DNA Testing for Family Reunification in Europe: An Exceptional Resource?

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Abstract
In Europe, several countries are adopting more stringent immigration policies to restrict the number of immigrants crossing their borders. This has affected immigration for the purpose of work and especially of family reunification, where strict subjective and material conditions control its exercise. One of these involves testing the existence of kinship ties. Exceptionally, in cases of doubt or insufficient evidence, DNA testing is allowed. This article offers a critical analysis of the widespread use of genetic testing in family reunification procedures in European countries, especially Spain. On the one hand, its practice has been regulated in the European Aliens Act and on the other hand, particularly in the Spanish case, its possible incompatibility with the protection and guarantees of fundamental rights demanded at international and national levels is highlighted.

Keywords: 1. DNA tests, 2. immigrants, 3. family reunification, 4. Europe, 5. Spain.

Las pruebas de ADN y la reagrupación familiar en Europa: ¿Un recurso excepcional?

Resumen
En Europa, varios países han implementado políticas migratorias más restrictivas para gestionar los flujos migratorios que cruzan sus fronteras. Esto ha afectado la inmigración con fines de trabajo y, especialmente, de reagrupación familiar, procedimiento para el que se exigen estrictos requisitos subjetivos y materiales. Uno de ellos es la prueba de la existencia de parentesco. Excepcionalmente, en casos de duda o documentación insuficiente, se admite investigar el vínculo familiar utilizando pruebas de ADN. Este artículo ofrece un análisis crítico sobre la inclusión generalizada de las pruebas genéticas en los procedimientos de reagrupación familiar en Europa y en España en particular. Por un lado, se plantea la regulación de su práctica en la normatividad de extranjería e inmigración europea y, por otro, se reflexiona –especialmente en el caso español– sobre su posible incompatibilidad con la protección y garantías exigidas por los derechos fundamentales.

Palabras clave: 1. pruebas de ADN, 2. inmigrantes, 3. reagrupación familiar, 4. Europa, 5. España.

Introduction[1]

Since the mid-1990s, parallel to the restriction or closure of the ordinary means of entry for new immigrants, family reunification, together with work, has become one of the quantitatively most important sources of new immigration in Europe (Kofman, 2009:244-245) and more recently in Spain. Family reunification is a mechanism for immigrants already residing in national territory to be able to reunite with their relatives in order to exercise their right to family life and thereby contribute to their social and economic integration into the host society (Solanes, 2008a:147 and ff). The fact that it is a mechanism for legal entry, a fundamental right and means of integration justifies the legal will to configure this in its minimum expression and promote a somewhat negative perception through the use of tendentious labels such as drag, suffered or false immigration (De Lucas, 2006:45; Solanes, 2008a:144-145; Wihtol, 2006:261-266). Among the requirements linked to the duration of residence and residence permits, the availability of sufficient financial capacity and housing capacity and the procedural phases included in the family reunification regime, proof of kinship links, in the absence of quotas or work contingencies, are crucial to determining this right in most European Union states. Although this requirement might appear to be a simple test, since the basis of family reunification and the family is the existence of family links, this does not necessarily make it easy. Indeed, family links are usually accredited through the documents required by the authorities concerned who determine whether or not to grant appeals for family reunification. However, there are exceptions to this general rule, sometimes imposed by the legislators and at other times, justified in the event of doubt, which are solved by proving the authenticity of

[1] This paper is part of the Consolidar Ingenio 2008-00007 project, "Time of Rights" and the "Immigration, Integration and Public Policy: Rights Guarantees and their Evaluation" DER 2009-10869 project, financed by the Ministry of Education. It was carried out as part of a research grant from the University Professor Training Program of the Ministry of Education 2006-2010 and the VALi+d Apostd 2011/53 post-doctoral grant from the Generalitat Valenciana.

these documents. This article reviews the practice of DNA testing in family reunification in Europe, with particular emphasis on the Spanish case. On the one hand, it will provide a comparative chart of European countries that have included these practices with the aim of analyzing their extremes. And, on the other hand, it will question the admissibility of resorting to DNA testing in this procedure, which has often been used in paternity tests and criminal investigation in penal trials (O'Callaghan, 1994; López, 2004:221). This is basically because if the scientific use of DNA is generalized and extended, then the problems that occur in relation to advances in genetic and legal issues will also increase. Therefore, its extension to other spheres including migration, in keeping with the moral obligations of the states regarding family reunification and asylum (Carens, 2003:96; Solanes, 2010) require maximizing the protection of the rights at stake and optimizing all due guarantees in their practice, even in exceptional cases.

Kinship Links between Immigrants and DNA Testing a Widespread "Exceptional" Practice in Europe

Genetic analysis for family immigration control is common in countries that have traditionally received immigrants or have a high presence of immigrants such as Australia, New Zealand, the United States and Canada (IOM, 2002:25). However, its expansion to the European scenario is merely further proof of the selective, restrictive openness to the migratory movements targeting fortress Europe (CEU, 2008). It is only since 2007, when the French government committed itself to the temporary and exceptional inclusion of DNA tests that the remaining countries appeared to have acquiesced, recognizing and normalizing their common practice explicitly and/or implicitly incorporated into the family reunification regime. European countries that have adopted genetic testing to prove family status in the family reunification procedure (Higgins, 2004; Labayle and Pascouau, 2007) include France, Italy, Spain, Belgium, Holland, the United Kingdom, Denmark, Germany, Finland, Norway, Sweden, Switzerland, Austria, Estonia

and Lithuania (CEC, 2008). This measure has triggered a heated debate over the existence of possibly illegal interference in the familial and personal intimacy of those subjected to these tests. This is particularly so because *Directive 2003/86/EC* of September 22, 2003 (CEU, 2003) does not say anything on the subject (Groenendijk *et al.*, 2007; IOM, 2008). In other words, it permits a broad margin of discretionality by each state when accrediting family members involved in family reunification. Article 5.2 stipulates that where convenient, in order to obtain proof of the existence of family links, member states may conduct interviews with the resident seeking reunification and members of his family or else carry out any other investigation deemed necessary. This discretionality is subtly included in article 16.4 to prevent fraud insofar as it grants the power to carry out specific inspections and controls regarding marriages, civil unions and adoptions, without mentioning biological filiation. In any case, the discretionality regarding the admission of other means of investigation deemed appropriate permits the existence of several variables of verification although preference is implicitly given to DNA tests.

