‘and the members of his/her family’’ have the financial means to look after themselves without relying on the host country’s social system. This is reminiscent of the ‘‘economic well-being of the country’’ clause of article 8.

For Wright and Larsen, one of the reasons why the United Kingdom opted out of the 2003 Directive was that the Directive was ‘‘not in line with [its] border control policies.’’ (2007, p.4). Indeed and as evidenced by its failure to sign the Schengen agreement, the United Kingdom has always been keen on remaining insular. If England and Wales are free to depart from the spirit of the 2003 Directive (and in particular the criteria it sets out) they must still comply with the principles set out in article 8.

In a landmark 2006 case, *Parliament v Council (Area of Freedom, Security and Justice)*¹⁵, the European Court of Justice heard an application from the European Parliament against the Council of the European Union seeking to annul the provisions of the 2003 Directive enabling Member States to restrict in some cases the right to family reunion. The European Parliament argued that these provisions, i.e. the last paragraph of article 4(1), article 4(6) and article 8, did not comply with the right to respect for family life and the principle of non-discrimination set out in articles 8 and 14 of the ECHR. The case revolved around whether the Member States which ratified the 2003 Directive could check whether a 12 year old child who arrived in Europe separately from his family met an integration condition. The European Court of Justice ruled that the 2003 Directive did not breach the provisions of article 8 of the ECHR. In so doing, it relied on the fact that it should always be possible to weigh the competing interests of the family reunion applicant and of the relevant Member State.

This landmark decision, which is of direct concern to the signatories of the 2003 Directive, is important in various ways. First, it reasserts the right of the Member States to control their borders as against all forms of immigration, including family reunion migration. Then, the emphasis is placed on the paramount role of integration as an essential pre-condition to migration. Because it confirms the right of European countries, under article 8 of the ECHR, to ‘‘weigh the competing interests’’, i.e those of the host country and the immigrant, this precedent indirectly endorses the restrictions

15 [2006] EUECJ C-540/03.

imposed by England and Wales – which are not signatories to the 2003 Directive but are bound by article 8 - upon immigrants.

2. Steps taken at European level to ensure the future protection of the right to family reunion

The 2003 Directive is no longer in its prime and in view of the emergence of a number of problems such as increasing illegal immigration seeking the application of article 8, may no longer provide a satisfactory protection of the right to family reunion. Thus, a number of steps have been taken at European level.

In October 2008, the European Commission published a report expressing its wish to “to reinforce the EU's comprehensive approach to migration” and to launch a “wider consultation [...] on the future of the family reunion regime.”¹⁶ The 2003 Directive has been blamed for giving “Member States too much discretion when applying some of its optional provisions (the “may”- clauses) in particular as regards the possible waiting period, the income requirement and the possible integration measures.”¹⁷

The European Commission's Green Paper of 2011 on the future of the right to family reunification was an opportunity to launch a public debate inviting Member States, IGOs or even individuals, to respond to a number of specific questions. More precisely the Commission expressed the wish to hear back from “Member States who reported problems of abuse of the right to family reunification.” However, the European Commission made it clear that once the consultation process was completed, it would “decide whether any concrete policy follow up is necessary (e.g. modification of the Directive, interpretative guidelines or status quo).”¹⁸

Section 5 of the questionnaire raises the issue of fraud in the context of family reunion migration. Fraud seems to be a main reason why a confusion is sometimes made between applicants to family reunion (i.e. authorised migrants) and illegal migrants and thus, feeds the “crimmigration” phenomenon. Of course, not all unauthorised migrants are criminals, but some of them may be.

The increasing number of “marriages of convenience” and “false declarations of parenthood” led to a June 2012 report from the European Migration Network. It shows

16 European Commission (IP/08/1473) of 8/10/2008 on Strengthening the EU's Comprehensive migration policy: new initiatives of the European Commission on the Global Approach to migration, on Integration and on Family reunion of third-country nationals, <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1473&format=HTML&aged=0&language=en&guiLanguage=en>>.

17 Ibid. 2

18 Ibid. 2

that such frauds may not only have civil consequences, but also criminal ones depending on the Member State where the fraud takes place:

The majority of (Member) States impose penalties on both sponsors and applicants. In some, such penalties are imposed directly in relation to a detected marriage of convenience ([...] France [...]); in others ([...] United Kingdom), the penalty is determined by the actions involved, for example, forgery, provision of false documents, etc. or related criminal activity [...]. In the United Kingdom, any person found to have broken the law by way of entering into or organising a marriage of convenience will be arrested and processed through the criminal justice system. [...] Penalties include, for the sponsor, imprisonment, fines, or both. The duration of imprisonment and levels of fines vary. Where stated, the duration of imprisonment ranges from up to 1 year (Austria) [...] and to up to 5 years (France). Fines may be imposed alongside a prison sentence, and ranged [...] up to €15 000 (France). [...]) Where there is evidence of organised crime, penalties imposed are higher still, for example, in France, such circumstances may attract imprisonment of up to 10 years [...]. (2012, pp. 39, 40 & 41)¹⁹

The European Commission's 2011 Green Paper and the European Migration Network's 2012 report show that fraud, and its possible criminal consequences, is a fast developing problem. The obvious consequence is that the people who make fraudulent applications for family reunion will affect the reputation of those – much more numerous – who are of good faith and really want to be reunited with their family, so that even honest family reunion applicants will unfortunately end up being assimilated to fraudsters or criminals.

It is premature to comment on how the 2003 Directive is likely to evolve, but those working on the reform will have to strike a balance between the current willingness of European countries to cut down on immigration in general (including authorised immigration) and the need to protect the right to family reunion under article 8 of the ECHR. The last few years have already given rise to many discussions on the general issue of immigration amongst the member states of the European Union. It was part of the Tampere programme (1999-2004), the Hague programme (2004-2009) and

19 Author's own translation.

discussions are ongoing with the Stockholm programme, adopted on the 15th December 2009.²⁰

III. THE RIGHT TO FAMILY REUNION IN ENGLAND AND WALES AND FRANCE

France and England and Wales have different legal and social cultures. The former is a civil law country whilst the latter are based on common law. England and Wales are insular as opposed to France which is on the continent. Their respective constitutions differ. Compared to France, the constitution in the United Kingdom is uncodified. Regarding immigration, we will see that the law applicable in France is codified but regulatory in England and Wales.

