

Introduction: integration for third-country nationals in the EU – the challenge of equality

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SCOPE AND AIMS OF THE BOOK

Words such as integration, migration, citizenship and equality are at the core of political speeches and media communications. They represent the focus of national agendas, particularly in Europe, and are frequently linked to security and border control. However, they are not just empty words; by contrast, depending on the interpretation of their meaning they can have varying consequences for individuals. The significance of these terms, while vague and content-less to some audiences, is extremely powerful and relevant to those whom the laws and policies address. Scholarly theories and academic discourse analysis often ‘unpack’ their connotations to reveal their profound implications. The study of migration in all its forced and voluntary forms and regarding its interplay with equality and integration is particularly appealing.

This volume does not try to engage in a critical theoretical discussion stemming from the different concepts of integration, equality, migration and citizenship. On the contrary, it engages with them to provide a contextual analysis of the various layers of ‘citizenship’¹ accorded to non-EU nationals legally resident within the EU borders.

It attempts to blend legal, sociological and policy-oriented research to examine the status of this group of migrants, referred to, in EU jargon, as Third-Country Nationals (TCNs). It reflects on the limitations present in the EU equality legislation² as abuses and discriminations triggered by

¹ The conceptual background has sometimes been referred to as ‘denizenship’, a term sometimes used to describe the status of immigrants who enjoy a set of rights approaching that of EU citizens though at different levels, defined as citizenship’s boundaries. See T. Hammar, *Democracy and the Nation State* (Avebury, 1990).

² For equality directives the authors mean the Council Directive 2000/43 of

differential treatment based on nationality for TCNs might be allowed by EU primary and secondary legislation.³ The factors and constraints that produce such inequalities are also reflected at the Member State level.

Thus, the work engages with current debates on equality and migration/asylum law and policies in Europe⁴ and provides a systematic account of the social rights of non-EU migrants. The study bridges the divide between 'black-letter law' and 'practical realities', capturing the interface between migration and equality in light of the Lisbon Treaty. It provides valuable comparative insights into equality and integration issues, their implementation in different Member States and their impact on individuals.

The aims of this manuscript are twofold. The first is to highlight the extent to which social rights formally assured to third-country nationals are effectively enjoyed. This is done through an analysis of the legal status of asylum seekers and beneficiaries of international protection, economic migrants, long-term residents and family members of the previous groups in a number of European countries. The second is to explore the interplay between equality/non-discrimination principles based on nationality and race and the equality clauses⁵ provided by secondary legislation in relation to the different categories of TCNs. Within this context, full attention is paid to the legal measures transposing EU Directives on migration and asylum adopted by a selected number of Member States,⁶ and to

29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin; the Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

³ On the personal scope of application of EU anti-discrimination legislation, see Art 3(2) Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin; Art 3 (2) Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. However, the Court of Justice of the EU failed to address the intersection between nationality and race in the case *Centrum voor gelijkheid van Kansen en voor racismebestrijding v Firma Feryn NV* Case C-54/07. This will be explored further in Chapter 2.

⁴ See J. Niessen and T. Huddleston, *Legal Frameworks for the Integration of Third-Country Nationals* (Martinus Nijhoff Publishers, 2009).

⁵ In this context, the term 'equality clauses' refers to provisions in Directives on migration and asylum, as well as in domestic implementing measures, which set out equivalent standards of treatment for third-country nationals and nationals with particular regard to access to social rights.

⁶ The 'conditions of entry and residence' of third-country nationals are regulated by art 79 (3) TFEU and secondary legislation. However, the volume of legal migration is 'a matter of national discretion'. Several directives have been introduced since immigration law was added as an area of the EC's competence in the EC Treaty in 1999. The main Council Directives investigated in the work are: Dir.

the perceptions of the migrants themselves towards safeguards of equality and integration requirements.⁷ The work's conclusions sketch out a number of future scenarios for the operation of the equality principle. They also comment on the sustainability of equality as an approach to facilitating the introduction of equivalent conditions between nationals and non-nationals, and in promoting integration. In this regard, the contributions to the book examine equality, proportionality and integration approaches in legislation and other measures at both the EU and the national levels.

CONTENTS AND METHODOLOGY

The originality of this book lies in its contents and methodology. There are a number of distinctive features.