The Normative Determination of DNA Tests in the European Environment

Within the normative management of family immigration, there are several countries at the European level that have explicitly adopted biological testing to control entrance into national territory for the purpose of family reunification. For example, a review of Finnish immigration law, *Finnish Aliens Act*, passed on February 22, 1991, shows that it was one of the first European countries to stipulate this practice. Its normative development was initially enshrined in section 18e 114/2000 and subsequently in sections 65 and 66 of the *Aliens Act 301/2004* and modified by section 973/2007, which admits the establishment of the authenticity of family ties through DNA analysis (MI, 2000). The Norwegian Directorate of Immigration (UDI) gives the sponsor, who is a legal resident of Finland and the relative he wishes to sponsor, the

opportunity to prove their biological relationship if this cannot be determined by any other means. In any case, it is a precondition for the analysis to be carried out with written consent and for information to be given on the consequences and risks of DNA analysis, thereby granting the freedom to submit to these tests or otherwise. The test is carried out by the National Institute of Public Health and the Department of Forensic Medicine of Helsinki University. In the event that a person has submitted false information on his family links, he is obliged to pay the state compensation for the cost of the medical test (García, 2007:74-75). The Finnish government covers the cost of the test. In the event that it is negative, the applicant is obliged to reimburse the state. In practice, the citizens most frequently required to provide DNA proof by the Finnish consular authorities are from Iraq and Somalia, although this practice has spread to Angolans and citizens of the Democratic Republic of Congo (IOM, 2002:25). However, this is not an isolated practice, since it has extended to other Scandinavian countries (Tandonnet, 2001:160-171) as in the case of Denmark, Norway and Sweden. In Norway, for example, DNA tests were used for the first time in 1999 for Somali citizens, in the event that the documentation submitted was either insufficient or contradictory. In any case, since 2001, the immigration office (UDI) has decided to request, on the basis of sections 27 and 37 of law num. 20, passed in 2007, which modifies law number 64 of 1988, the genetic accreditation of the generic mode to be charged to the "sponsor" (Stortinget, 2007). This was extended to other nationalities, particularly in the case of minors under the age of ten, if there were no other means of proving the kinship link. The examination requires a blood sample and is carried out by the Institute of Forensic Medicine of Norway, which sends the results to the UDI. Likewise, in Denmark, since 2007, a reform of the current Danish immigration law num. 1044, passed on August 6, 2007, subsequently reformed by law num. 264, passed on April 23, 2008, law num. 431, passed on June 1, 2008, law num. 485 and 486, passed in June 2008, stipulates in article 40*c) ex lege* the introduction of a DNA test for cases that cannot be documented. In

other words, only in the event that the identity documentation is insufficient or regarded as insufficiently "authentic", can immigration services require the sponsor and the person with whom he has a kinship link to submit to a DNA test (DMRIIA, 2008). The same happens in Sweden, according to Law num. 716 of the Ministry of Foreign Affairs dated September 19, 2005, according to sections 15 and 16, in the event that proof of kinship links is insufficient, a DNA analysis may be carried out by the state (MFA, 2005a). Submitting to these tests is voluntary and the cost will be reimbursed if the result is positive. In fact, the Immigration Board offers a DNA analysis, paid for by the state, for issues related to residence permits for family reunification with residents in Sweden. This occurs when the documentation accrediting kinship is insufficient for the Board to be able to reach a decision on a residence permit.

Since we are already discussing Europe, it is worth providing a brief description of the situation in Belgium, Holland Germany and Austria (Tandonet, 2001:160-171). In Holland, DNA tests were introduced on February 1, 2000 in cases where the applicants were unable to produce identification documents or family certificates. In any case, the applicants always submitted voluntarily to the tests, following the protocol stipulated in the law on aliens of September 16, 1999, passed on April 1, 2001 (LHSG, 2001). A report by the Dutch Ministry of Justice (2000-2001) stated that DNA tests had considerably reduced the number of cases of baseless applications and helped speed up decisions over applications for family reunification. Conversely, this was not the case in Belgium, where there had first been an experimental introduction, registered during the second half of 2003, after an agreement between the Ministries of Foreign Affairs and the Interior sent to the Belgian consulates and embassies by certain consulates. Tests were initially carried out in Abidjan, Addis Ababa, Islamabad, Kinshasa, Lagos, New Delhi, Beijing, Lumbubashi and Shanghai. A total of 6.86 percent of the tests carried out have proved negative. Tests in Belgium are performed by the Genetic Fingerprint Laboratory of Hospital Erasme and in the countries of origin, are organized by the diplomatic representations.

Its practice has subsequently been extended, by internal circular, to all the Belgian consular representations in third countries. This takes place, despite the fact that there is no normative measure in the last reform of the Belgian immigration law of December 15, 1980, passed on July 15, 2006 (HRB, 2006) and in a bill. The same happened in Germany; the aliens law of July 30, 2004, modified on August 19, 2007, in article 36 does not expressly mention these practices (FMI, 2004). It merely stipulates that the sponsor must provide all the necessary proof to enable his family to enter the country, without specifying which. Nevertheless, for immigrants from countries where there are no records of births or in which there are data that can easily be falsified, since 1997, using DNA tests has been a standard, voluntary procedure, especially for Turkish and Iraqi citizens, who bear the cost of these tests. Analyses are carried out by the Institute of Forensic Medicine while the German embassies in the countries of origin are responsible for taking blood samples from the alleged relatives of family reunification sponsors. The situation is quite different in Austria which, in article 29.2 of the *Federal Act Concerning Settlement and Residence in Austria* (AFMI, 2006), stipulates DNA analyses in terms of collaborating with foreigners in the family reunification procedure and in the event of insufficient documentary proof. It points out that the lack of a request for a DNA test will not be interpreted as a refusal to participate in the clarification of circumstances and will have no effect on the evaluation of the tests.

