

The importance and application of the principle of equal treatment of third country nationals in the EU

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Abstract

The communitarization of immigration and asylum disciplines and the beginning of a common European Union policy in such areas will begin to create more favorable conditions for the integration of third country nationals who are legally resident, in the territory of the EU. The Tampere European Council of 1999 stressed the need to provide to nationals of third countries rights and obligations similar to those of EU nationals, in order to eliminate social, economic and cultural discrimination. This could be possible through the approximation of the legal status of third country nationals to that of EU nationals. To achieve this goal, there are adopted secondary norms of Community legislation on equal treatment for certain categories of citizens of third countries as refugees, the long-term residents, etc. Regulation EC No 859/2003 extended the effects of the provisions relating to the coordination of national social security regimes and to third country nationals. This European common policy took a new development with the Lisbon Treaty. One of the objectives of the common policy on immigration is the one which provides an equal treatment to third-country national who are legally resident in one of the Member States. This attitude finds concretization even to several articles of the European Charter of Fundamental Rights, which after the Lisbon Treaty has binding legal effects as it has the same legal value of the treaties. The Directive 2011/98/EU aims to establish a single procedure for third country nationals to obtain a combined permit for both residence and work, establishing a series of rights for third-country nationals who are legally resident in a Member State. This directive, in certain sectors, provides an equal treatment of third country nationals with those national. But the text of the directive provides also the cases when EU Member States may derogate from the application of the principle of equal treatment. This paper aims to analyze legal instruments adopted by the EU which recognize the principle of equal treatment of nationals of third countries with nationals, as well as the ways provided to implement this important principle.

Key words: equal treatment principle, third-country nationals, immigration, Community legislation

Introduction

The equal treatment of third country nationals took place only with the adoption and development of a common European policy in the discipline of immigration and asylum. Until the Maastricht Treaty these disciplines were part of the "domestic jurisdiction" and were excluded from any power of community as they were considered as closely related to public order and public safety. (B.Nascimbene, 1995). With the Maastricht Treaty they were considered as a "common interest issues" and it was provided a kind of and intergovernmental cooperation among member states, while if the Council decided unanimously, there was provided even the possibility of applying the Community method.

With the entry into force of the Amsterdam Treaty the context changed completely. Measures relating to immigration and asylum were included in Title IV of the European Community Treaty (ECT) titled "Visas, asylum, immigration and other policies related to free movement of persons" and thus transferred from the third pillar to the first, becoming so issues which enter in the Community competence. The Council took the power to adopt measures concerning third-country nationals.

Through a special protocol *acquis Schengen* was integrated into Community law. in this way a Community policy on immigration and asylum was established with the Treaty of Amsterdam. The extraordinary Summit held in Tampere on 15-16 October 1999 on the creation of a space of freedom, security and justice in the European Union, represents an important step on the perception of immigration considered at that time as an internal security problem. Between members states was created the conviction thath a regular immigration constitutes a benefit for the EU, for immigrants and for countries of origin 1. in order to regulate this phenomem, measures of short term and medium term are not sufficient. A complex, long

1 European Council, "Presidency Conclusion" Tampere European Council, 15-16 October 1999 in http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm

term strategy, oriented to soften the push factors in the main countries of migration flows, was necessary. The Tampere Summit provides that for separate policies of immigration and asylum, a new common policy of the EU should be determined based on several elements, one of which is the equal treatment of third country nationals who are legitimate residents in the territory of the Member States. The emphasis was put on the implementation of a more vigorous integration policy in order to eliminate economic, social and cultural discrimination and to ensure fair treatment of immigrants, rights and obligations similar to those of EU citizens. The European Council recognizes also the need for an approximation of national legislations concerning the conditions of admission and residence of third country nationals, and the need for an approximation to the legal status of these citizens by guaranteeing equal rights to those of the member countries citizens to persons who have a long-term residence permit.

Community norms which provide equal treatment with EU citizens for specified categories of third-country nationals, were adopted due to the provisions of the Treaty of Amsterdam. With the entry into force of the Lisbon Treaty, the common policy on immigration and asylum had a further development. Chapter 2 of Title V establishes the targets for the implementation of a common policy on immigration and asylum. Article 79 of the TFEU provides that the Union must ensure fair treatment of third-country nationals residing legally in Member States when implementing common policy¹. The Parliament and the Council using the ordinary legislative procedure can take measures to give support to the member states on their actions in order to promote the integration of third-country nationals residing legally².

