CITIZENSHIP, MIGRATION AND ANTI-DISCRIMINATION LAW

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Abstract: *The article deals with the question how EU anti-discrimination law and migration law are interrelated. The concept of fundamental market freedoms and the prohibition of discrimination based on nationality have approximated the status of state nationals and Union citizens. General human rights law, on the other hand, has strengthened the legal status of third-country nationals, also in the field of migration law. The combination of both approaches in the light of current anti-discrimination directives and activist human rights jurisprudence may lead to confusion.*

Keywords: *migration, citizenship, third-country national, racial discrimination*

1. INTRODUCTION

The common immigration policy and the efficient management of current migration flows to European countries belong to the most sensitive areas of EU law. In the light of Article 79 (1) TFEU those goals have to be pursued with respect to the fair treatment of third-country nationals who are legally residing in EU Member States and the prevention of illegal migration. As the regulation of immigration, for centuries, has been understood as a key element of state sovereignty, EU Member States have been conferring their relevant competences in this field to the EU rather reluctantly. However, in the context of enhanced economic cooperation and the abolishment of controls at the internal Schengen borders close cooperation and common measures on migration turned out to be inevitable.

At present, EU migration law is determined by three crucial concepts. First, with respect to the concept of citizenship, EU Member States may still reserve specific rights with regard to residence and access to the labour market to their nationals. However, this sovereign space of Member States has been gradually eroded by the concept of free movement of EU citizens. The prohibition of discrimination on grounds of nationality is the key principle of European integration. The constant expansion of its scope in the context of reform treaties and case-law of the EU Court of Justice has led, over the years, to an approximation of the status of EU citizens and the status of national citizens, especially in the areas of residence, access to the labour market and social security. The third concept which substantially influences the current approach towards migration of third-country nationals is the international protection of human rights.

In the following article we will analyse the impact of EU anti-discrimination law on European migration law. After a brief reflection of the status of migrating EU citizens we will focus on the legal status of third-country nationals. The approximation of the position of EU citizens to the status of third-country nationals is, on the one hand, based on the standards of secondary legislation, and, on the other hand, on the human rights principle of equality, as expressed e.g. in the European Convention on Human Rights and the Inter-

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national Human Rights Covenants. The further development of the equality principle on the level of EU anti-discrimination law has a significant impact on migration law which shall not be underestimated.

2. THE HUMAN RIGHTS DIMENSION OF MIGRATION LAW

Migration is connected to a number of civil and political rights, like e.g. the non-refoulement principle, respect for private and family life, fair trial and personal liberty, human dignity and the freedom of opinion, but also to social rights such as e.g. the right to just conditions of work, the right to a fair remuneration, the right to social security and the right to health care. Both, international human rights doctrine and the jurisprudence of international and national courts have shown very clearly that migration is one of the most complex human rights issues of our time.

Already in 1989, the UN Human Rights Committee in its General Comment No. 18 on non-discrimination[1] found that non-discrimination, taken together with the principle of equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. This principle which is included in Articles 2 and 26 of the International Covenant on Civil and Political Rights, refers to any distinction, exclusion, restriction or preference which, among others, is based on national origin. However, on the other hand, the Human Rights Committee also observed that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective".

20 years later, the UN Committee on Economic, Social and Cultural Rights again confirmed that non-discrimination and equality are fundamental components of international human rights law.[2] In paragraph 30 of its General Comment No. 20, the Committee on Economic, Social and Cultural Rights further stated that social and economic rights under the first International Covenant of 1966 shall apply to everyone including non-nationals, such as refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation. In this context, the Committee did not refer to specific cases in which differentiation based on nationality might be considered as legitimate.

However, in its General Comment No. 18 of November 2005 the Committee on Economic, Social and Cultural Rights had already offered a concise interpretation of Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) concerning the right to work.[3] In general terms, the Committee recalled that Article 6 ICESCR guarantees the right of everyone to the opportunity to gain his living by work that he freely chooses or accepts. According to the Committee, the principle of non-discrimination shall apply in relation to employment opportunities for migrant workers. On the other hand, the Committee pointed at the need for national action plans which shall promote this principle by "all appropriate means". This wording shows that States parties have a certain

[1] UN Doc. HRI/GEN/1/Rev.1 at 26 (1994).
[2] UN Doc. E/C.12/GC/20 (2009), "Non-discrimination in economic, social and cultural rights".
[3] UN Doc. E/C.12/GC/18 (2006).

margin of appreciation as far as the application of the non-discrimination principle to the status of migrant workers is concerned. Indeed, the interpretation of the right to work as a right of everyone would run counter to widespread state practice which limits the access of non-nationals to the national labour market and strictly regulates the issue of work permits.