Belonging to Europe has helped to homogenise their respective cultures albeit in a limited way. France is one of the original members of Europe whereas the United Kingdom only joined in 1974 and has since refused to sign the Schengen agreement. The United Kingdom has also opted out of the 2003 Directive.

Yet despite their different historical, sociological and political backgrounds, authorities from both countries seem to have fairly similar immigration policies. Generally speaking, France and England and Wales welcomed immigration after the second World War to rebuild their countries. Recently they have tried to cut down on the number of immigrants. One way to cut down on authorised migration is to toughen up the conditions which applicants to family reunion have to fulfil.

1. In France

Unlike the United Kingdom, France has ratified both the ECHR and the 2003 Directive thus showing its (at least apparent) willingness to play the European game. The right to family reunion has been protected for a long time but as allowed by article 8 of the ECHR – and by the 2003 Directive - some limits have been placed to restrict it.

A decree was passed in 1976 granting the right of entry and residence to the members of a resident immigrant's immediate family subject to certain specific conditions.²¹

20 The Stockholm programme followed the adoption in summer 2008 of the European Pact on Immigration and Asylum, which is a non-binding political document (Carrera & Guild, 2008) initiated by former French President Nicolas Sarkozy and unanimously accepted by twenty seven European States “whatever their political sensibilities or geographic situation.” It seeks to “reject both closed door and open door policies” towards immigration (*Ministère de l'Intérieur et de l'Immigration* 2008).

In 2007, a reform on the control of immigration, integration and asylum²² was brought in by former conservative President Nicolas Sarkozy which amended the provisions of article L.111-6 of the French Code of Foreigners' Entry and Stay and the Right to Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile* or "CESEDA")²³. It allowed the experimentation of DNA tests on applicants to family reunion until the end of 2009. This reform was based on article 5(2) of the 2003 Directive whereby: "If appropriate, in order to obtain evidence that a family relationship exists, Member States may [...] conduct [...] investigations that are found to be necessary."²⁴ Under amended article L.111-6 of the CESEDA, any DNA tests were to be paid by the French state. This means that irrespective of the results of the DNA tests, the applicant to family reunion was not going to pay for the tests.

In February 2009, the then prime minister François Fillon renounced implementing DNA testing. The reasons are manifold. There were administrative hurdles which made it difficult to apply the law. Two years before the presidential elections of May 2012, there may have been political reasons for former President Sarkozy's change of mind. His team may have been concerned about the possible loss of part of their electorate, upset by the potentially random targeting of migrants. Lobbying group *SOS Racisme* praised that decision on the grounds that any DNA testing would have amounted to "associating foreigners with fraudsters."²⁵

The last legislative reform passed under former President Sarkozy was the adoption of statute No. 2011-672 relating to immigration, integration and nationality passed on 16 June 2011 which, according to the lobbying group *Groupe d'Information et de Soutien des Immigrés* ("GISTI") "like all legislative reforms [...] over the last twenty years aims at [...] making family reunion more difficult."²⁶ The French Parliament stated that any naturalisation would involve the signature of a "charter of rights and duties of the citizen" and an "integration course" for family reunion applicants (Laurent, 2011). The scope of this law cannot be criticised: it is in line with the right for a country under

21 Decree (n°76-383 29/4/1976) *relatif aux conditions d'entrée et de séjour en France des membres des familles des étrangers autorisés à résider en France*. <<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000855572&fastPos=1&fastReqId=1085433867&categorieLien=id&oldAction=rechTexte>> (access: July, 10th, 2012).

22 Loi (2007-1631) of 20/11/2007 *relative à la maîtrise de l'immigration, à l'intégration et à l'asile*. <<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000524004&dateTexte=&categorieLien=id>> (access: October, 20th, 2012).

23 <<http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006334951&cidTexte=LEGITEXT000006070158&dateTexte=20121008&fastPos=1&fastReqId=1519958850&oldAction=rechCodeArticle>> (access: September, 17th, 2012).

24 Ibid. 5.

25 14/9/2009. Tests ADN: Fillon envisage une nouvelle discussion avec le Parlement. *Le Monde*. <http://www.lemonde.fr/societe/article/2009/09/14/besson-enterrer-les-tests-adn-les-associations-se-rejouissent_1240083_3224.html> (access: July, 18th, 2012).

26 GISTI, June 2011. *Les cahiers juridiques: le regroupement familial*. <http://www.gisti.org/publication_pres.php?id_article=2317> (access: June, 5th, 2012).

article 8 to strike a balance between the right to family reunion and the “economic well-being of the country”. It is also in line with the spirit of the 2003 Directive.

The current conditions applicable to family reunion are set out in article L. 411-1 of the CESEDA. The host must have “lawfully resided in France for at least eighteen months.” Other conditions are that the applicant must have “regular and sufficient income to satisfy the needs of his family in France [...], accommodation deemed normal for a similar family living in the same geographical area. [...], comply with the essential principles which govern family life in France [...]”²⁷ These conditions are reminiscent of the criteria set out in the 2003 Directive. There is not a set amount of income required for the family reunion applicant to satisfy article L. 411-1 but any application seems to be processed on a case by case basis.

Should there be any doubt by the authorities of the applicant's or the host's financial resources or ability to look after the family for instance, investigations can be carried out by the mayor of the relevant town and if need be, by the French *Office Français de l'Immigration et de l'Intégration* (“OFII”). Should the local *Préfet* (the representative of the government at a local level) or the Interior Minister turn down the application for family reunion, the applicant can sue the *Préfet*/minister and seek that it be overruled. Research shows that the French authorities are very cagey about the number of times and the conditions in which such investigations are carried out into the family reunion applicants' affairs. Therefore it is impossible to comment on how regularly investigations are carried out and thus how often applicants to family reunion are suspected of being fraudsters and on which grounds.