Because of its geographical proximity, Switzerland constitutes an unusual case as regards the use of DNA tests in family reunification procedures. Initially, the Swiss law on aliens of 1931 lacked a legal basis regarding this issue. There is therefore an unresolved gray area in the new law on aliens, which came into effect on January 1, 2008, since it does not clarify the issue of DNA tests although it does cite the obligation to collaborate. However, the new law on human genetic analysis, which came into effect in April 2007, expressly allows the administrative authorities to delay authorization until a genetic profile has been established if there are doubts about the relationship. The lack of this provision has not

prevented the practice of DNA testing since 2004 for administrative purposes, thereby avoiding parliamentary approval. In fact, a 2004 ruling by the Federal Migrations Office—Office Fédéral des Migrations (ODM)—stipulates the use of DNA tests carried out under the supervision of the authorities to clarify doubts about a person's origin that may not otherwise be solved. In short, genetic tests are allowed if, after an examination of the documentation and related investigations, doubts persist regarding the authenticity and accuracy of the documents. The ODM stressed the voluntary nature of the test. "It helps candidates who are unable to prove their marital status". This is a rather questionable or relative voluntariness, since if a person refuses, he runs the risk of being denied a visa if he does not manage to find any other way of proving his family links. Moreover, if a residence permit is granted in doubtful cases, the ODM expressly reserves the right to reject approval of a request for a residence permit. In any case, the conditions for the analyses to be carried out and the means of selecting the Swiss laboratories entitled to do so are stipulated in article 87 of the *Ordinance on Admission, Residence and Gainful Employment —Ordonnance relative à l'admission, au séjour et à l'exercice d'une activité lucrative (OASA)*—(SFC, 2007a), the *Directive on the Entry Procedure in case of Family Reunification—Directive sur le procédure d'entrée en cas de regroupement familial: Compétence et examen des actes de l'état civil dans certains États*—(FDJP, 2005), and the *Ordinance on DNA Profiling in Civil and Administrative* of February 14, 2007—*Ordennance sur l'établissement de profils ADN en matière civile et administrative (OACA)*—(SFC, 2007b).

Since 1991, in the Atlantic countries next to the United Kingdom, in accordance with chapter 8, section 5A, annex N, the *Immigration Directorate Instructions* allow customs officers to carry out DNA tests when those seeking admission, such as children, have kinship links with the sponsor in the United Kingdom (UKBA, 2009). Another link in using genetic testing for the relatives of those seeking asylum at the state's expense is France, undoubtedly the most emblematic case. However, the decree stipulating the methods to be used and the countries that will be subjected to

these tests in an experimental fashion if proof of marital status is insufficient has yet to be passed. In fact, the use of genetic tests in the family reunification procedure has only been authorized in the French law on aliens in a temporary, experimental fashion in certain countries of origin with serious flaws in their civil registries, expressly indicated in a decree approved following a decision made by the state council. Following a lengthy parliamentary debate, recent French legislation, in article 13 of *Law 2007-1631* of November 21, 2007 (FP, 2007), the *Sarkozy Law*, has subjected the practice of genetic testing to strict guarantees, restricting it to situations involving the absence of a marital status document, in other words, in the face of serious doubts concerning the authenticity of the documents. This measure would initially be limited to the December 31, 2010 and was conducted on a strictly voluntary basis.

Its use therefore required legal authorization and was limited to testing maternal filiation to exclude paternity tests in each case, which would have serious consequences in terms of interfering in people's private lives. As analyzed below, the French Constitutional Council validated, with some reservations, in *Decision num. 2007-557* of November 15, 2007 (FCC, 2007), the polemical use of DNA testing stipulated in articles 13 and 63 of the new immigration control law, so that those applying for family reunification could prove their links with the mother who had settled in France. Conversely, the highest constitutional jurisdiction rejected data collection on a person's ethnic or racial origin stipulated by law to measure the diversity of origins, and degree of discrimination and integration (Möschel, 2009:197-198). In any case, in the last instance, the use of genetic testing has been delayed by the French government in the absence of measures guaranteeing their proper "*mise en oeuvre*".

The Striking (Lack of) Normative Determination of DNA in Spain, Italy and Portugal

Along another geographical axis, however, one can find a less defined and uniform practice, for example, in countries such as

Spain, Portugal and Italy, albeit with some differences in the latter. Particularly in the first two, although the law on aliens and immigration refers to the duly legalized documentation to accredit family kinship links, it does not specify what test should be used to achieve this. The official documents of the corresponding registers or the way in which each country officially justifies these events should be valid. Within the framework of the triple test demanded of foreign residents to exercise their right to family reunification (Solanes, 2008b:241) resident foreigners must accredit their kinship links by proving the existence of marriage, their links with their children or the relationship with their parents in accordance with basic documentation accrediting family links that has been duly legalized (Pereira and De Pinho, 2008). Specifically, Portuguese legislation utilizes this eventuality in a complementary fashion, requiring proof of kinship through medical-experts' tests in both article 42.3 *Regulatory Decree num. 6/2004* (PP, 2004) and article 67.1 *Regulatory Decree num. 84/2007* (MIA, 2007). This occurs by virtue of the last reform, which increase the possibilities of investigating the conditions of family reunification, particularly as regards the actual existence of a family link or a *de facto* union. In keeping with the means expressly indicated, this does not, for example, exclude the possibility of performing genetic tests to prove a relationship within the generic stipulation of articles 104.1 and 2 of the *Law 23/2007* (PP, 2007) to propose other investigations regarded as necessary. However, I understand that this vagueness should be justified in the face of doubt or justified questions of need, since it is striking that it is subject to a degree of discretionality by the administration concerned. Thus, according to the data provided by the Ministry of Foreign Affairs, the Portuguese case shows that the number of tests performed is relatively small in relation to the number of family reunification requests submitted. This common, selective practice in these consulates sets a bad example and reflects a degree of distrust of the accounts of immigrants from two geographical zones: India and Pakistan. Moreover, the lack of transparency and shortage of internal consular instructions available to the public make it

difficult to determine the specific procedure adopted by consular authorities. In other words, there is a lack of information on the circumstances under which the tests are performed, whether the applicant is requested to give his consent, who analyzes the tests and what guarantees are provided genetic samples.