The human rights approach which grants social and economic rights to both, nationals and foreigners, is reflected in further UN documents. Looking at the general comments of the UN Committee against Racial Discrimination, we may see an interesting development with respect to foreigners' rights. In 1993 the Committee published its General Recommendation No. 11 on non-citizens[4] which contained only three short paragraphs. The Committee, at that time, focused on the prohibition of discrimination among foreigners from different countries (but not between foreigners and citizens) and the obligation of States parties to report on the implementation of measures relating to foreigners.

About 10 years later, distinctions on grounds of nationality had become suspicious in the light of human rights law and it was called upon States parties to the International Convention on the Elimination of All Forms of Racial Discrimination to present compelling reasons for such differentiation. In its General Recommendation No. 30 which was adopted in 2004[5] the Committee against Racial Discrimination affirmed that differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation are not applied pursuant to a legitimate aim, and are not proportionate to the achievement of this aim. The Committee, therefore, urged the State parties to regularly report on such distinctions. General Recommendation No. 30 also dealt with the issue of expulsion and economic and social rights of foreigners. With regard to the termination of the stay, the Committee called upon the States parties not to deport foreigners with permanent residence, if such a measure would result in disproportionate interference with the right to family life. As to economic and social rights, the Committee stressed the areas of education, housing, employment and health care. According to the Committee, equal rights for citizens and foreigners shall be granted in matters of access to housing. On the other hand, the Committee recognized the legality of different approaches as far as access to employment is concerned. States parties may refuse to offer jobs to non-citizens without a work permit.

These examples show a manifest link between human rights law and the status of migrants. The link between anti-discrimination law and migration seems to be even clearer within the frame of EU law. Indeed, from a EU perspective, we have to distinguish between two generations of anti-discrimination norms. The concept of fundamental market freedoms and the internal market was from the very beginning based upon the principle of non-discrimination on grounds of nationality. Later, the Amsterdam Treaty of 1997 introduced a new provision which empowered the EU Council to deal with discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Whereas the first generation of non-discrimination rules was inspired by economic considerations and is based upon pragmatic considerations on reciprocity among member

[4] UN Doc. A/48/18 at 112 (1994).
[5] CERD/C/64/Misc.11/rev.3 (2004), "Discrimination against non-citizens".

states, the second generation of EU antidiscrimination law is rooted in human rights law. Let us briefly consider the impact of both generations of anti-discrimination rules on migration in the EU.

3. MIGRATION AND THE PARADIGM OF EU CITIZENSHIP

As far as discrimination on grounds of nationality is concerned, the migration of EU citizens has been subject to a paradigm shift. Traditional international law categorically differentiated between citizens and foreigners. The term citizenship referred to a specific bond of loyalty between a sovereign state and its nationals. Citing Vattel, the US Supreme Court in a leading case of 1892[6] decided that it was an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[7]

EU law has changed the fundamental dichotomy of citizens and non-citizens in favor of Union citizens. Citizens of EU Member States were granted a privileged status, the so-called free movement of persons. Whereas in the period until the adoption of the Maastricht Treaty, free movement as one of the key market freedoms was reserved to economically active citizens, i.e. workers and entrepreneurs, after 1993 the new concept of Union citizenship expanded the privileged status also to students, unemployed and retired persons from EU Member States.

The dynamics of EU citizenship can hardly be overestimated. In a number of crucial decisions the EU Court of Justice has defined the scope for the application of the non-discrimination principle in the light of former Article 12 TEC (now Article 18 TFEU). For example, in the landmark decision of Ian William Cowan v. Trésor public[8] the question was raised whether a certain right to compensation under French law shall be granted to all citizens of EU Members States. According to French law compensation was reserved to French nationals and to foreign nationals whose home country had concluded a reciprocal agreement with France or who were holders of a residence permit. Mr. Cowan, a British tourist, who had become victim of a criminal assault in a metro station in Paris, could not gain profit from such reciprocal agreement, nor was he the holder of a residence permit in France.

In the proceedings before the Court the French Government defended the national regulation by pointing at the fact that the right to compensation was grounded in the principle of national solidarity. It further explained that "such right presupposed a closer bond with the State than that of a recipient of services, and for that reason it may be restricted to persons who are either nationals of that State or foreign nationals resident on the territory of that State". The EU Court of Justice, however, did not accept this argument and maintained that the prohibition of discrimination on grounds of nationality excluded

[6] Nishimura Ekiu v. United States – 142 US 651 (1892).

[7] For a detailed analysis of the relation between state sovereignty and access to territory see POŘÍZEK, P. *Vstup cizince na území státu. Pohled mezinárodního, unijního a českého práva.* Praha: Linde, 2013, pp. 25–51.