Two sets of fees (called *taxes*) amounting to a total of 368 euros as from January 2012 are payable by each applicant to family reunion.²⁸ This is an application fee as opposed to a litigation fee. It is not clear whether this sum is refunded if the application is turned down. The French authorities want to make sure that the applicants are of good faith and financially solvent to some extent.

Nine months after his election it is difficult to forecast what new socialist President François Hollande's detailed views are on family reunion. As part of his political programme, the new President said he wanted to make “legal immigration” (including family reunion migration) “more secure” (Laurent, 2012). In April 2012 he said that he could not “set a precise figure for the number of immigrants to be allowed, believing that it is impossible to reduce, save for imposing a minimum income and a knowledge of the French language, legal immigration (families and mixed couples) protected by

27 June 2012. *Service public: Regroupement familial: conditions à remplir par le demandeur étranger.* <<http://vosdroits.service-public.fr/F11166.xhtml>> (access: October, 11th, 2012).

28 January 2012. *Service public: Regroupement familial: arrivée en France des membres de la famille.* <<http://vosdroits.service-public.fr/F11170.xhtml>> (access: October, 11th, 2012).

European law and international conventions.’’ Conversely he intended to limit ‘‘economic migration due to weak growth’’.²⁹

Although he has not had a chance since May 2012 to express himself on the specific issue of DNA testing briefly launched by his predecessor, the new President already made his thoughts clear when he took part in the parliamentary debates which led to the adoption of the 2007 statute. Before the *Assemblée Nationale* he argued that the scope of DNA tests should be limited and they should only be used for medical research and ‘‘judicial proceedings’’ by which he meant criminal proceedings.³⁰ But any possible immigration reform the current government might undertake will need to take into account the 18% of French voters who voted for extreme right wing *Front National* which advocates a broad anti-immigration policy.

As regards the fraud issue, France's reply to the European Commission's consultation was published by the French government in March 2012.³¹ Concerning questions 10 and 11 of Section 5 on fraud and marriages of convenience, France's replies provide interesting information:

In France, attempted frauds in connection with applications for family reunion mainly concern children of certain nationalities (civil status documents indicating an erroneous parental filiation [...]). However, accurate statistics on these frauds are not available. [...] In France, the phenomenon of marriages of convenience is established, although no statistics are available, mostly for marriages with French citizens because of the possibility offered [...] to obtain more promptly a right of residence in France without having to fulfil any housing or income condition. (2012, pp. 7 & 8)³²

This shows that article 8's right to family reunion is used on a regular basis by illegal immigrants as a way to try to enter Europe. As seen above, a marriage of convenience can lead to a penalty and a criminal conviction in France.

29 7/5/2012. *Immigration: le programme "réaliste" de François Hollande*. <<http://lci.tf1.fr/politique/elections-presidentielles/immigration-le-programme-realiste-de-francois-hollande-7224268.html>> (access: September, 27th, 2012).

30 4/10/2007. Reply to the DNA testing question. *Journal Officiel*, p.2565. <<http://questions.assemblee-nationale.fr/q13/13-13QG.htm>> (access: October, 4th, 2012).

31 Secrétariat Général des Affaires Européennes, March 2012. *Contribution Française au Livre Vert de la Commission Européenne sur le Regroupement Familial*. <http://www.sgae.gouv.fr/webdav/site/sgae/shared/04_Consultations_publicques/ReponseFR_2012/20120301_ReponseFR_Livre_vert_regroupement_familial.pdf>.

32 Author's own translation.

2. In England and Wales

The United Kingdom's initial reluctance to join the European Union and its refusal to ratify the 2003 Directive show its willingness to depart (at least to an extent) from the spirit of Europe.

Under the current legislation, which was last updated in October 2012, applications for family reunion are made under rules 352 A to FI of part 11 of the Immigration Rules which are regulatory by nature (as opposed to the French CESEDA which is law passed by the Parliament).

The Immigration Rules define eligible and ineligible applicants and sponsors. Unlike immigrants who have obtained the refugee status, ordinary immigrants have to comply with “maintenance and accommodation requirements.” The non refugee sponsor and his/her family need to give evidence to the authorities that the family can look after itself financially once in England and Wales. Funnily and although the United Kingdom chose to opt-out of the 2003 Directive, the criteria currently set by the Immigration Rules are very much reminiscent of it. Bearing in mind that the right to family reunion is not absolute, the requirement that migrants will not financially rely on the host country seems fair.

From 29 November 2010 immigrants have been under an obligation to prove that they “speak and understand English if [they] want to enter or extend [their] stay in the UK as the partner of a British citizen or a person settled here.”³³ The requirement to have a good command of the English language is necessary to integrate to British society and this was recently upheld by the High Court (Travis, 2011).

Until 19th December 2011, no charges applied to family reunion applicants.³⁴ However the Immigration and Nationality (Fees) Order 2012 made by application of the Immigration, Asylum and Nationality Act 2006 now requires payment of a fee by each person seeking to overrule a decision refusing family reunion. This is a litigation fee as opposed to the application fee payable in France. Here again the requirement seems fair. The applicant to family reunion does not pay anything when filing his application. Should it be turned down by the authorities, he can dispute the refusal by way of an Immigration and Asylum Appeal. The payment of a fee is required for all types of

33 UK Border Agency, 23/11/2010. *New English language requirement for partners*. <<http://www.ukba.homeoffice.gov.uk/sitecontent/newsfragments/26-english-language-partners>> (access: December, 27th, 2012).