In Italy, the Presidential Decree (DPR) num. 334 of October 18, 2004, passed in January 2005, stipulated this possibility in article 2.2b if personal capacity could not be documented through certificates issued by foreign authorities, either because these authorities did not exist or because the certificates were regarded as unsuitable (MFA, 2005b). Only in this case, according to article 49 DPR of January 5, 1967, num. 200, could the necessary controls be performed, the cost of which would be borne by the applicants. Perhaps, rather ingenuously, this regulation sought to facilitate the limited evidential status of those from countries without recognized certification authorities. However, strictly speaking, it denies the legal effectiveness of all certification issued by legitimate national authorities recognized by the international community, insofar as the diplomatic representations of member countries of the Schengen Agreement distrust their contents.[2] This occurs despite admitting the legal value of consulates abroad on the basis of article 6, ap. 2 and 3 of the Regulation, unless there is definite, documented proof of their falsity. The Italian government has recently re-instated the requirement of DNA analysis in the event of doubts among the set of measures included in the so-called "Security Package" (IP, 2009). The possibility of simply verifying documents is also included in the text of the legislative decree of

[2] The Schengen Area makes it possible to eliminate controls on inner borders between signatory states and create a single outer border where entry controls are carried out within the Schengen space with identical procedures. The Schengen Area comprises: Germany, Austria, Belgium, Denmark, Slovenia, Spain, Estonia, Finland, France, Greece, Holland, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Czech Republic, Slovak Republic, Sweden and Switzerland. The most outstanding instrument in the control of nationals from third states that do not benefit from free movement in the community is Regulation num. 562/2006, passed on March 15, 2006, known as the Schengen Borders Code (EP and CEU, 2006).

October 3, 2008, num. 160 relating to family reunification (IP, 2008), enabling Italian consular diplomatic representations abroad to perform legalized certifications on the basis of DNA testing.

In short, this is an obligation that makes no distinctions regarding the origin of family reunification sponsors and one that is applied in all suspicious extra-community cases, regardless of their origin (ASGI, 2008:25). In practice, though, since 2005, following an agreement with the IOM, the Ministry of Foreign Affairs has formally extended DNA tests to all countries.

On the subject of its legitimacy, however, the guarantor for privacy—Garante per la Protezione dei Dati Personali (the Italian data protection agency)—(GPDP, 2007) has admitted that this authorization prescribes and expressly stipulates the treatment of generic data, restricting them to family reunification. This is the case when they are unable to provide official documents that determine blood links, the status or lack or reliability of the documents issued by the authority concerned in the country of origin. However, it fails to provide any details of the treatment, collection, announcement or preservation of results and makes no recommendations on the subject. Nor does it raise the issue of their possibly unconstitutional nature due to the violation of article 117, 1 of the Italian Constitution regarding community obligations, since the law does not stipulate holding a discussion on the issue nor does it state that the Italian authorities should carry out other forms of verification. It merely stipulates that the cost of the tests will be borne by the "sponsors" (ASGI, 2008:35). In any case, although one cannot deny the state's right to examine and assess the evidential nature of foreign certification, as Morozzo notes (2006:3), this resource should not be generalized to other means of control if there is no well-founded suspicion of fraud.

Lastly, Spain does not consider the possibility of performing biological tests although it does require a personal interview, as stipulated in article 57 of the *Royal Decree 557/2011*, dated April 20 (MP, 2011), according to Directive 2003/86/EC (CEU, 2003). The fact that genetic testing is not legally stipulated does not prevent it from being common practice among consular authorities,

as noted in the information provided by the Ministry of Foreign Affairs in response to a question from the Izquierda Unida parliamentary group. Broadly speaking, Spanish consular practice, recognized by the Ministry of Foreign Affairs, is selective, since kinship is verified in the consulates of China and Nigeria. This practice may be extended to Sub-Saharan countries, such as the Dakar consulate, which has the consular circumscription of six countries: Senegal, Gambia, Guinea Conakry, Guinea Bissau, Sierra Leone and Cabo Verde. This discretional criterion makes it possible to determine the authenticity of a kinship link when registration documents fail to provide sufficient veracity. This degree of distrust is surprising, given that in the Spanish consulates in China (Peking and Shanghai) and Nigeria (Lagos), the results yielded to date show that 86 of the 177 tests provide confirmation of paternity (48.6 %). In any case, according to the National Institute of Toxicology, the organization responsible for the analysis, performing the tests requires the informed consent of the person who provides a biological sample to proceed to a DNA study.

In short, the differences or variations existing between European countries show that these tests are only performed in exceptional circumstances, which become discretionally operational once the lack of accurate documentation has been "assessed". In fact, all of them share a broad, normative discretionality complemented by the selective application of the test to certain individuals according to their place of origin. However, after admitting their exceptionality, they differ as regards the explicit provisions subsequently incorporated into normative rules with the status of law and the assumptions of implicit application used indiscriminately with lower-ranking normative regulations, as shown in the table of legal sources and costs (see table 1).

