THE STATUS OF CITIZENS AND MIGRANTS IN LIGHT OF THE NON-DISCRIMINATION PRINCIPLE

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Introduction

Migration is connected to a large number of civil and political rights like, e.g., the non-refoulement principle, the respect for private and family life, a fair trial and personal liberty, human dignity and freedom of opinion, as well as social rights like, e.g., the right to just conditions of work, the right to fair remuneration, the right to social security and the right to health care. In the international human rights doctrine there is little doubt about the close link between international protection of human rights and the regulation of migration. Also the jurisprudence of international and national courts has clearly demonstrated that migration is one of the most complex human rights issues of our time.

The purpose of my contribution is to show how the non-discrimination principle substantially affects the standards of European migration law. Already in 1989, the UN Human Rights Committee in its General Comment No. 18 on non-discrimination found that non-discrimination, together with 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. However, the Human Rights Committee at the same time observed that not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Such interpretation can be seen as a cornerstone for the concept of migrants' rights because any differentiation of treatment which is based on national origin or nationality has to be justified by rational arguments. Under the influence of international human rights law, citizens' rights have, gradually, become everybody's rights, which apply to migrants.

This development has been thoroughly considered by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 20 from May 20, 2009. Twenty years after the Human Rights Committee had pointed out the outstanding importance of the non-discrimination principle, the Committee on Economic, Social and Cultural Rights 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.

EU anti-discrimination law and international human rights law are to a certain degree complementary. However, we have to recall that with respect to EU law it is necessary to distinguish between two generations of anti-discrimination norms. The first generation is built upon the concept of fundamental market freedoms. In the light of internal market rules, free movement of economically active citizens of EU Member States was, from the very beginning, connected to the principle of non-discrimination on grounds of nationality. This generation of EU anti-discrimination law was inspired by the economic goals of European integration and, even more pragmatically, by the principle of reciprocity among Member States.

The second generation of EU antidiscrimination law was closely related to the Amsterdam Treaty of 1997 which introduced, as one of its major achievements, a new provision empowering the EU Council to deal with discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The following legal acts adopted by the Council were much less influenced by the idea of mutual economic benefit than by the principle of European and international human rights law. Below, we want to show how both generations of EU anti-discrimination rules affect the legal regulation of migration.

EU Citizenship and Migration

EU law has, fundamentally, changed the notion of discrimination on grounds of nationality. For centuries, traditional international law had been categorically differentiating between citizens and non-citizens. The term citizenship described a specific bond of loyalty between a sovereign state and its nationals. In a leading case of 1892[1] the US Supreme Court found that it was an accepted

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

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. In this light it is understandable that international law, in general, left it to the sovereign state to determine who shall be a citizen and which specific rights and duties are attributed to citizens.

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. This key market freedom had been, originally, reserved to economically active citizens, i.e., workers and entrepreneurs. Since the entry into force of the Maastricht Treaty in 1993, the concept of Union citizenship also grants free movement within the Member States to students, unemployed and retired persons.

The combination of free movement of EU citizens and the principle of non-discrimination has reached an unexpected dynamics. In a number of crucial decisions the EU Court of Justice has defined the scope for the application of this new concept. For example, in the landmark decision of Ian William Cowan v. Trésor public[2] 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 or foreign nationals whose home country had concluded a reciprocal agreement with France or who were holders of a residence permit. Mr. Cowan, a British citizen, who had become the victim of a criminal assault 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 differentiation between citizens and non-citizens by pointing out the principle of national solidarity. According to this principle, a sovereign state may presuppose a closer bond with the State and the beneficiaries of social benefits.

The EU Court of Justice, however, did not accept the argument of the French government and found that the prohibition of discrimination on grounds of nationality, as part of primary EU law, excludes any 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.

2 Case 186/87 (judgment of February 2, 1989).

In the Grzelczyk decision,[3] the EU Court of Justice for the first time explained that "Union citizenship is destined to be the fundamental status of nationals of the Member States. In their textbook on European Union Law Damian Chalmers, Gareth Davies and Giorgio Monti (2010: 446) 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 approximated to the status of Member State nationals.

The prohibition of discrimination on grounds of nationality also applies in the politically sensitive area of social assistance. The rule of equal treatment was already contained in Regulation (EEC) No. 1408/71 of the Council of June 14, 1971, on the application of social security schemes to employed persons and their families moving within the Community. In the spirit of reciprocity the Regulation mainly applied only to employed citizens of Member States and their family members. The personal scope of the Regulation was gradually extended to bring other categories within its scope. According to the modernized Regulation No. 883/2004 of the European Parliament and of the Council of April 29, 2004, on the coordination of social security systems the personal scope relates to all nationals of a Member State who are or have been subject to the legislation of a Member State.

EU law, so far, appeared to allow for the possibility of treating home state nationals and migrating EU citizens differently with regard to access to social assistance. However, the EU Court of Justice in its ruling in the Brey case[4] has clarified that economically non-active EU citizens, like, e.g., pensioners from other Members States, must not be excluded from social assistance in the receiving Member State. The Court has, in principle, recognized a certain degree of financial solidarity between of a host Member State and nationals of other Member States.