34 Paragraphs 4 & 5 of UK Border Agency, 2011. *Family Reunion*. <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/asylumsupport/guidance/eligibilityandassessment1.pdf?view=Binary>> (access : September, 11th, 2012).

litigation and is designed to ensure that the court action is not an abuse of process. For 2012 the fee payable amounts to £140 (about 170 euros).³⁵

This amount is not outrageous if one compares it to fees payable for an ordinary money claim before the county courts. For instance a claimant who seeks payment of a sum between £3,000 and £5,000 will pay £120. He will pay £245 if the claim is comprised between £5,000.01 and £15,000.³⁶ However one cannot help wondering whether the authorities might be keen on rejecting as many applications as possible to test the good faith of the applicants who will then dispute this refusal in court. This amount may be substantial if the spouse who wants to move to the United Kingdom with her husband or his wife is accompanied by four children. Unfortunately we have not been able to find any documents allowing us to comment on the number of applications for family reunion made and the number of those dismissed which then give rise to a court dispute.

No real criticism can be made of the above rules which seem to comply with the spirit of article 8. But some comments can be made about some other practices of the authorities.

In July 2011 and whilst Parliament was debating the Legal Aid, Sentencing and Punishment of Offenders Bill, charitable organisation Refuge Action lodged a memorandum which said: “the UK Border Agency routinely requires DNA testing to be able to establish family relationship, yet it does not provide or pay for testing. Without legal aid to pay for tests, many applications will fail unfairly.”³⁷ If required to provide a DNA test, the prospective immigrants must therefore pay for it. The amount paid will not be reimbursed even if the family link is established by the tests. And if the family reunion applicant cannot afford paying for the DNA test and cannot benefit from legal aid, he will not benefit from reunion with his family in England or Wales.

By making DNA tests fairly common and by requiring the applicants to support the costs of the tests, the British authorities have created hurdles which risk depriving good faith applicants of a right normally protected by article 8. The problem is that there does not seem to be any statistics or evidence showing the extent of the problem raised by lobbying group Refuge Action.

It is worth noting that the debate over the DNA testing and its funding arose in the context of a legislative bill which bears a strong criminal connotation. From being

35 HM Courts and Tribunals Service, undated. *Immigration and Appeals Tribunal fees guidance*. <<http://www.justice.gov.uk/tribunals/immigration-asylum>> (access: October 11th, 2012).

36 HM Courts and Tribunals Service, undated. *Civil court fees guidance*. <<http://hmcts.courtfinder.justice.gov.uk/courtfinder/forms/ex050-eng.pdf>> (access: October, 11th, 2012).

37 Paragraph 3.1.b <<http://www.publications.parliament.uk/pa/cm201011/cmpublic/legalaid/memo/la22.htm>> (access: October 10th, 2012).

initially an administrative or civil process, family reunion gradually ends up being discussed by the British legislature at the same time as criminal issues, thus leading to a shift in its approach. There seems to be an implied presumption from the legislator that any DNA test is likely to fail because there is a good chance that the applicant is a fraudster. And if the DNA test does not fail and parenthood is established, financial hurdles are placed over the applicant's path to reduce his chances of family reunion.

In a consultation published in July 2011, the UK Border Agency announced that the government was considering reforming the Immigration Rules in order to “strike a proper balance between the individual’s right to respect for family life and the broader public interest” (paras 4 & 7). This followed revelations that the criteria set for the interpretation of article 8 had created “a ‘loophole’ which could allow thousands of asylum seekers” to bring their families into the United Kingdom and that the United Kingdom had been unable “to deport more than 200 Somali immigrants, most of them criminals, after judges in Strasbourg decided that sending them home would breach article 3 of the convention, which bans inhumane treatment” (Barrett, 2011). This very mediatic incident led once more to an unfair amalgamation between criminals (including fraudsters) and family reunion applicants of good faith. The UK Border Agency implies that the United Kingdom has become too lenient in allowing family reunion, that the “broader public interest” of the country is not currently protected but needs to become a priority again.

Likewise, in a much-criticised speech nicknamed Catgate and made in October 2011, current Home Secretary Theresa May also talked about the conservative government’s intention to reform the Immigration Rules. As an example of abusive family reunion applications, she referred to an unauthorised immigrant who was granted leave to stay in the United Kingdom in order to avoid being separated from his pet cat (Wagner, 2011). The pet cat would have been his sole family. Unfortunately for the British authorities, the story turned out to be vastly exaggerated. Of course, such stories are likely to be covered by the media but should not be seen as reflecting the authorities’ general approach to family reunion.

Another aspect of the current conservative government's immigration has been criticised, not so much for the financial changes brought but for the way in which the government tried to overstep the Parliament. In June 2012 the Home Office announced that from July:

A major overhaul of family migration will help stop foreign criminals hiding behind human rights laws to dodge deportation and ensure only migrants who can pay their way are allowed to come to the UK. [...] only those earning at least £18,600 will be able to bring in a spouse or partner

from outside Europe. Applicants lacking the financial support or language skills they need to play a full part in British life - without becoming a burden on the taxpayer - will be refused entry.³⁸

The requirement of language skills is essential for integration of the migrant in the host country. Likewise the fact of ensuring that family reunion applicants will not rely on the host country's social security and benefits system is not shocking as article 8 allows for the Member States to take account of the "economic well-being of the [relevant prospective host] country." However the Home Secretary suffered a severe defeat when the Supreme Court handed down a landmark decision, *Alvi v. Secretary of State for the Home Department*,³⁹ on 18th July 2012. It is not so much the financial constraints imposed on the immigrants which were the focus of the higher judges but the way by which the changes were brought. Indeed the Home Office introduced the reform through instructions or guidance rather than in the Immigration Rules themselves and this was struck down by the Supreme Court.

Unlike France, it seems that England and Wales never replied to the consultation launched by the European Commission in 2011. Because the United Kingdom failed to sign the 2003 Directive, it probably does not feel concerned by its future evolution. However it is bound by article 8 of the ECHR and the United Kingdom's thoughts on how to tackle issues such as fraud would have provided interesting evidence.

III. APPROACH OF NATIONAL COURTS TO FAMILY REUNION

Under article 35(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4th November 1950 all "domestic remedies" (which means litigation before national courts) must be exhausted before a case goes to the European courts.⁴⁰ European court judges only deal with a few cases each year which raise major legal issues, unlike national judges who are involved daily with a wide range of cases. Unlike European judges who intervene as a last resort, national judges are those who find themselves face to face with applicants to family reunion whose application has been dismissed by the authorities and who see their last hope in the judicial system. For similar reasons, i.e. the specificity of the legal issues they deal with and the remoteness

38 Home Office, 11/6/2012. Radical immigration changes to reform family visas. <<http://www.homeoffice.gov.uk/media-centre/news/migration-changes>>.