Some Reasons for Questioning the Admissibility of DNA Tests Performed on Immigrant Families

As Guerrero notes, genetic information, together with scientific advances, makes human beings particularly vulnerable by

Table 1. Summary of Cost and Regulation of DNA Tests

Country	*Date practiced*	*Alien and immigration norms in force*	*Cost (€)*	*Approximate minimum inter-professional salary, 2010 (€)*
Finland	1991	*Act 301/2004* amendments up to *973/2007* (MI, 2000)	269	1 640*
Norway	1999	*Act 20/2007* amends *Aliens Act 64/1988* (Stortinget, 2007)	—	1 600*
Denmark	2007	*Act 1044/2007* amends *Act 264/2008* (DMRIIA, 2008)	—	2 160*
Sweden	2005	*Aliens Act 2005:716* (MFAa, 2005)	200	1 100
Holland	2000	*Aliens Act 2000* (LHSG, 2001)	360	1 382
Belgium	2003	*Act of December 15, 1980* amended by the *Act of September 15, 2006* (HRB, 2006)	200	1 387
Switzerland	2008	*Foreign Nationals Act* of December 16, 2005 (FASC, 2005)	1 103	1 682
France	2007	*Law 2007-1631* of November 21, 2007 (FP, 2007)	250	1 321
Spain	2006	*Organic Law 2/2009* for reform *Organic Law 4/2000** (SP, 2009)	300	628
Italy	2005	*Law 94/2009* (IP, 2009) and *Decree 160/2008* (IP, 2008)	350	770
Portugal	2006	*Law 23/2007* (PPR, 2007) and *Regulatory Decree 84/2007* (MIA, 2007)	200	525
Germany	2004	*Residence Act of July 30, 2004*, as amended August 19, 2007 (FMI, 2004)	220-500	1 150*
Austria	2005	Act SRA, *Federal Law Gazette* I, num. 100/2005 (AFMI, 2006)	—	1 000*
United Kingdom	1991	*Immigration Directorate Instructions* (UKBA, 2009)	State	1 090

*Spain and Portugal do not have explicit measures regarding the regulations for aliens and immigration. Norway, Denmark, Austria, Finland and Germany do not have a minimal inter-professional salary established by law and the first three have not established a set fee for the test.

Source: Drawn up using data from Eurostat (Wozowczyk and Massarelli, 2011) and European Migration Network (EMN, 2008).

reducing their autonomy and rights in the most varied aspects of life (Guerrero, 2008:224; Álvarez, 2007:20). For these reasons, the admissibility of these practices in family reunification procedures in the countries analyzed has raised the question of their unconstitutionality regarding their normative measures and subsequent use. Indeed, one should not be surprised by the attention the French case has attracted in the media not only at the time when the proposal was presented but after the decision not to entertain this possibility.

This situation has highlighted the reasons put forward to question the legitimacy of these practices, which have focused on the following: *1)* The violation of sponsors' dignity and intimacy and interference in the fundamental right to the respect to private and family life stipulated in article 8 European Convention on Human Rights (ECHR, 2006); *2)* The absence of legal guarantees and the application of the principle of proportionality; *3)* The principle of equality and non-discrimination.

Likewise, from a methodological point of view, the existence of major technical limitations (Karlsson *et al.*, 2007:144-149) has not failed to corroborate their absolute "reasonableness" or effectiveness. Regardless of this, it is important to develop the first arguments, whose protection, in the Spanish case, will permit reflection on their possible constitutional legitimacy.

1. Violation of Sponsors' Dignity and Intimacy, Interference in the Fundamental Right to the Respect for Private and Family Life Stipulated in Article 8 ECHR

Regarding DNA testing, at the community level, signing the *Prüm Convention*[3] (CEU, 2005) has permitted the exchange of information regarding data on fingerprints and genetic prints in

[3] See the Prüm Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, dated may 27, 2005.

immigration procedures. In other words, it allows greater use of scientific methodology in a broad sense (Gómez, 2007). However, this trend predicts serious risks and possible abuse in the use of genetic testing. Basically, it may significantly violate sponsors' dignity and intimacy, since it affects the fundamental right to the respect for private and family life stipulated in article 8 ECHR. This does not affect the other arguments wielded in Italy regarding the bases of the regulations contained in private international law that would be affected. In other words, article 33 of Law 31 of May 1995, n. 218, in keeping with the two sentences passed by the Supreme Court of Cassation 365/03 (SCC, 2003a) and 14545/03 (SCC, 2003b), stipulating that this should be carried out on the basis of the national law of persons with the prohibition of the national judge to "subordinate national forms of information outside this legislation to the certifications carried out by the state of origin according to its own regulations" (SCC, 2003a).

Regarding the first issue: the possible violation of article 8 of the European Convention on Human Rights, it is interesting to analyze the legal response provided in Italy and France, since they have both raised the issue of possible incompatibility with the standard of human rights and its interpretation in the national catalogue of fundamental rights. In Italy, although the Garante per la Protezione dei Dati Personali (GPDP, 2007) has adopted a favorable verdict on this regulation, it reconfirms the fact that this procedure based on the use of genetic testing must be strictly limited. The treatment of genetic data must therefore not be considered indispensable even though it raises two important issues. First, that the indiscriminate use of genetic testing may significantly violate applicants' dignity and intimacy, as well as strongly affecting the right to the respect for private and family life stipulated in article 8 ECHR (Panozzo, 2008:3). That is why it states that its use must be preceded and followed by measures which, in exceptional cases, reconcile their application and inalienable right to respect for family life included in article ECHR between parents and children (ECHR, 2001, 2005, 2006). This has been admitted in the French case in article 13 *Law 2007-1631* of November 21,