The first relevant facet is the treatment of issues at the intersection between the EU's migration/asylum law and policy and EU anti-discrimination legislation on the grounds of nationality and race. The volume extensively investigates the link between migration and discrimination against third-country nationals in the European Union from an integration perspective. The focus is on the limited protection given to legally resident third-country nationals within the EU, as protection against discrimination on grounds of nationality is not covered by any of the Equality Directives. Reflections on the Charter of Fundamental Rights as a human rights instrument to enhance protection against indirect racial

2003/109 on the status of third-country nationals who are long-term residents, in Chapter 12; Dir. 2003/86 on the right to family reunification in Chapters 14 to 17; Dir. 2003/9 laying down minimum standards for the reception of asylum seekers in Chapter 5; Dir. 2004/83 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; Dir. 2005/71 on a specific procedure for admitting third-country nationals for the purposes of scientific research and Dir. 2009/50 on the conditions of entry and residence for the purposes of highly qualified employment examined in Chapter 11.

⁷ The integration process is double-faceted as it would require from the side of the state to grant equivalent conditions of treatment for non-nationals and effective access to welfare, and from the side of the individual to meet certain requirements, such as mastering the language of the host country. Moreover, the concept of integration could be challenged by the migrants, who will demand the full enjoyment of the social rights they are entitled to from the State, thus to acquire to a certain extent the active position of formal citizens. For more detail on this concept see Chapter 3.

discrimination based on nationality for TCNs are offered. Then, the equality clauses in EU migration and asylum legislation are also explored.

A second feature relates to integration, a central theme in the EU's and Member States' migration policies. In this respect, the book provides a commentary on different aspects of this and charts developments since 1999 when, at the European Council of Tampere, EU political leaders declared that 'a more vigorous integration policy should aim at granting (lawfully resident third-country nationals) rights and obligations comparable to those of the citizens of the EU'.⁸ This was intended to strongly promote, as an integration tool for immigrants, the link between secure residence status and equal treatment. The book follows the legal, political and social developments of the integration policy after Tampere, culminating in the adoption of the 'Single Permit' Directive⁹ which provides working TCNs with comparable rights to those of EU nationals. The work considers both positive outcomes and significant shortcomings associated with the way integration has been approached by both the EU and Member States.

The third characteristic of the manuscript is the analysis of EU laws and strategies as implemented in a selected number of Member States. The book explores and evaluates the impact of the implementation measures introduced by these countries at the national level.

Another distinctive and innovative aspect of the work lies in its comparative and socio-legal approach: on the one hand, the driving focus of the work is on EU and national law; on the other hand, the input and influence of policy-oriented and sociological research have been considerable, particularly in relation to certain chapters.¹⁰ In-depth legal analysis of the equality provisions present in the EU directives on migration and asylum and their interplay with EU anti-discrimination legislation is provided throughout most of the book. Then, a number of chapters¹¹ offer a sociological account of the impact of European and national law and policies on migrants and family members within those groups.

⁸ Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, Bulletin EU, pp.10–99, available at http://www.europarl.europa.eu/summits/tam_en.htm (last accessed 12 July 2012).

⁹ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, Official Journal of the European Union, 23 December 2011, L 343, pp.1–9.

¹⁰ See Chapters 3, 9 and 10.

¹¹ See for example Chapters 9 and 10.

Reference is made, for example, to up-to-date case studies and case law developments. Some chapters¹² reflect a comparative pattern, focusing on the implementation of EU law and policy in a number of countries in a cross-cutting fashion.

OUTLINE OF THE BOOK

This book is divided into ‘framework’ and ‘contextual’ chapters. Part I contains three framework chapters (Chapters 1, 2 and 3) which constitute the skeleton of the book.