39 [2012] UKSC 33.

40 Council of Europe (CETS/005) of 4/11/1950. Convention for the Protection of Human Rights and Fundamental Freedoms, <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>>.

between the applicant and the judge, caselaw from England's Supreme Court and France's *Conseil d'Etat* will not be discussed in order to concentrate on how national courts resolve ordinary applications for family reunion. The idea is to compare the criteria these courts apply when dealing with an application made under article 8 and to see whether any express or implied references are made to crimmigration.

The difference between common law countries (such as England and Wales) and civil law ones (such as France) could potentially have repercussions on the way an application for family reunion is dealt with. It may also have repercussions on the way the decisions are drafted. Common law judgments “extensively expose the facts [...], and decide (if not create) the specific legal rule relevant to the present facts. Civil law decisions first identify the legal principles that might be relevant, then verify if the facts support their application [...]” (Tetley 1999, p.599). This means that the lay person will usually find it easier to understand the grounds on which the common law judge reached his decision than the civil law judge.

First and foremost, in France and England and Wales, the courts which have jurisdiction to hear applications are civil or administrative courts as opposed to criminal courts. Therefore the judges do not have jurisdiction to qualify – and punish – a possible criminal fraud.

French administrative courts (*Tribunal Administratif* in first instance, *Cour Administrative d'Appel* on appeal and *Conseil d'Etat* or Supreme Court at the top of the judicial hierarchy) have jurisdiction to hear disputes between an individual and the administration such as proceedings issued against the dismissal of an application for family reunion.

In England and Wales, the courts or more precisely tribunals in charge of dealing with immigration litigation recently changed. From the 15th February 2010, the work in the former Asylum and Immigration Tribunal (AIT) was transferred to a two-tier tribunal structure, created under the Tribunals, Courts and Enforcement Act 2007. This new system may be a way for the government to limit the number of cases which will give rise to review from a higher court. Higher courts have a substantial backlog and the underlying idea of the reform might be to try and ensure that most immigration litigation will be resolved within the (lower) tribunals system.

In France, although attention will be focused on first instance or appeal decisions, which represent the bulk of the French courts' workload, the landmark case brought by GISTI in which judgment was handed down on the 8th December 1978 by the *Conseil d'Etat* must be mentioned. The French supreme court annulled a decree passed on 10th November 1977 which suspended, for three years, the entry of a foreign individual's family members into France, unless they relinquished their right to work there. It held that this decree contravened a “general principle of the law” (or *principe général du*

droit) whereby “foreigners who reside regularly in France have, like any national, the right to lead a normal family life” including the right to work (GISTI 2012). The right to the respect of one's family life was thus emphasised and implied the right for both spouses to work. This precedent which has not yet been overruled is all the more important in that it implies that authorised immigrants and the host country's nationals should be treated equally.

Regarding the French cases all cases were found on the *Conseil d'Etat's* website (<<http://arianeinternet.conseil-etat.fr/arianeinternet/>>), save for 11BX00126 which was found on <www.juricaf.org>, an official website recording all francophone higher court decisions. All French to English translations are the author's own.

Regarding the cases from England and Wales, all decisions came from the British and Irish Legal Information Institute's website <www.bailii.org>, save for [2009] UKAIT 00052 which came from the UN Refugee Agency's website <www.unhcr.org>. Regarding the methodology we merely entered into the search engine the words *regroupement familial* (for France) and “family reunion” (for England and Wales). No other criteria applied as we wanted our sample search to be as representative and as accurate as possible.

In all French cases, the appeal lodged by the applicant to family reunion in France was dismissed. The appeal was granted in one case. In the dismissal decisions, the Courts made a strict application of the criteria set out in article L. 411-1 of the CESEDA to justify why the applicant or appellant should not be entitled to family reunion. In 11DA01020⁴¹ the applicant to family reunion (whose father and sisters lived in France) did not prove that he had lived in France for a continuous period of time and that he did not have family in his native country. In 09PA05147⁴² the court held that the applicant to family reunion was divorced from her alleged spouse (the sponsor living in the host country), that her former husband could look after their child and that she herself had

41 Douai administrative court of appeals, N° 11DA01020, 1st chamber, 24/11/2011 - “If Mr. A argues that the center of his private interests and family is in France where his two sisters and his father lawfully reside, he does not establish that he would be devoid of any tie in Algeria where his mother and his other brothers live; that if he alleges that he entered French territory in 2004, he produces no evidence to establish that he would have lived here between 2004 and 2011; therefore the argument whereby the disputed decision would be in breach of [...] article 8 of the ECHR must be dismissed.”

42 Paris administrative court of appeals, N° 09PA05147, 7th chamber, 11/3/2011 - “It is clear from the evidence adduced that Mrs. (Wife) has only resided in France since late 2003; that the community of life with her husband stopped; that at the date of the contested decision, nothing precluded her husband from exercising parental authority over his son, respond to his needs and visit her in her country of origin; that she is not without ties in that country where her eldest daughter lives and where she herself lived until she was 33; that as a result, the refusal [to grant family reunion] dated 27th January 2009 has not caused Mrs (Wife)'s right to the respect of her and family life a disproportionate interference with the purpose for which it was taken; thus, this decision has not overlooked the provisions of article 8 of the European Convention on Human Rights [...].”

family in her native country with whom she could be reunited over there. In 10PA00164⁴³ the facts were very similar.

The legal (as opposed to factual) grounds on which the above decisions rely are simple. The courts held that in view of the evidence adduced, the French authorities' decision not to grant the applicants the right to family reunion did not cause their "right to the respect of [their] family life a disproportionate interference with the purpose for which it was taken." The right to family reunion is qualified as opposed to absolute which means that it can be limited. However any interference must be proportionate in order to protect a "democratic society" against amongst other things "disorder or crime". For French courts a balance must be struck between the interests of the individuals concerned and those of society which must be protected against excessive authorised or unauthorised immigration.