2007, by subjecting its practice to strict guarantees: It also restricts it to situations where there is no certificate of marriage and/or there are serious doubts about its authenticity. These are two specific measures, not adopted by the other countries, that do not consider accepting the authorization of the legal authorities or limiting tests exclusively to maternal filiation. However, the High Authority for the Struggle Against Discrimination and for Equality—Haute Autorité de Lutte contre les Discriminations et pour l'Egalité (HALDE)—, in the Council's decision num. 2007/370 of December 17, 2007 has pointed out that the idea of using genetic testing, whether temporarily or exceptionally, to condition a fundamental right (Quirós, 2008:35-49; Labayle, 1999:103-107) such as family reunification constitutes a supplementary step towards making the right to family life more difficult or even ineffective in practice. However, the French Constitutional Court determined that this does not imply a direct or indirect violation of the right to lead a normal, constitutionally guaranteed family life. It therefore concludes that there is nothing to prevent consular and diplomatic authorities, under judicial control, from ensuring the validity and authenticity of the documents produced on marital status. The court itself validates, with certain reservations, the possibility of using genetic fingerprinting to prove blood links in family reunification as a supplementary means of testing. Indeed, they hold that this is admissible in keeping with the principle of equality, subject to the international conventions that determine the law applicable to blood links in the event of a normative conflict with the mother's personal law. Thus, it considers that the normative measure is not unbalanced, since the legislator has adopted a measure designed to ensure a conciliation that is not manifestly unbalanced between the right to a normal family life, the respect of the child and parent's private lives and safeguarding public law and order, which includes the fight against fraud. Conversely, the Constitutional Council of France criticized the possibility of drawing up ethnic statistics on the grounds that this mechanism contravened article 1 of the Constitution's stipulation of equality in the eyes of the law for all citizens, regardless of origin, race or

religion. The question is, is this really the case? The answer is no. Turpin (2008:1638) observes that constitutional validation does not solve all issues. It is difficult to agree fully with "validation", particularly when it combines with unacceptable interference in family intimacy entailed by the family reunification regime.[4] It is a legal regime, whose legal configuration seeks to minimize or even annul the choice of reunifiable relatives and the impermeability of the most intimate familial and personal sphere of the sponsor and the family with which he wishes to be reunited. It is doubly unacceptable if one questions the ethics of the fact that a person should give his genetic information to the consulate in a foreign country. Indeed, one should not overlook the fact that the genetic data that can be extracted from DNA testing is internationally protected by a high level of preservation of people's fundamental rights and freedoms of, even though this is done through an extremely limited, scattered form of regulation.[5] This greater predictive capacity of genetic data should not be forgotten. They

[4] *Vid*. legal basis 10 and 11 of Constitutional Court Judgment (CCJ) 236/2007 (CCS, 2007) and their cross reference in the CCJ 260/2007 (CCS, 2008a), CCJ 261/2007 (CCS, 2008b), CCJ 262/2007 (CCS, 2008c), CCJ 263/2007 (CCS, 2008d), CCJ 264/2007 (CCS, 2008e), CCJ 265/2007 (CCS, 2008f) sentences.

[5] The first text, which is both international and universal, is the *Universal Declaration on the Human Genome and Human Rights* passed by the 29th Commission of the UNESCO General Conference in Paris on November 11, 1997 (UNESCO, 1997). Completing their special protection, the *International Declaration on Human Genetic Data* approved by the UNESCO General Conference on October 16, 2003 admits that "human genetic data are unusual in that they are sensitive data of a personal nature, since they may indicate individuals' generic predispositions" (UNESCO, 2003). In the European regional sphere, one should note article 5 of the Council of Europe Convention on the Protection of Human Rights and the Dignity of the Human Being dated April 4, 1997, which proclaims the right of all persons to have their private lives respected when information on their health is involved. However, the most significant progress is found in the Charter of the Fundamental Rights of the European Union, which establishes this in articles 8 and 12. Charter of Fundamental Rights of the European Union, signed on December 7, 2000 in Nice, p. 1/22, articles 8 and 12 (EP, 2000). At the European level, Directive 95/46/EC of the European Parliament and Council dated October 24, 1995, concerns the protection of physical persons regarding the treatment of personal data and the free circulation of these data (EP and CEU, 1995). In Spain, according to Organic Law 15/1999 on the protection of personal data (SP, 1999), any information containing identified or identifiable persons is personal data.

are sensitive data whose externalization could have important consequences for the family, since they may contain information which may be of vital importance from a cultural point of view for persons or groups (Nicolás, 2006:48). They may therefore be classified as sensitive information in keeping with the definition provided by Pérez (1990:152), insofar as they are data known only by the sponsor or as a result of special circumstances described by law. Moreover, given their importance in the personal sphere and privacy, genetic data may be regarded as extremely personal information that provides extraordinarily delicate information, intimately linked to the personality nucleus and human dignity.

This obviously negates the scientific information provided by DNA testing. It is therefore unacceptable to reduce the reinforced protection they must be afforded by *Organic Law 15/1999* passed on December 13 (Losano, Pérez and Guerrero, 1990; SP, 1999). Once again, however, it appears that these guarantees or maxims are shaped in the migratory context, given that the tests for the obtainment of genetic data are an open, undetermined issue. This is established in the French case of the Commission Nationale Informatique et Libertés (CNIL) which openly questions the degree of access to genetic fingerprinting as a result of the analyses performed (Marzouki, 2008:25).

Absence of Legal Guarantees and Application of the Principle of Proportionality

Since the practice of DNA testing can obviously not be trivialized or generalized, this implies that any use of these tests must not only be circumscribed and subjected to the proper, inalienable legal guarantees but also to the principle of proportionality between the opposing interests and values at stake. The authorities must therefore determine whether the investigation of DNA profiles in the laws on aliens and immigration is carried out for the purpose of clinical analysis, investigation or identification (Nicolás, 2006:35). This is a crucial distinction, if DNA analysis in this sphere is designed purely for the aim of identification. In any case, the need to establish guarantees is by no means a minor issue if

one considers that, regardless of the purpose, there are several fundamental rights that may be violated when a test of this nature is performed. This has been highlighted by the *Constitutional Court of Spain in Judgment 292/2000* (CCS, 2001a) passed on November 30,[6] which states that "a normative system that authorizes data collection for legitimate purposes yet without including the proper guarantees against its potential invasion of citizens' private lives violates the right to intimacy in the same way that direct interference in the family nucleus would".