The principle of fair treatment (equal treatment) of third-country nationals is provided even in the European Charter of Fundamental Rights proclaimed in Nice on December 7 of 2000. The Charter provides in article 15 concerning the right to work, the right of third-country nationals to enjoy the same working conditions as EU nationals. The Charter becomes enforceable as the treaties³ with the Treaty of Lisbon which force its compliance by member states when applying the European Union law. The Charter also recognizes the right to benefit from social security and social advantages to any person residing and moving legally within the territory of the Union. The fact that the provision uses the term "everyone" means that these rights are not only recognized to the Union citizens but even to third-country nationals who are legally resident⁴.

The principle of fair treatment is established in different instruments for certain categories of third-country nationals. For this reason it is important to study the application of this principle according to the categories of third-country nationals and by determining community provisions that recognize this principle for each of these categories.

Family members of citizens of the European Union

The principle of equal treatment will be applied to family members of citizens of EU member states in certain fields. The Directive no. 2004/38/EC concerning the freedom of movement and residence of third country nationals and their family members, recognizes the right of the latter, regardless of their citizenship to exercise an economic activity⁵. Article 24 of the Directive establishes the principle of equal treatment for citizens of the Union and their family members regardless of their nationality⁶. It is prohibited any discrimination established by law, regulations or any administrative discrimination to access on the labor market. Article 24 when establishing the principle of equal treatment prohibits also any discrimination in the discipline of social security against the family members of EU citizens who are nationals of third countries. This level

1 Article 79 TFEU: "The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings...".

2 Art. 79.4 TFEU "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories ...".

3 Art. 6 TEU: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

4 Citti, W., "Le categorie di cittadini di Paesi terzi non membri dell'UE protetti dal principio di parità di trattamento di cui al diritto dell'Unione europea", study published in http://www.asgi.it/home_asgi.php?n=30&l=it

5 DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC in Official Journal of the European Union, L 158/77 of 30.04.2004.

6 Art. 24 "Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence".

of protection is not exercised autonomously as they obtained by the relation that family member has with the EU citizen who has exercised the right to freedom of movement.

Third-country nationals in possession of a long-term residence permit

The Directive No. 2003/109/EC1 concerning the status of third-country nationals who are long-term residents provides the equal treatment with the citizens of member states with regard to: access to employment and self-employed activity, conditions of employment and working conditions; education and vocational training, recognition of qualifications and study grants; welfare benefits (family allowances, retirement pensions, etc.) and sickness insurance; social assistance (minimum income support or retirement pensions, free health care, etc.); social benefits, tax relief and access to goods and services; freedom of association and union membership and freedom to represent a union or association; free access to the entire territory of the EU country concerned. in certain cases, EU countries may restrict equal treatment with nationals with respect to access to employment. in the field of social assistance and protection, EU countries may limit equal treatment to core benefits. They are nevertheless free to add to the list of benefits in which they grant equal treatment with nationals as well as to provide equal treatment in additional areas. The Court of Justice has interpreted the application of the principle of equal treatment of third-country citizens who are long-term residents. in the *Kamberaj*² case the Court held that there was a violation of the European Union law if the national normative reserves a different treatment to third country nationals to that reserved for nationals of the Member State in which they reside, if this discrimination comes in one of the areas for which the directive no. 109/2003 provides for the application of the principle of equal treatment. in this case it was a discrimination against long-term residents of third country nationals in relation to the access to goods and services made available to the public and to procedures for obtaining housing. The Court held that Member States are obliged not only by the Directive No. 109/2003 but even from the European Charter of fundamental rights which is directly applicable when the European Union law is applied and which provides the right of residence for those who do not have sufficient financial resources.

On the social security the Regulation EC no. 859/2003 will extend the effects of Regulation (EEC) no. 1408/71 and 574/72 on third-country nationals on whom these regulations have not been applied because of nationality. Regulations 1408/71 and 574/72 are respectively replaced by EC Regulations no. 883/2004 and 987/2009 and Regulation 859/2003 was repealed by Regulation (EU) no. 1231/2010.