Third-Country Nationals and Migration

The second generation of EU anti-discrimination norms which have been adopted after the Amsterdam Treaty does refer not only to state nationals and privileged citizens of EU Members States (EU citizens) but to all human beings. Therefore,

3 Case C-184/99.

4 Case C-140/12 (judgment of September 19, 2013).

in such respect, the principle of reciprocity does not apply. Fundamental human rights have to be granted to all individuals, regardless of the specific relations between the receiving state and the home country of the individual.

In this context we may recall, e.g., Article 1 of the European Convention on Human Rights according to which the High Contraction Parties (i.e., among others all EU Member States) shall secure the rights and freedoms to "everyone within their jurisdiction." It is no coincidence that the first EU anti-discrimination directive adopted after Amsterdam, i.e., Directive 2000/43/EC of June 29, 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, explicitly refers to general human rights standards. According to Recital 3 of the Directive 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. Further, 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.

Undoubtedly, such legal regulation may bring the status of third-country national very close to the status of EU citizens. As Directive 2000/43/EC combats, in general, discrimination on the ground of racial or ethnic origin, those anti-discrimination rules may very well apply in favor of third-country nationals. Article 1 of the International Convention on the Elimination of all forms of Racial Discrimination, to which the preamble of the Directive directly refers, clarifies that racial discrimination shall mean distinction, exclusion, restriction or preference based not only on race and ethnic origin, but also on national origin.

The current jurisprudence of international human rights bodies, therefore, shows that differentiation based on nationality is, to a very large degree, understood as something suspicious. In its General Comment No. 30 on discrimination against non-citizens[5] the competent Committee on the Elimination of Racial Discrimination confirmed that differential treatment based on citizenship or immigration status will constitute discrimination if the criteria

5 CERD/C/64/Misc.11/rev.3 (2004).

for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim and are not proportional to the achievement of this aim. In this context the Committee calls upon States Parties to avoid the expulsion of non-citizens, especially long-term residents, that would result in disproportionate interference with the right to family life, and to grant equal rights to citizens and non-citizens in the areas of education, housing, employment and health. On the other hand, the Committee concedes that States Parties may refuse to offer jobs to non-citizens without a work permit. Moreover, it seems clear that the right to residence may be linked to a valid work permit.

This idea is also well expressed in Article 3 para. 2 of Directive 2000/43/EC, according to which the Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals. But what does this mean?

So far, the case-law of the EU Court of Justice has contributed very little to the clarification of the question of how the prohibition of racial discrimination may refer to the migration of third-country nationals to EU countries and their access to the labor market. In the Feryn case which was decided on July 10, 2008,[6] the Court did not deal with the concrete case of a person who had been discriminated on grounds of ethnic origin and nationality but with a public statement of an employer. Mr Feryn, the director of an enterprise specializing in the sale and installation of security doors, had declared in public 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 Mr Feryn was published by a Belgian newspaper, Mr Feryn 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 Center for equal opportunities and opposition to racism, a national anti-discrimination organization, initiated proceedings against the Feryn company before the competent Belgian courts. The national court of second instance made a reference to the Court of Justice for a preliminary ruling.

In my view, it is a pity that the ECJ has not used the opportunity to explain the applicability of EU anti-discrimination law with respect to third-country nationals in cases concerning access to the labor market and, indirectly, to long-term

6 Case C-54/07.

residence status. Neither the Court in its judgment nor the Advocate General in his Opinion analyzed the possible impact of different migration status on the scope of Directive 2000/43/EC. Therefore, we do not learn from the legal arguments whether it makes a difference whether Mr Feryn was referring to Moroccan citizens, Union citizens of Moroccan origin or Belgian citizens of Moroccan origin.

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

Conclusions

Two generations of EU anti-discrimination law have approximated the status of state nationals, Union citizens and third-country nationals. The principle of reciprocity between Member States and the idea of basic human rights have inspired a set of EU anti-discrimination rules which extend the scope of the non-discrimination principle. The jurisprudence of international human rights bodies and the EU Court of Justice shows that a clear line between the different categories is hard to draw and will be subject to further debate. The Feryn case may be seen as an example for problematic and unclear application of non-discrimination rule in a migration situation. I believe that the approximation of the legal status of all individuals irrespective of their nationality may be welcomed as one of the major achievements of international human rights law. However, the concept of equality should not be overused in order to, completely, replace the traditional concept of reciprocity between sovereign states and the basic value of citizenship expressing a special bond of loyalty between an individual and a State. Eventually, a State not being supported by citizens' loyalty and democratic legitimacy will not be able to protect human rights, nor the rights of citizens nor migrants' rights.

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Reference

Chalmers, Damian, Gareth Davies and Giorgio Monti (2010): *European Union Law: Cases and Materials*. 2nd Edition. Cambridge University Press.