Regarding this point, although the doctrine is not unanimous about the rights that are presumably violated in the penal process, given the technical progress achieved to date (Fábrega, 1999: 1692), the following could, in principle, be an object of violation: freedom of movement, physical integrity, the right not to declare against oneself, the right not to plead guilty and the right to presumption of innocence.[7] Although the author highlights the contradictions regarding the rights at stake in criminal investigation by stating that, "it is no longer necessary to even minimally affect a person's physical integrity in order to perform the tests because non-codifying DNA does not retain any form of genetic information that affects fundamental rights".

In any case, in our sphere of study, one can add possible interference in the right to intimacy for two reasons. First, because on the basis of profile data, one can infer other information and second, because although genetic data determined for the purposes of identification do not refer to health, they do concern other personal issues regarded as intimate, such as a paternity link.[8] Only by taking up the limits established in criminal and paternity in-

[6] *Vid.* legal basis 10 of the sentence of the Constitutional Court Judgment (CCJ) 292/2000 (CCS, 2001a).

[7] *Vid*, various sentences in the Constitutional Court including *CCJ 120/1990* (CCS, 1990). "The inviolability of the person is protected, not only from attacks intended to harm his body or spirit but also from all kinds of interventions in those assets that lack the consent of their owner".

[8] The sentence of the constitutional court expressly states that undertaking biological tests does not violate either the right to intimacy or physical integrity 7/1994 (CCS, 1994a) in section 2. *Vid.* also *CCJ 197/2001* (CCS, 2001b); *CCJ 142/1993* (CCS, 1993); *CCJ 117/1994* (CCS, 1994b), which preferably refers to the strictly personal sphere of the private or intimate life of the latter two.

vestigation can one establish parallels regarding the procedure stipulated in the law on aliens and immigration. For example, as regards the filiation actions closest to the purpose of DNA tests in immigration (O'Callaghan, 1994:28), one can cite the principal of the free investigation of paternity and maternity (O'Callaghan, 1994:74) enshrined in article 39.2 of the EC. In keeping with this constitutional principle, article 127 of the CC determines that the investigation of paternity and maternity will be admissible in filiation trials. However, article 127 of the CC on the exercise of the action of filiation accepts the breadth of the trial, specifically "any kind of trials" even though the biological test is the most direct test. Thus, on the basis of article 135 CC (O'Callaghan, 1994:81) there is no need to use biological tests if recognition of paternity and maternity are possible when the fact of childbirth and the identity of the child can be physically proved, but not if there have been alterations in the time or place.[9]

Likewise, performing DNA analyses on the accused in a penal trial (Armenteros, 2007:2-14) requires either consent or a specific legal measure. Thus, legal regulation constitutes the unavoidable framework within this practice may take place. Spain lacked this legal ruling until law 15/2003, passed on November 25 reforming the *Criminal Code* (SP, 2003), which stipulated its practice in two specific articles. Article 326 ap. 3 establishes the biological analysis of fingerprinting that contributes to the clarification of the fact investigated, through the adoption of the measures required for their collection, protection and analysis in conditions that guarantee their authenticity. And article 363.2 adds that when accredited reasons concur that justify obtaining biological samples from the suspect, the examining magistrate, through a resolution stating grounds, may determine the practice of those acts of inspection, recognition or bodily intervention in keeping with the principles of proportionality and reasonableness.

[9] *Vid.* the sentence in *CCJ 7/1994* (CCS, 1994a) section 6. However, despite its admissibility, according to several laws, biological tests may not be imposed, meaning that the applicant's unjustified refusal to submit to a biological test is not regarded as *ficta confessio*, although it is seen as data of unquestionable value together with the other evidential means provided.

Thus, in the two spheres where genetic testing is usually performed, a person's consent regarding the use of his personal data, including genetic ones, constitutes a key element in ensuring his ability to control this information (Lucas, 1997:577). That is, in accordance with the definition of consent in article 3, ap. H of the *Organic Law* of data protection (SP, 1999), as noted by Pablo Lucas, the person who collects data is obliged to inform the person concerned in the terms legally stipulated about the consequences of his consent, since it is only there that he will be able to exercise his right to informative self-determination with full knowledge of the scope of his acts. The right to information is therefore presented as an essential requirement for consent to be provided in a valid fashion by the interested party. It is therefore the responsibility of the owner of the genetic data to determine when they can be registered and treated and by whom and for what purpose. To this end, the demand for information and consent must already have been concurrently provided.

Transferring this maxim to the procedure of family regrouping, one can assume that although genetic information is extremely valuable for the purposes of law enforcement and the consular authorities, one cannot ignore the information or consent of the passive subject in these practices. The confusion surrounding the act of resorting to genetic tests in immigration appears to confirm the suspicion of doubt that this use may indirectly be coercive or imperative. I understand that submitting to these tests is voluntary if the foreigner wishes to find out about the biological reality or genetic status of his relatives but not if, in the absence of an evidential alternative, his aim is merely to be reunited with his family. In fact, this is the only reasonable motivation for the sponsor and his relatives to consent to these tests. Otherwise, verifying these family links would be a minor, unforeseen issue.

The Principle of Equality and Non-discrimination

Critics of DNA tests point out that through them, family links are reduced to blood links, thereby giving different treatment to foreign and national parents and children. Foreigners are treated

differently according to their country of origin or socio-demographic characteristics and whether they are related to the father or mother when it comes to establishing filiation between biological and other types of kinship links. The reason for the last two assumptions is because there are family relations or links that cannot be subjected to these tests, since the DNA does not coincide. This occurs in the case of the legal representatives of minors or disabled persons, adopted children, spouses, etc. As a result, relatives potentially subjected to these DNA tests may be the fathers-mothers of their children or the grandfathers or grandmothers or their adult children or grandchildren.