[8] Case 186/87 (judgment of 2 February 1989).

a differentiation between nationals of a Member State and EU citizens as far as the right to maintain financial compensation for injury resulting from a criminal assault was concerned.

A thorough analysis of relevant ECJ case law would exceed the frame of this contribution. However, we can point at the doctrine formulated first in the Grzelczyk decision[9] according to which "Union citizenship is destined to be the fundamental status of nationals of the Member States". In their text-book on European Union Law[10] D. Chalmers, G. Davies and G. Monti state that national communities are no longer free to exclude others. They reach at the conclusion that "national citizenship may still exist, but it confers very few special rights", e.g. as far as national elections or some sensitive occupations are concerned. In other words, the legal status of Union citizens has been, to a large degree, approximated to the status of Member State nationals.

4. THE STATUS OF THIRD-COUNTRY NATIONALS UNDER EU MIGRATION LAW

The status of third-country nationals under EU law is, of course, different from the legal status of EU citizens, but, nevertheless, we can point at a very interesting process of approximation which has been stimulated by current EU anti-discrimination law. As it has been already pointed out in this contribution, the original concept of market freedoms and the prohibition of discrimination on grounds of nationality, as the cornerstone of European economic integration, has been, from the very beginning, inspired by the idea of reciprocity and mutual benefit. In contrast, new antidiscrimination legislation which has been adopted after the Amsterdam Treaty does not only refer to state nationals and EU citizens but to all human beings as such. Therefore, in such respect, the principle of reciprocity does not apply. Fundamental human rights including the non-discrimination principle have to be granted to all individuals, regardless of the specific relations between the receiving state and the home country of the individual.

Indeed, many politicians and lawyers considered the introduction of former Article 13 TEC (now Article 19 TFEU) as one of the most important benefits of the Treaty of Amsterdam.[11] Although the EU institutions, especially the European Parliament, addressed the issue of racism in the past and adopted a number of legally non-binding documents, before Amsterdam there had been no provision in primary EU law empowering EU institutions to adopt binding regulations. This deficiency was remedied by the new anti-discrimination provision.

Focusing on the beneficiaries of the new provision we may point at a crucial difference between the traditional concept of non-discrimination based on nationality, on one hand, and the new anti-discrimination framework of Article 13 TEC (Article 19 TFEU), on the other hand. Whereas Article 18 TFEU clearly refers to market freedoms and EU citizenship, Article 19 TFEU is reflecting a basic human rights principle. This has been unequivocally

[9] Case C-184/99.

[10] CHALMERS, D., DAVIES, G., MONTI, G. *European Union Law.* 2nd ed. Cambridge University Press, 2010, p. 446.

[11] More detailed ALTHOFF, N. *Die Bekämpfung von Diskriminierungen aus Gründen der Rasse und der ethnischen Herkunft in der Europäischen Gemeinschaft ausgehend von Art. 13 EG.* Frankfurt am Main 2006, p. 23.

expressed in the preamble of Directive 2000/43/EC, the so-called Racial Discrimination Directive,[12] which was the first anti-discrimination directive to be based on Article 13 TEC.

Recital 2 of the preamble points at Article 6 TEU according to which the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Recital 3 recalls that the right to equality before law and protection against discrimination for all persons constitutes a universal right recognized by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, the International Convention on the Elimination of all Forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 3 para. 1 of the Directive states that the Directive shall apply to all persons, e.g. in relation to the conditions for access to employment, employment and working conditions, social protection, education and access to goods and services. These references seem to indicate that beneficiaries of Directives 2000/43/EC shall be all individuals, regardless of their nationality. This idea is also expressed in Recital 16 of the preamble according to which it is important to protect all natural persons against discrimination on grounds of race or ethnic origin. So, the advantages of anti-discrimination legislation in this sense cannot be reserved only to EU citizens.

However, this interpretation is not supported by the principles regulating the delimitation of EU powers with respect to the competences of Member States. According to the principle of conferral of powers[13] the EU shall act only within the limits of competences conferred to it by the Member States. Competences which have not been conferred to the EU remain with the Member States. As it has been pointed out by the EU Court of Justice in its Opinion 2/94,[14] no provision conferred to the EU the power to adopt rules in the field of human rights or to conclude international conventions in this area. This situation has not been changed neither by the Lisbon Treaty nor by the now legally binding EU Charter of Fundamental Rights. Article 6 TEU expressly states that the provisions of the Charter do not extend the competences of the EU in human rights matters.