In Chapter 1, Elspeth Guild analyses the evolution of the concept of Union Citizenship after the entry into force of the Lisbon Treaty. Since the creation of Union citizenship, there has been much discussion about its meaning and indeed whether it is in fact a ‘citizenship’ at all, particularly as it lacks the related fundamental international legal characteristics that confer the complete individual protection from expulsion. The long and slow process which has led to the Lisbon Treaty has fundamentally changed the content and meaning of citizenship of the Union. The argument set out in this chapter is based on three main premises. The first is that EU citizenship has finally acquired its Bill of Rights in the form of a legally binding EU Charter of Fundamental Rights. The second premise is that the Charter transforms the overall concept of citizenship in the EU as it redefines who is entitled to bundles of rights that inform the meaning of citizenship and ‘belonging’. The third premise is that the Charter is neither part of a constitution in the traditional nation-state sense, nor is it an international human rights treaty even in the regional sense of the European Convention on Human Rights. As a new mechanism for the delivery of rights it transforms the relationship between the individual and the state through a different type of rights entitlement that has arisen from, and is embedded in, the EU. Thus, in rethinking the relationship between fundamental rights and EU citizenship, as shaped by Lisbon, this chapter frames the EU context of citizenship’s evolution and human rights obligations, and related implications on third-country national status, approaching to some extent those of Union nationals.

In Chapter 2, Sonia Morano-Foadi and Karin de Vries examine the principle of equality emerging from EU law, focusing on the Equality Directives and, in particular, the Racial Equality Directive (2000/43/CE) and its scope of application. The chapter assesses the successes and

¹² See for example Chapters 13 and 14.

constraints of the EU equality directives, e.g. their scope of application to compensate for the exclusion of differential treatment based on nationality in order to safeguard Member States' sovereignty in migration policy. It then provides an insight into EU directives on migration and asylum and related background policies in order to highlight the provisions dealing with access to key social goods for the different third-country national categories. A key aspiration of this chapter is to consider the degree to which EU legislation has been effective in achieving its aims, particularly in achieving equality. In light of the new challenges introduced by the Lisbon Treaty,¹³ the jurisprudence of the European Court of Human Rights and the Court of Justice of the EU (CJEU) is also analysed to capture the new concept of social integration encompassed by EU migration and asylum law,¹⁴ and to tackle the equality question for third-country nationals.

Chapter 3 reviews the evolution of European Union policies on integration, and considers its implications. The Amsterdam Treaty and the Tampere agenda not only initiated the development of common European policies on migration and asylum, but also gave rise to the development of integration policies at the European level. While the Tampere agenda stressed equal opportunities and equality as key aspects of third-country nationals' integration, subsequent EU policy debates and legislation emphasized migrants' obligations. Micaela Malena and Sonia Morano-Foadi argue that the interplay between EU integration goals and migration policy severely affects the chances for third-country nationals to effectively belong to the host community. Based on the latest developments,¹⁵ the chapter analyses three distinct emerging models of integration: (1) rights-based inclusion, (2) integration involving both obligations and rights (conceived as allowances, *octroyées*, rather than

¹³ The Treaty on the Functioning of the EU (TFEU) and Treaty on the EU (TEU) entered into force in December 2009 known as the Lisbon Treaties or Treaty. The treaties have introduced a number of significant changes in relation to immigration and asylum law and policy (the co-decision procedure and the extended jurisdiction of the Court of Justice of the EU); and fundamental rights (including the new legally binding nature of the EU Charter of Fundamental Rights, and the new legal basis to accede to the European Convention of Human Rights). The equality policy has not significantly changed, as the consultation procedure remains for any of the protected grounds of discrimination.

¹⁴ K. Groenendijk, 'Legal Concepts of Integration in EU Migration Law', *European Journal of Migration and Law*, 6: 111–126, 2004.

¹⁵ The most recent developments are the European Agenda for the Integration of Third-Country Nationals COM(2011) 455 final and the 'Single Permit' Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011, *op. cit.* footnote 9.

entitlements) and (3) focus on cultural assimilation, notably through an emphasis on acquiring language proficiencies and embracing European basic values.

Part II is divided into three sub-parts. Each sub-part is introduced by a general chapter dealing with EU policy and law on asylum and immigration. Then, contextual chapters based on case studies offer an overview of the legal measures transposing EU Directives on migration, asylum and equality in a number of selected Member States and the interplay between equality and migration policies.

Part II-1 contains four chapters which present case studies from the UK, Italy and Greece in relation to asylum seekers and beneficiaries of international protection.

Madeline Garlick, in Chapter 4, examines the current EU legal provisions covering reception conditions for asylum seekers; asylum procedures applied to all seeking protection in the EU; and the entitlements finally conferred on people who are granted protection under the Qualification Directive. A number of areas that highlight current challenges are considered. These include discrimination against nationals of EU Member States seeking asylum in other countries; limits for people seeking protection on the right to be heard, to legal assistance, and to remain in the EU while an appeal is considered; and access to the labour market for subsidiary protection beneficiaries, as well as basic subsistence for such protection beneficiaries and their family members. The author argues that stringent analysis and data is needed to inform on-going processes of law and policymaking to ensure that equality for people needing protection in the EU is achieved in the framework of rights for years to come.

