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The Child Is Not the Marriage: A.A. v. the Netherlands and Individual Assessment in the Application of Article 4(4) of Directive 2003/86

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A.A. v. the Netherlands sits at an unusual intersection of Strasbourg family-life doctrine and EU family-reunification law. The European Court of Human Rights unanimously found no violation of Article 8 after the Netherlands refused a Yemeni refugee's request to bring five children born of his second and third polygamous marriages to the Netherlands. The result turned on a wide margin of appreciation, the European consensus against polygamy, and the concrete circumstances of the children living in Türkiye (paras. 53-73).

The domestic refusal was itself grounded in EU law. It was expressly based on Article 4(4) of Directive 2003/86/EC, as implemented in Dutch law (A.A., paras. 10 and 21). Where the sponsor already has a spouse living with him in the territory of a Member State, that provision provides that the Member State "shall not" authorise family reunification with a further spouse, whereas it only "may limit" reunification with the minor children of that further spouse. The Directive thus treats the further spouse and her children as legally distinct: the status of the additional marriage does not, in EU law, settle the status of the child.

The argument of this post is a limited one. The judgment uses the polygamous character of the marriages to set a wide margin of appreciation (paras. 60-65), but its finding of no violation rests on child-specific findings about the children's situation in Türkiye (paras. 68-71). When a Member State applies Article 4(4), Articles 5(5) and 17 of the Directive, read with Articles 7 and 24 of the Charter, require a child-specific assessment. The outcome in A.A. is defensible on its particular facts, but the case should not become a shortcut around that assessment.

The claim, the arguments and the ruling

The applicant before the Strasbourg Court was the father; the five children were not applicants. He complained that the refusal of family reunification violated *his* right to respect for family life under Article 8 (A.A., para. 32). He argued that his refugee status narrowed the State's margin of appreciation, that polygamy was lawful where the marriages had been contracted, that the Dutch authorities had failed to conduct a sufficiently individual assessment, and that the children's age, dependency and best interests favoured reunification (paras. 34-42). He also stressed that his application concerned the children, not admission of his second and third wives (see para. 18).

The Government relied on immigration control and public order. It argued for a wide margin of appreciation because polygamy is prohibited across Council of Europe States, and maintained that the domestic authorities had examined the children's actual circumstances. In particular, it pointed to schooling, housing and health care in Türkiye, the absence of proven dependence on the father beyond financial support, and the possibility of continued contact and visits (paras. 43-49).

The Court began by reiterating that, in family-reunification cases, the best interests of children must receive significant weight, although they are not a "trump card" requiring admission in every case (para. 52). It then separated family life from marital recognition. A child's bond with a parent may amount to family life even where the parents' relationship is not legally recognised, and family life therefore existed between the applicant and all five children despite the Netherlands' non-recognition of the second and third marriages (paras. 53-55).

The Court next addressed the scope of the State's margin of appreciation. Although the application concerned only the children, it considered the polygamous marriages to be "the core of this case" because they were the reason for the refusal (para. 60). It emphasised the universal prohibition of polygamy among Council of Europe Member States, the applicant's refusal to regularise his situation, and his knowledge that maintaining all three marriages would create immigration difficulties (paras. 61-65). On that basis, it afforded States a wide margin of appreciation in deciding whether to permit reunification between fathers and children born of polygamous marriages (para. 65).

The judgment then turned to the individual circumstances (paras. 66-71). The Court accepted that there were insurmountable obstacles to family life in Yemen, but noted that the children

lived with their mothers in Türkiye, held temporary residence cards and had access to education and health services (para. 68). It found no demonstrated risk of violence there, treated one child's difficulties as largely linked to language, noted the absence of ties to the Netherlands beyond the father, and found no proven dependence beyond financial support (paras. 68-71). On that factual basis, it concluded that the domestic authorities had struck a fair balance between the interests of the applicant and those of the State "as regards the applicant's right to respect for his family life", with immigration control and public order outweighing the applicant's family-life interest (paras. 72-73).

Two layers in the Court's reasoning

Because the right adjudicated was the father's Article 8 right, the children's interests entered the judgment as part of the proportionality balance rather than as separate claims. Fair criticism of the judgment has to start from that framing. The Court was not asked to decide five separate applications, so the pertinent question concerns the father's positive-obligation claim: did the Court allow the legal disapproval of his marital arrangement to do too much work before testing the circumstances of the children themselves?

Read closely, the judgment proceeds in two stages. In paragraphs 60-65, the polygamous character of the marriages determines the breadth of the margin of appreciation. In paragraphs 66-71, the Court examines where the children live, whether they depend on the father, what alternatives exist for family life and whether any of them is particularly vulnerable. The ultimate finding of no violation rests substantially on this second, individualised stage. When a Member State applies Article 4(4), Articles 5(5) and 17 of the Directive, read with Articles 7 and 24 of the Charter, make that stage mandatory; the public-order assessment cannot replace it.

EU law does not turn Article 4(4) into an automatic veto

Directive 2003/86 makes family reunification the rule for the nuclear family, while Article 4(4) creates a specific derogation for polygamous households. Its wording distinguishes a mandatory prohibition (the further spouse) from a discretionary power (that spouse's minor children). The Directive therefore leaves Member States discretion in relation to those children rather than prescribing their exclusion.