This tension calls for a solution that combines the non-discrimination principle as it has been developed by human rights law and the prohibition of discrimination under EU law. In those specific areas in which the EC has been granted legislative powers by Member States, the Council is empowered to adopt rules for the benefit of all individuals, i.e. also for third country nationals. However, where primary EU law reserves certain rights to EU citizens, the powers of the Council with respect to antidiscrimination legislation is limited.[15] In this sense, as determined in Article 3 paragraph 2 of Directive 2000/43/EC, the Directive does not cover different treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals.

[12] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[13] Article 5 TEU.

[14] Opinion 2/94 of 28 March 1996 ("Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms").

[15] HOLOUBEK, M. Art. 13 EGV. In: SCHWARZE, J. (Hg.). *EU-Kommentar*. Baden-Baden 2000; POŘÍZEK, P. *Vstup cizince na území státu. Pohled mezinárodního, unijního a českého práva*. Praha: Linde, 2013.

But what does this mean? On one hand, antidiscrimination legislation may bring the status of third-country national closer or even very close to the status of EU citizens since the provisions of Directive 2000/43/EC may very well apply to third-country nationals. On the other hand, reasonable differentiation with respect to nationality will continue to be legal. By the way, it may seem rather surprising that the above quoted provision of Article 3 paragraph 2 of Directive 2000/43/EC was not contained in the first drafts which the European Commission presented in 1999[16] and 2000[17].

Unfortunately, the case-law of the EU Court of Justice has, so far, contributed very little to the clarification of the question how the prohibition of racial discrimination refers to the migration of third-country nationals to EU countries. For the purpose of this contribution we may briefly revisit the Feryn case which was decided by the ECJ on 10 July 2008.[18] In this context the Court did not deal with a concrete case of a person who had been discriminated on grounds of ethnic origin and nationality but with a public statement of an employer. Actually, when reading the judgment of the Court of Justice, the facts of the case are not entirely clear. According to the Court, Mr Feryn the director of an enterprise, which specialised in the sale and installation of security doors, declared in public that his enterprise could not employ immigrants because its customers were reluctant to grant them access to their private residences for the period of the works. This gives the impression that the statement was, in general, related to all immigrants from third-countries and maybe even from EU countries.

Fortunately, the Opinion of Advocate General Maduro of 12 March 2008 describes the circumstances of the case in more detail. According to this Opinion the director of the Feryn company said in a newspaper interview that his firm would not recruit Moroccans. He explained that when he sends door installers to private homes and villas, the customers do not want Moroccans coming into their homes. The same day when the statement of the director of Feryn was published by a Belgian newspaper, he participated in an interview on Belgian national television in which he stated that he had to comply with the customers' requirements and suggested that if he sent Moroccan employees the customers would reject the service. The Belgian Centre for Equal Opportunities and Opposition to Racism, which had been set up by national anti-discrimination law, brought proceedings against the Feryn company before the competent Belgian courts. The national court of second instance made a reference to the EU Court of Justice for a preliminary ruling.

In my view, it is a pity that the ECJ did not use the opportunity to explain the applicability of EU anti-discrimination law with respect to third-country nationals in cases concerning access to the labour market and, indirectly, to permanent residence status. Neither the Court in its judgment nor the Advocate General in his Opinion analysed the possible impact of Directive 2000/43/EC on different migration status. Therefore, we do not learn from the legal arguments whether it would make a difference if the director of Feryn was talking about Moroccan citizens, EU citizens of Moroccan origin or Belgian citizens of Moroccan origin.

[16] COM (1999) 566 final.
[17] COM (2000) 328 final.
[18] Case C-54/07.

The ECJ judgment suggests that such different status is completely irrelevant to a case in which Directive 2000/43/EC shall be applied. It seems that access to the Belgian labour market has to be granted, in the same manner, to Belgian, French or Moroccan nationals. I wonder whether such interpretation is in line with the above quoted Article 3 para. 2 of Directive 2000/43/EC.

So far, the ECJ had no chance to tackle this problem in its subsequent case-law. But, hopefully, the Court will clarify the complicated relation between anti-discrimination rules and migration in the future.

5. CONCLUSIONS

Two generations of EU anti-discrimination law have approximated the status of state nationals, Union citizens and third-country nationals. The idea of basic human rights is the driving force behind this development. However, conceptual considerations lead to the conclusion that in certain sensitive areas state nationals and Union citizens may be granted a privileged status, in comparison to third-country nationals. The jurisprudence of international human rights bodies and ECJ case-law show that a clear line between the different categories is, sometimes, hard to draw.

On a conceptual level, there is a conflict between three major models, first, the construction of the social contract as a contract between citizens, secondly, the reciprocity principle as the basis for the non-discrimination principle in EU law and, last but not least, the idea of general equality, which is laid down in international human rights norms. We find that activist approaches, however well-intentioned, may weaken the authority of the entire system of equality and non-discrimination and, thus, negatively affect the concept of EU citizenship.