Katia Bianchini analyses, in Chapter 5, the treatment of asylum seekers in the United Kingdom, pending their application. The purpose of this chapter is to provide an overview of the transposition of Council Directive 2003/09/EC of 27 January 2003 (Reception Directive) with particular regard to the effective enjoyment of reception services in the UK. The analysis shows that the United Kingdom should reinforce the current reception services and commit further resources to their improvement.

Chapter 6 focuses on recent legal developments concerning the content of the international protection statuses in the Italian context. Micaela Malena assesses the effectiveness of integration prospects for refugees and beneficiaries of subsidiary protection and the extent to which the rights attached to respective statuses are actually enjoyed. The key social goods considered within this analysis entail rights of access to housing, social assistance and employment. The perspective adopted is the principle of equality and the instruments of anti-discrimination policies. Within the implementation process of the EU Directives on qualification and asylum

procedures – respectively transposed in 2007 and 2008 – the Italian system has been developing significantly. Relevant provisions of the Legislative Decree no. 251/07 (transposing the Qualification Directive), set out in compliance with the Geneva Convention on refugee status, are also analysed. Micaela Malena argues that severe shortcomings emerge from a number of discriminatory practices, normative changes and structural constraints within secondary reception capacity.

The case of asylum procedures and the detention of asylum seekers in Greece is examined in Chapter 7. Evangelia (Lilian) Tsourdi assesses whether the transposition of Council Directives 2005/85/EC and 2003/9/EC through the Presidential Decrees 81/2009 and 220/2007, as well as their application in practice, are in line with the obligations of Greece under international human rights law, refugee law and European Union Law. In particular the author looks into the limitations imposed by law or emerging in practice for third-country nationals who seek international protection in Greece and comments on the legislative reforms to the Greek asylum system that are currently underway.

Part II-2 comprises six chapters. It contains case studies on economic migrants in Belgium, Germany, the Scandinavian countries and the UK, and a chapter dealing with long-term residents in Spain.

In Chapter 8, Moritz Jesse highlights trends in European policy and law regarding access to the employment market for immigrants with an emphasis on the legal situation of long-term residents under Directive 2003/109/EC. The chapter introduces EU directives that determine the legal status of third-country nationals, defined as economic migrants and long-term residents, as well as relevant case law of the CJEU. This area of immigration law reveals ‘subtle’ and ‘not-so-subtle’ policy choices creating situations of inclusion and exclusion of immigrants that underlie European immigration law as a whole. The author argues that legislation is tailored to encourage immigration of wanted immigrants, such as highly qualified individuals, researchers, or students, and to discourage immigration of unwanted categories of immigrants, for example family members of regular migrants. Dividing lines between unwanted and wanted immigration are, for example, visible when comparing rights to family reunification, obligations to participate in integration courses, pre-departure integration conditions, or access to unlimited residence statuses.

Maria Kontos, in Chapter 9, elaborates on the policy framework that determines the social citizenship rights of migrant domestic workers and questions how welfare, care, and migration policy shape the working and living conditions of migrant domestic and care workers in Germany. Drawing from the results of the FeMiPol project conducted from 2006 to

2008 and funded by the European Commission, the author argues that labour market policies have an adverse impact on migrant domestic and care workers in Germany.

In Chapter 10, Aino Saarinen focuses on economic migrants and their ability to access the welfare system in Finland. A discussion of differences and similarities with other Scandinavian countries is provided. An outline of the four main waves of migration and the three related policy turns is proposed. Differences, tensions and collisions between the Nordic, residence-based welfare regime and the EU work-based model are evident after Finland's EU membership in 1995. In spite of the formally favourable Nordic norms and principles for social equality and the new, EU-inspired integration and non-discrimination laws and policies, TCNs in practice have to confront economic marginalisation and discrimination.