Political refugees

The principle of equal treatment to third-country nationals who benefit of their refugee status is provided by the directive 2004/83/EC³. Article 26 of the Directive recognizes the right of access to employment and paragraph 5 provides that national legislation will be applied to the payment terms, and to other terms of employment. Article 28 establishes the

1 COUNCIL DIRECTIVE 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents in Official Journal of the European Union L 16/44 of 23.01.2004. Art. 11 "Long-term residents shall enjoy equal treatment with nationals as regards:(a) access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration; (b) education and vocational training, including study grants in accordance with national law; (c) recognition of professional diplomas, certificates and other qualifications, in accordance with the relevant national procedures; (d) social security, social assistance and social protection as defined by national law; (e) tax benefits; (f) access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing; (g) freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security;(h) free access to the entire territory of the Member State concerned, within the limits provided for by the national legislation for reasons of security".

2 CJEU of 24 April 2012, C-571/10, *Kamberaj*, in <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:62010CJ0571&from=IT>

3 COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 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 in Official Journal of the European Union L 304/12 of 30.9.2004.

obligation for Member States to ensure the right to social security to beneficiaries of refugee status or subsidiary protection status equally as to their citizens¹. in the same way Art 29 establishes the right to benefit from the access to health care.

The principle of equal treatment in Association Agreement with the EU – Third Countries

The agreements concluded by the European Community with third countries provide the creation of an Association characterized by mutual rights and obligations, common action and special procedures (310 TEC, sot 217 TFEU) (Zanghi, 2003). The institutional structures, which is a characteristic of these agreements, provides the creation of a "Council" composed of representatives of the Union and the associate State, who can make recommendations and in some cases adopt binding decisions. One of the first Agreements which provided equal treatment in certain areas for the associated third country - nationals is the one with Turkey approved in December 23, 1963. Article 10 of the agreement prohibits any discrimination based on the nationality in terms of payment and working conditions, recognizing in this way equal treatment to Turkish workers as those of the community. An Decision of the Association Council of 1980 has provide equal treatment to all sectors of social security defined as such by Regulation no. 1408/713. in the Association Agreements with the Mediterranean countries, the principle of equal treatment shall be expressly provided even in the field of social security.

Conclusions

The equal treatment of third-country nationals will receive a development with the communitarization of immigration and asylum policies. The fact that the communitarization of these policies is fragmented in different categories and have created different legal statuses for third – countries nationals, this principle today in European Union law applies not only to a fixed norm but to a plurality of norms. Beside the Association agreements which define the legal status of workers of associated countries, there are special norms for family members of Community nationals, third -countries nationals, long-term residents, refugees, etc.. If we take in analyze the Directive no. 2009/50/EC which provides the "blue card", a special residence permit for highly skilled workers, is noticed that some categories of third-country nationals as family members of citizens of third countries, skilled workers or long-term residents benefit from the norms of Union law which, for the manner and extent of rights put a more privileged position than nationals of third countries who are legally resident but who do not have a long- term residence permit. Some provisions of the fair treatment for these privileged categories, formally and in substance are similar to those that the EU law provides for citizens of the Union. As an example of this is the right to move for employment in the territory of the Union, a right that traditionally belongs to citizens of the Union, but that nowadays is provided differently in some of the special status of third country nationals. Family members of the EU citizens and citizens of third countries who have long-term residence permits or those equipped with "blue card" can also benefit from this right. Even the adoption of the Directive 2011/98/EU⁴ 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, doesn't change this juridical fragmented situation. The Directive itself in its final provisions establishes that there should be no prejudice on the more favorable norms that are provided in the Association Agreements.

The fair treatment of third country nationals is one of the main principles which supports the policy of immigration and asylum and one of the objectives that the Treaty (Article 79 TFEU) sets to the Union for the implementation of these policies. This principle applies to all third-country nationals residing lawfully in the territory of the Union. for certain categories of third countries nationals as; long-term residence permit, those who posses the "blue card" as well as those who are family members of a Union citizens, this principle has evolved into an equal treatment with that of the nationals of a member of the Union.

1 Art. 28 "Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has granted such statuses, the necessary social assistance, as provided to nationals of that Member State".

2 DECISIONE DEL CONSIGLIO del 28 dicembre 1963 relativa alla conclusione dell' Accordo che crea un' Associazione tra la Comunità Economica Europea e la Turchia in Gazzetta Ufficiale Delle Comunità Europee 3685/64 e 29.12.1964.

3 Substituted from REGULATION (EC) No 883/2004 OF THE EUROPEAN PARLIAMENT and OF THE COUNCIL of 29 April 2004, in Official Journal of the European Union L 166/1 of 30.4.2004.

4 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, in Official Journal of the European Union L343/1 of 23.12.2011

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