That discretion is constrained by the rest of the Directive and the Charter. Article 5(5) requires Member States to have due regard to the best interests of minor children, while Article 17 requires an individual assessment of the nature and solidity of family relationships and relevant ties. The Court of Justice has long treated those safeguards as legally meaningful. In Parliament v Council (C-540/03), it held that the Directive must be read consistently with respect for family life and the child's best interests (paras. 52-60). In *O and S (Joined Cases C-356/11 and C-357/11)*, the Court required a "balanced and reasonable assessment of all the interests in play", with particular account taken of the children concerned (paras. 79-81).

The point became still clearer in *E. v Staatssecretaris van Veiligheid en Justitie (C-635/17)*. The Court of Justice stressed that Directive 2003/86 must be applied in the light of Articles 7 and 24 of the Charter; Article 17 requires case-by-case examination; and the age, circumstances and dependency of children may determine how intensive that examination must be (paras. 54-59). Read together, paragraphs 54-59 require an individual examination that takes account of the child's age, circumstances and dependency, and they exclude any single consideration becoming automatically decisive.

The Dutch Administrative Jurisdiction Division itself treated a decision under Article 4(4) as requiring an individualised assessment in the light of Article 5(5), Article 17 and Articles 7 and 24 of the Charter (A.A., para. 21). The Netherlands could legitimately attach substantial weight to polygamy, but that factor had to remain one consideration within the assessment rather than becoming a near-dispositive presumption against children born of later marriages.

Why a child-specific analysis need not change the outcome

A different analytical structure would not necessarily have produced a different result in A.A. This is an important limit to the argument, and a rigorous criticism of the judgment should respect it.

The facts recorded by the Court were comparatively unfavourable to the applicant. The children had never lived in the Netherlands and had no ties there apart from their father (para. 70). They were living with their mothers in Türkiye and had access to school and health care (para. 68). The father remained in contact with them, could visit, and had not established a form of dependency beyond financial support (para. 71). Moreover, the Court noted that the

applicant’s second wife later obtained asylum in the Netherlands and came there with her children, although that development occurred after the domestic refusal had become final and did not alter the claim before the Court (para. 56, read with para. 24).

Against those facts, a child-focused proportionality analysis could still end with no violation. The legal significance of the distinction lies in what a Member State must ask before reaching that result. The State may treat the sponsor’s maintenance of a polygamous arrangement as relevant to public order, but it should still establish, for each affected child, four things: the child’s situation, the degree of dependency, the practical alternatives for family life, and any particular vulnerability. The Court’s reasoning in paragraphs 68-71 can be read as covering each of these elements. A conclusion reached after that inquiry is materially different from a conclusion in which birth within a disfavoured marital form effectively settles the case, and only the former can claim support from A.A.

The harder case A.A. leaves open

A.A. is therefore most important for the cases it does not decide. Imagine the same legal structure with materially different facts: all wives and children remain in a conflict zone or in a third country without secure status; a child has a serious medical condition; the sponsor is the only realistic caregiver; regular contact and visits are impossible; or there is no safe country in which family life can realistically continue. In such a case, the language of a “wide margin of appreciation” cannot itself answer the proportionality question.

EU law makes this especially clear. Article 4(4) permits Member States to limit reunification of the children of a further spouse and does not require them to do so. Articles 5(5) and 17, read with Articles 7 and 24 of the Charter, require the discretion to remain responsive to individual circumstances. The more severe the child’s vulnerability and the less realistic the alternative to reunification, the harder it becomes to allow the public-order objection to the adult marriage to determine the child-related outcome.

The ECHR analysis points in the same direction. A.A. relied on the children’s situation in Türkiye, the absence of ties to the Netherlands, continued contact and limited demonstrated dependency before finding a fair balance (paras. 68-72). Those findings formed part of the Court’s justification for giving greater weight to the State’s interests in immigration control and

public order. Materially different circumstances would alter the proportionality assessment, even if the State retained a wide margin of appreciation.

A narrow reading of A.A.

A.A. should therefore be read narrowly. It confirms that Article 8 does not oblige States to recognise polygamous marriages and that States enjoy substantial room to protect public order in this field. It does not establish that the immigration consequences of a polygamous marriage can automatically be transferred to every child born within it.

For EU Member States, that limit is embedded in the structure of Directive 2003/86. The legislature used a mandatory rule for a further spouse and a discretionary rule for the children of that spouse. Articles 5(5) and 17, read with Articles 7 and 24 of the Charter and the Court of Justice's case law, require that discretion to be exercised through an individual, balanced assessment. For national authorities implementing EU family-reunification law, Strasbourg's wide margin of appreciation cannot displace those parallel EU-law obligations.

The strongest criticism of A.A. concerns paragraph 65. Its broad language on polygamy could be read more widely than the fact-sensitive reasoning that follows it, and the judgment is most defensible when its conclusion remains tied to paragraphs 68-71 and to the particular circumstances of these children.

That is the legal content behind the simpler proposition that the child is not the marriage. The father's marital choices may legitimately affect the proportionality balance. They should not replace it.

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