In Chapter 11, Kay Hailbronner focuses on the Blue Card Directive 2009/50/EC and the Researchers Directive 2005/71/EC which intend to offer attractive conditions for entry and residence in the EU to highly qualified third-country nationals and researchers from third countries. Both directives contain a number of norms providing equal treatment with nationals in several areas of law. However, as the chapter shows, some of these provisions fail to effectively result in equal treatment due to uncertainties as to the scope and interpretation of the provisions at the national level.

The implementation of the Long-Term Residents Directive (2003/109) in Spain is the object of Chapter 12. Diego Acosta Arcarazo explores how Spain has answered four fundamental questions in the implementation of the Directive: Who can obtain long-term residence? What are the conditions required to obtain it? What is the security of residence once it has been obtained? What are the chances for status-holders in other Member States to come to Spain in order to work? The answer to these questions is accompanied by a comparison of how other Member States have implemented the same provisions. This allows conclusions to be made about the level of openness or restrictiveness of the Spanish implementing law.

Moritz Jesse, in Chapter 13, endeavours to assess under which conditions non-economic and economic immigrants have formal access to employment and occupation in Belgium, Germany and the UK. The study reveals the policy choices taken by the three States in order to discourage the immigration of 'unwanted' immigrants, facilitate the entrance of highly qualified immigrants and restrict conditions for regular economic immigrants. The chapter juxtaposes the legal situation of the three States and displays similarities and differences influencing the legal situation of immigrants and their chances of inclusion.

Part II-3 examines the rights of family members in Chapters 14, 15, 16 and 17, where an account of the laws in Germany, the Netherlands and Spain is provided.

Keith Puttick and Cordelia Carlitz, in Chapter 14, focus on a number of areas of inequalities affecting family members of EU and non-EU citizens. The authors consider the family migration route as an important strand of entry and residence by TCNs and TCN family members assisted by the Family Reunification Directive (Dir. 2003/86) and the Citizens Directive (Dir. 2004/38), and art 8 ECHR. This is an area in which those who enter and reside in the EU's host States can be affected by significant inequalities. Assisted by the results of their research, the authors examine the operation of language tests, civic integration requirements, and material support. They analyse the various concepts of 'integration' currently prevailing in the EU with regard to family reunification and compare integration approaches applied to family reunification of TCNs and their family members with the way it applies to Union citizens and their family members.

Following on from the introductory chapter to Part II-3 (Chapter 14), in Chapter 15, Cordelia Carlitz develops some of the integration themes considered in relation to Germany. In August 2007, pre-entry language requirements and a minimum age for the family reunification of spouses were introduced in Germany as part of new legislation. The author answers the question of whether these new immigration requirements respect fundamental rights protecting family life and the Family Reunification Directive 2003/86/EC. To this end, an analysis of the integration requirement's consequences in practice, which have been observed in a small-scale study in Turkey, is presented.

Karin De Vries, in Chapter 16, examines the integration requirements that form conditions for immigration in the Netherlands. The country made use of the discretion granted by the Family Reunification Directive (2003/86/EC), requiring that third-country nationals should first pass a civic integration exam abroad before they can be admitted for family reunification. The Dutch legislation differentiates between different categories of family migrants, resulting in the unequal treatment of transnational families depending on whether the incoming family member is a 'Western' or 'non-Western' national. The author argues that the unequal treatment constitutes a form of (indirect) discrimination on the ground of racial or ethnic origin. For this purpose, the relevant provisions of the UN Convention on the Elimination of All Forms of Racial Discrimination, the European Convention on Human Rights and the Racial Equality Directive are considered.

Chapter 17 discusses the implementation of Family Reunification

Directive (2003/86/EC) in Spain. Carmen Pérez González argues that Spanish implementing law contains a number of limitations on the reunification of first-degree ascendants. In conformity with the Directive, Member States remain free to remove more favourable conditions in order to accommodate political migratory concerns. The author argues that those limitations for TCNs' ascendants bear discriminatory consequences mainly related to access to the labour market in Spain.

In the concluding remarks, Sonia Morano-Foadi and Micaela Malena reflect on the scope of the socio-legal concept of third-country nationals' integration arising from EU migration/asylum law, and the tensions affecting the principle of ethnic and racial equality. Their analysis suggests that the Charter of Fundamental Rights could assist the courts in Europe in their endeavour to balance the tensions between migration and equality in the continent by focusing more on rights than on security worries.

The laws and policies contained in this volume are updated to July 2012.