Conversely, in 11BX00126⁴⁴ the appellate judges went one step further than the statutory provisions to overturn a refusal to grant family reunion. Here, the Congolese appellant was married to someone who had a long-term residence permit and a "steady job" with whom she first had a little girl. At the time of the contested decision, she was expecting twins. Although, given the circumstances of the case, she was now entitled to family reunion, she was not when the application for family reunion was initially made. A strict application of article L. 411-1 *et seq* of the CESEDA would have required her to go back to Congo and re-lodge a fresh application from there which would have subsequently been granted. However, in view of the particular circumstances of the case and of the consequences which her return would have had on her family life the appeal judges held that the "contested decision caused Mr and Mrs X's right to respect for their

43 Paris administrative court of appeals, N° 10PA00164, 7th chamber, 11/3/2011 - "If Mrs A claims to have all her ties, be they cultural, personal or professional in France and in various countries of Europe and to be fully integrated into French society, as evidenced by her proficiency in French, the fact that she was married to a French national and that she holds a long term work contract, it appears from the evidence that when the contested decision was taken, she was divorced, was not in charge of a family on French territory; that contrary to her allegations, Mrs. A, who came into France in 2004 at the age of 26, does not demonstrate that she no longer has family ties in Morocco and only adduces copies of French or Spanish residence permits for some of her brothers and sisters; that as a result, the refusal decision of 15th April 2009 has not caused to Mrs. A' right to the respect of her private and family life a disproportionate interference with the purpose for which it was taken; thus, this decision has not overlooked the provisions of article 8 of the ECHR [...]."

44 Bordeaux administrative court of appeals, 1st chamber, 11BX00126, 30/6/2011 - "It appears from the evidence that Mrs X, a Congolese national, came to France in June 2007, with a short stay visa in order to live with Mr X Brazzaville whom she married on 9th September 2006; that he has lawfully lived in France since 1987, has held a residence permit since 2003 and has a steady job; that Mrs X gave birth to a daughter in France on 25th November 2007; that at the date of the decision of 19th September 2008, Mrs X had been pregnant with twins for a few weeks; thus, in the circumstances of the case, given the implications which the fact for Mrs X to return to Congo with a view to apply for family reunion would have on the balance of the family, the Administrative Court rightfully held that the contested decision caused Mr and Mrs X's right to respect for their private and family life a disproportionate interference with the purposes for which it was taken and that it was in breach of the provisions of article 8 [...]."

private and family life a disproportionate interference with the purposes for which it was taken.” This decision is particularly interesting in that it shows that despite the recent crackdown on immigration and the somewhat ambiguous wording of article 8 and the 2003 Directive, French judges are happy to overturn an administrative decision – even if it means going beyond the original intentions of the legislator – when the conditions of article 8 are obviously fulfilled. This decision is very much in tune with the 1978 GISTI precedent.

In England and Wales, the current criteria applied by the courts in relation to article 8 claims was set out in [2007] 2 WLR 581 in which the then Law Lords (the predecessors of the Supreme Court) held that the “ultimate question” is “whether the refusal of leave to enter or remain [...] prejudices the family life [or private life] of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8” without having to wonder “whether the case meets a test of exceptionality.” In [2010] UKUT 379 (IAC) and [2009] UKAIT 00052, the application or appeal was dismissed as opposed to [2011] UKUT 00246 (IAC) and [2007] EWCA Civ 587.

In [2007] EWCA Civ 587⁴⁵ the Court of Appeal remitted the case to the Asylum and Immigration Tribunal in view of the prior “material errors of law in the way in which the AIT [first] considered the article 3 claim, which may also impact on the article 8 claim.” It seems that the Asylum and Immigration Tribunal has since handed down its decision in which the appellant won a “key victory” in summer 2011 when she was granted leave to stay in England and her three children permission to come on article 8 grounds.

45 Court of Appeal (civil division) on appeal from the Asylum and Immigration, CN (Burundi) Tribunal, [2007] EWCA Civ 587, 19/6/2007 - “(1) It is well established that there may be circumstances in which it would not be possible for the Secretary of State to remove a foreign national to his home country where he would be at a high and increased risk of committing suicide without contravening that person's human rights, in particular the rights safeguarded by articles 3 and 8 [...]. (6) The appellant left Burundi in the company of his mother in 1994 when he was aged 10 or 11. They feared persecution from the Tutsi who had murdered his Hutu father because they wanted to take his cattle [...]. (7) The AIT noted the history of the appellant's times in hospital under the Mental Health Act. He was detained from 30 March 2004 until 22 April 2004, from 27 April 2004 until 3 June 2004 and from sometime in May 2005 until 2 June 2005. The diagnosis is one of paranoid schizophrenia [...]. (33) It follows from what I have said that, having identified material errors of law in the way in which the AIT considered the article 3 claim, which may also impact on the article 8 claim, I would allow this appeal and remit the case to the AIT for a full rehearing on reconsideration [...].”

In [2011] UKUT 00246 (IAC)⁴⁶ the Upper Tribunal held that the Immigration Judge had “erred in law” in failing to properly consider “proportionality” in respect of article 8. The idea was to see whether the consequences of the dismissal of his application for family reunion on the applicant's or appellant's life were proportionate to the “legitimate aims of immigration control.” Here it was held that the people concerned were a family and that, thanks to their savings and not only their income, they could maintain themselves in England. This decision is particularly interesting in that it implies that the “economic well-being of the country” is something to take into account on a short term basis as opposed to a long term one. The applicants to family reunion would need to have some money to settle down without necessarily having any long term prospect of getting a job.

[2010] UKUT 379 (IAC) and [2009] UKAIT 00052 in which the applications to family reunion were dismissed show that the courts strike a balance between the right to a family life and the need to enforce the immigration rules and protect the borders against “fake” applications for family reunion. In [2010] UKUT 379 (IAC)⁴⁷ the applicant was a lady who arrived unauthorised in the United Kingdom and married an unemployed person. Her children had remained in her native country and the dismissal of her claim would not be “[dis]proportionate to the legitimate aims of immigration control” and it would give her a chance to be reunited to her children.