A propos of a person's origin and sociodemographic characteristics, although the legislator is entitled to establish differential treatment for foreigners, this treatment may be discriminatory if the state fails to prove the need, proportionality and justification of the measure (Fongaro, 2008:11). In other words, the criterion of reasonableness and proportionality implies that differences in treatment must be justified by a real need to protect values at the same level of those who are affected or sacrificed. If this genuine need can be justified by other means that involve fewer restrictions or distinctions, then the latter must be applied (Esteve, 2008:204-205). Performing DNA tests may be an indirect form of discrimination. Although they are apparently neutral, in family reunification, despite the lack of rigorous statistical data, they have a harmful effect or constitute a barrier to certain ethnic groups from emerging countries that do not match the documentary *modus* of countries that receive immigrants (Taitz, Weekers, and Mosca, 2002:25-28).

However, a propos of its discriminatory nature, going back to the decision by the French Constitutional Council, there is nothing to oppose legislators regulating the various situations demanded for reasons of general interests in a different fashion if this difference in treatment is directly related to the object of the law that establishes this.[10] This is the case, even though nationals

[10] On the principal of equality in the eyes of the law acknowledged by article 14 CE, *vid.* CCJ 223/1981 (CCS, 1981) and *CCJ 137/2000* (CCS, 2000).

are in a different situation regarding foreigners regarding rules of access and entry. Thus, foreigners residing in states where a person's marital status cannot be verified are in a different situation from other countries where it can be verified. Different treatment could therefore be justified on the grounds of *ratione personnae, ratione loci et ratione temporis*. Moreover, the French Constitutional Council has considered that the legislator has not established specific filiation laws for foreigners by repealing the French law or the rules governing the conflict of law according to which, "In principle, filiation must be subjected to the mother's personal law". On the contrary, according to the decision of the French Supreme Court mentioned earlier, the measure adopted usually seeks to ensure a conciliation that is not manifestly unbalanced between the right to normal family life, respect for the parents' and children's private lives and safeguarding the public order, which includes the fight against fraud. In any case, these rules could not deprive the foreigner of the possibility of justifying his filiation in other ways that are also provided for and admitted according to the applicable law.

In any case, in my point of view, one may have serious doubts about the control of conventionality or respect for the minimal international standard of human rights as a result of the implementation of this rule. Indeed, if biological and adopted children are to be treated in the same way, it is reasonable to think that this demand is a disproportionate form of discrimination in relation to the object of this text with a view to stiffening the conditions for family reunification. Article 10.1 of the Convention on the Rights of the Child, referring to the obligations stipulated in article 9.1 point that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner".

Final Considerations

Proportional to its advances and advantages in all spheres, it also entails risks and backwardness in the guarantee of certain risks

that may clash with use of DNA tests. The practice and/or normative inclusion of genetic testing to determine the effectiveness of kinship links in immigrants' family reunification is an example. It is a quantitatively generalized practice, if one examines the number of countries that have resorted to this method, albeit with an officially exceptional recognition that subjects persons with an insufficiently well documented familial situation to discretional or even arbitrary practices. Although the interested parties consented, this acquiescence continues to be forced by the demands of restrictive entry mechanism or one that denies family life. It also destabilizes the protection of the fundamental rights and minimal rights of the non-national, despite the fact that these are characteristic of the rule of law. Thus, according to the doctrine of the Spanish Constitutional Tribunal[11] and applying them, by extension to genetic testing in the family reunification procedure, it is possible to establish a series of final reflections on the demands they should contain. These demands, depending on the country in question, if one opted for their normative inclusion that is not entirely risk free (as would be the case with any measure limiting fundamental rights) must comply with minimal requirements:

a) There must be a legal stipulation. In the case of Spain, this stipulation does not exist and the Organic Law 2/2009 for reform of *Organic Law 4/2000* (SP, 2009) continues without normatively defining this practice. Conversely, when there is a legal stipulation, another warning issued by the French Constitutional Council must be followed. It states that the intelligibility of the law requires the adoption of sufficiently precise provisions that may produce an interpretation that is contrary to the *Constitution* or entail the risk of arbitrariness the subjects of the law.
b) It must be adopted as through a judicial resolution that is especially motivated. In penal and paternity investigations, it is

[11] *Vid*. sentence of the *CCJ 207/1996* of December 16, 1996 (CCS, 1997). "Scientific activity must be conditioned and limited in order to avoid ending up turning into a tool that can be used to subordinate or deny human dignity".

a *conditio sine qua non* for justifying the intervention and obtainment of genetic testing. The same does not happen, in the family reunification procedure, which, except in the French case, is a consular practice, not subject to the control of the legal authorities who neither order nor authorize them. On the contrary, they are admitted on the basis of a broad exceptionality, pursuing a biological truth that is irrelevant to the "interested parties".

c) It must be ideal, necessary and proportionate, with a constitutionally legitimate purpose. This specific measure of performing genetic tests may be ideal and necessary in cases in which the certificates issued by the country do not constitute accurate or indubitable proof of kinship links. However, the sacrifice involved should assess the rights at stake if it is disproportionate in comparison to the gravity of the events and the existing suspicions. Indeed, as stipulated by the European Court of Human Rights, and as one should often recall, biological paternity does not in itself imply *ipso iure* the existence of a family between parent and child and instead is linked to other types of indications of family life. In short, since the Court of Strasbourg opted for the presumption of family life if there are legal or blood links between parents and children, grandparents and grandchildren and sometimes between siblings, it seems clear that the family is not a purely biological construction if, moreover, there is no universal definition of family to which one can appeal (McIntosh, 1988:104).

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Date of receipt: January 8, 2010.
Date of acceptance: May, 17, 2010.