46 Upper Tribunal (Immigration and Asylum Chamber), Jahangara Begum [2011] UKUT 00246 (IAC), 14/6/2011 (Bradford) - “(2) The first Appellant is the wife of the Sponsor [...] and mother of the second, third, fourth and fifth Appellants who are all citizens of Bangladesh [...]. They applied to come to the UK as the spouse and children of the Sponsor [...] but were refused on maintenance grounds on 3 May 2010. The Sponsor is working but his earnings are not adequate to meet the requirements of the Immigration Rules [...]. (13) This application [for family reunion] was made under paragraph 281 of HC 395 [...] : “The requirements [for family reunion] [...] are that [...] the parties will be able to maintain themselves and any dependants adequately without recourse to public funds” [...]. (20) There is no requirement in the Immigration Rules that the maintenance provision can only be satisfied by the Sponsor’s income. Savings have always been a relevant factor [...]. (27) Immigration Judge Baker said that article 8 was not engaged. He gave no reasons for so finding and it is plainly wrong. This is a subsisting family unit who clearly enjoy family together. The Immigration Judge erred in law in failing to conduct a proper exercise in determining proportionality in respect of article 8 [...]. (30) his decision is set aside [...].”

47 Upper Tribunal (Immigration and Asylum Chamber), LM, [2010] UKUT 379 (IAC), 30/6/2010 (Field House) - “(1) On 14 October 2008 the SSHD refused the appellant leave to remain in the United Kingdom as the spouse of Paul Meade. She is a Jamaican national [...]. her appeal was limited to a claim under article 8. The Immigration Judge dismissed the appeal [...]. (23) The appellant is an overstayer who failed to take any steps to regularise her position between June 2002 and December 2004 [...]. (24) Although Mr Meade has lived in the United Kingdom since at least 1991, he has no children in this country and, as a result of his medical problems, no work. We have seen no evidence of deep or enduring ties in this country [...]. (25) We return to the central question [...] namely whether the removal of the appellant [...] would be proportionate to the legitimate aims of immigration control [...]. Her removal would disrupt the life of her husband if he were to follow her. Its impact on the appellant herself would, unusually, be to reunite her with her three children from whom she has been separated since 2001 and who she desperately misses [...]. She married in full knowledge that she had no right to be in the United Kingdom and her husband had no reason to suppose that she did [...]. (26) we are satisfied that the appellant’s removal from the United Kingdom is proportionate to the legitimate aims of immigration control. In the circumstances [...] we dismiss the appeal.”

In [2009] UKAIT 00052⁴⁸ the applicant and the prospective sponsor were married for a few weeks before she was notified of the dismissal of her application for family reunion. In order to confirm the administration's decision, the judge held that "the couple ha[d] been unable to satisfy the requirements of the Immigration Rules concerning maintenance." More precisely he held that although the existence of a real family life was established, "interference" with article 8 was "necessary in the interests of the maintenance of effective immigration control as well as to the economic wellbeing of the country". Here the judge interpreted article 8's "economic" clause as meaning that national interests should come before the right to family reunion if there is a risk that the immigrants, once authorised to live in a European country, will become financially reliant on public money.

A number of common conclusions can be drawn from the above cases.

Firstly they can only be tentative as they are drawn from a limited number of cases.

Secondly the cultural differences between common law and civil law courts are not obviously reflected in the way decisions are drafted by the relevant judges. The wording itself and the criteria applied (proportionality) are fairly similar, not only through the wide wording of article 8 of the ECHR but also the more precise wording of the 2003 Directive out of which England and Wales opted. By refusing until now to ratify the 2003 Directive, England and Wales have not adopted distinctively remote criteria. The fact that the United Kingdom is not a signatory to the Schengen agreement (which

48 Asylum and Immigration Tribunal, SL & HA, CG [2009] UKAIT 00052, 4/8/2009 (Birmingham) - "(1) The [...] appellant is a citizen of Somalia and [...] appealed to an Immigration Judge against the Entry Clearance Officer's decision of 15 December 2008 refusing to grant her [...] leave to enter the United Kingdom as [...] the spouse [...] of the sponsor Isa Fos Sharif, a person present and settled in the United Kingdom [...]. (2) The Immigration Judge accepted that the appellant and the sponsor were in a subsisting relationship. She found, however, that the appellant could not satisfy the requirements of the Immigration Rules in respect of maintenance [...]. (43) I accept that there is family life between the appellant and the sponsor [...]. they have spent some three and a half weeks in each other's company after the marriage. (44) [...] refusal of entry clearance has a significant effect on their family life. The next question is whether there is such interference as potentially to engage the operation of article 8. In this regard, clearly the extent of family life enjoyed by the couple when physically together cannot be enjoyed by being kept apart, but the family life that has very largely existed during the time of their relationship could continue to be enjoyed since they could still remain in contact by means of letters, photographs and telephone calls [...]. The issue then arises as to whether it is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. In this regard I find such interference [with article 8] to be necessary in the interests of the maintenance of effective immigration control as well as to the economic wellbeing of the country, and in this regard it is particularly important to note that the couple have been unable to satisfy the requirements of the Immigration Rules concerning maintenance, and therefore there would be a clear charge on public funds were the two appellants and the first appellant's child to join the sponsor in the UK [...]. (46) I therefore conclude that the appeal under article 8 is dismissed."

shows its willingness to strictly control its borders) is not reflected either in the way the tribunals' decisions are drafted.

Thirdly if judges seem to protect the right to family reunion by making a strict application of article 8 and of the essence of the 2003 Directive (even for the United Kingdom which did not ratify it), decisions such as French 11BX00126 or British [2011] UKUT 00246 (IAC) and [2007] EWCA Civ 587 show that judges do not hesitate to remind people that this right can be restricted.

Last but not least none of the above decisions in which the claim or appeal was dismissed even remotely implies that the family reunion applicant might be a fraudster and (or) a criminal. But as mentioned above, this does not fall within the scope of the courts which decisions were considered. However and despite the suspicions which a lower national court may have had when dismissing an application for family reunion, judges make a point of making a strict application of the spirit of article 8 and of the 2003 Directive.

IV. CONCLUSIONS

Juliet Stumpf said:

Both criminal and immigration law are, at their core, systems of inclusion and exclusion. They are similarly designed to determine whether and how to include individuals as members of society or exclude them from it. Both create insiders and outsiders. Both are designed to create distinct categories of people—innocent versus guilty, admitted versus excluded or, as some say, “legal” versus “illegal.” Viewed in that light, perhaps it is not surprising that these two areas of law have become entwined. (2007, p. 380)

However, one should bear in mind that unlike criminal law which aims at punishing someone who has committed an offence, immigration law is a form of civil or administrative law.

Family reunion is a right protected by article 8 of the ECHR. It is not subject to the authorities' discretionary power. If exercised in an appropriate and lawful manner, the right to family reunion should only be restricted if there is a prevailing national interest and for the countries which signed the 2003 Directive, if its conditions are fulfilled. Of course, if someone fraudulently purports to exercise the right to family reunion in order

to be admitted into a European Member State where he would not otherwise be allowed, he should not be referred to as a family reunion applicant, but as a fraudster or criminal who will be submitted to whatever penalty or criminal punishment is applicable under the relevant country's laws.

Barrett said: "Article 8 is increasingly being used by foreign criminals and illegal immigrants to dodge deportation" (2011). We saw above that due to the current lack of statistics, the extent of this phenomenon is not clearly determined, nor are its causes. We can guess that the economic circumstances which see poor countries getting poorer, as well as the attractiveness of the social security systems applicable in France and the United Kingdom, make these countries attractive to fraudsters or criminals. DNA tests were introduced in the United Kingdom, and only very briefly in France under former President Sarkozy, to investigate possible frauds and this cannot be subject to criticism, so long as those tests are carried out on a case by case basis, and not randomly.

More information might be disclosed by the European Commission on the existence and extent of fraud or criminality further to its 2011 Green Paper on the 2003 Directive. Even if it seems that the United Kingdom, which is not a signatory to the Directive, did not take part in the consultation, there does not appear to be major differences between the problems which the French and British authorities have to solve, or indeed the way they are tackled.

The generalisation of immigration as a single category (including legal and illegal immigrants) should be discouraged. It tends to boost xenophobia and oppose European nationals on the one hand, to aliens on the other hand. Likewise and for the same reasons, a systematic criminalisation of migrants should not be made. Indeed according to article 6 paragraph 2 of the ECHR: "Everyone [...] shall be presumed innocent until proved guilty according to law".

Regarding family reunion litigation, the courts which have jurisdiction make a strict application of article 8 of the ECHR, and of the 2003 Directive whenever it is applicable. In the sample of cases which were considered above, and mostly in those in which the family applicant's claim was rejected, there was no express or implied reference to a fraud, or an offence, which could have been committed. Judges from France or England and Wales are keen to apply the letter of article 8, weighing the applicant's interests against the nation's, and to ensure compliance with the 2003 Directive when applicable, within their jurisdictional powers.

There is no doubt that, mostly in times of economic difficulties, and despite their different cultures, political regimes and legal systems, France and the United Kingdom have toughened up their immigration policies in general. There is also no doubt that democracies should track down fraudsters and criminals, prevent entry into their countries and if need be, deport them and (or) punish them.

To address the question raised in the title of this study, the criminalisation of family reunion applicants is indeed a fact and not a fiction, because there is now evidence of a number of frauds or criminal offences related to family reunion applications. And unfortunately there is also evidence that some people, including the media, tend to treat all immigrants in the same way.

However, it is essential that the distinction between legal (or authorised) and illegal (or unauthorised) immigrants remains and that family reunion applicants are not automatically perceived as criminals. Of course, the role of the European courts is essential to safeguard this distinction but in our view, the role of the lower national judges, who deal with numerous applications for family reunion on a daily basis, is even more essential.

We saw that there are strong similarities between the criteria applied by French courts (“disproportionate interference with the purpose for which [the decision] was taken”) and the courts of England and Wales (the “removal from the United Kingdom is proportionate to the legitimate aims of immigration control”) when dealing with applications against a refusal to grant family reunion.

In 2009 the then conservative French government and the then New Labour British government published a joint declaration affirming “their willingness to [...] promote, according to the European Pact on Immigration and Asylum, a European policy of firmness and solidarity based on the [...] undertaking by the states of the European Union to fight against illegal immigration [...]”⁴⁹ The focus was then firmly on unauthorised migration. Since then political governance has changed hands.

In France and although it is still early days, socialist President François Hollande has not yet expressed the wish to reform his predecessor's immigration policy. In the United Kingdom Conservative Prime Minister David Cameron announced two years ago his intention to scrap the Human Rights Act 1998 which incorporated article 8 into national law and replace it with a Bill of Rights and Duties. Liberal Deputy Prime Minister Nick Clegg is openly opposed to that project. A United Kingdom Bill of Rights Commission set up in March 2011 launched a public consultation. Its report was published in December 2012.⁵⁰ It seems that the reform might not go ahead as two of the commission members have openly objected to the proposed Bill of Rights “for fear it would be used to lever the UK out of the European court of human rights” (Bowcott

49 Franco-British Declaration on immigration of July 2009. <<http://ukinfrance.fco.gov.uk/en/about-us/working-with-france/justice-home-affairs/migration/>> (access: July, 5th, 2012).

50 Commission on a Bill of Rights. December 2012. A UK Bill of Rights? The Choice Before Us. <<http://www.justice.gov.uk/about/cbr>> (access: January, 9th, 2013).

2012). Such a reform might have an adverse effect on authorised migration in general and the right to family reunion in particular.

The role of national judges will continue to be essential to ensure a fair application of article 8.

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