

Migration, Asylum and EU-Anti-Discrimination

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Introduction

- **Book Chapter: ‘Migration, Asylum and EU Anti-Discrimination Law’, in O’ Cinneide, Colm; Ringelheim, Julie; Solanke, Iyiola (eds.), *Edward Elgar Research Handbook on European Anti-Discrimination Law***
- **The ‘immunity’ of EU migration law to EU anti-discrimination law: A ‘migration exception’? (D. Fennelly & C. Murphy)**
 - Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Case-Studies (**‘Race Equality Directive’**) (art. 3(2))
 - Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (**‘Framework Equality Directive’**) (art. 3(2))

‘This 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 and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned’. (Arts. 3(2) of the RED and FED)

Introduction



- **Migration law and discrimination: Suspicious coincidences (I)**
 - **‘...[W]ithin the current (...) interpretation [of EU law], TCNs are not protected against nationality discrimination and are less protected against racial and religious discrimination.’ (S. Benedí Lahuerta)**
 - **‘...[A]ny form of immigration control tends towards racial discrimination as it seeks to exclude outsiders who are typically of different ethnic origins to the existing residents (M. Bell)**

Introduction

- **Migration law and discrimination: Suspicious coincidences (II)**
 - **'...[U]nder the cloak of immigration and nationality rules or through claims that the discriminatory treatment is based on nationality rather than race or ethnicity, a range of discriminatory practices can escape the application of the (...) [Race Equality Directive].'** (M. Möschel)
 - **'Migration law is a form of discrimination based on nationality (...). [M]igration law is also a form of racial discrimination** because it involves a "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". (T. Spijkerboer)

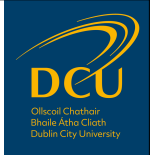
Introduction

- **Migration law and discrimination: Suspicious coincidences? (III)**
 - **Judgment of the Court (Grand Chamber), 24 April 2012, *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others*, C-571/10, ECLI:EU:C:2012:233 (Paras. 49-50)**
 - **Judgment of the Court of 10 June 2021, *Land Oberösterreich v KV*, C-94/20, ECLI:EU:C:2021:477 (paras. 56-57)**

49 Under Articles 1 and 2(1) and (2) of Directive 2000/43, the directive applies only to direct or indirect discrimination based on racial or ethnic origin. Article 3(2) of the Directive states that it 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 and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of third-country nationals or stateless persons.

50 Accordingly the discrimination claimed by the applicant in the main proceedings does not fall within the scope of Directive 2000/43 and the fourth question is inadmissible. (CJEU, *Kamberaj*)

Beyond the citizen/non-citizen binary: Legal status and the ‘hierarchy’ of rights



- **Civic Stratification:** ‘...[A] system of inequality based on the relationship between different categories of individuals and the state, and the rights thereby granted or denied.’ (L. Morris)
 - EU Nationals
 - Third Country Nationals ‘assimilated’ to EU nationals
 - ‘Privileged’ TCNs (e.g., Turkish nationals)
 - Other TCNs, ...

Beyond the citizen/non-citizen binary: Legal status and the 'hierarchy' of rights



➤ The original paradox: Immigration control vs Equal dignity of human beings

- The principle of immigration control and territorial sovereignty: 'A relatively recent invention of states.' (V. Chetail)
- Human rights and the cornerstone principle of non-discrimination
 - *Non-refoulement*
 - Family unity
 - Art. 21 EU Charter of Fundamental Rights
 - Judgment of the Court of 10 June 2021, *Land Oberösterreich v KV*, C-94/20, ECLI:EU:C:2021:477 (para. 63)

'It is 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 (...).' *Nishimura Ekiu v United States* (decided on 18 January 1892).'

'...[T]he Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (...), *Boujlifa v. France*, judgment of 21 October 1997 (...)). The Convention does not guarantee the right of an alien to enter or to reside in a particular country.' ECtHR, *Omorgie v Norway* (31 July 2008)



Article 21 (EU Charter of Fundamental Rights)

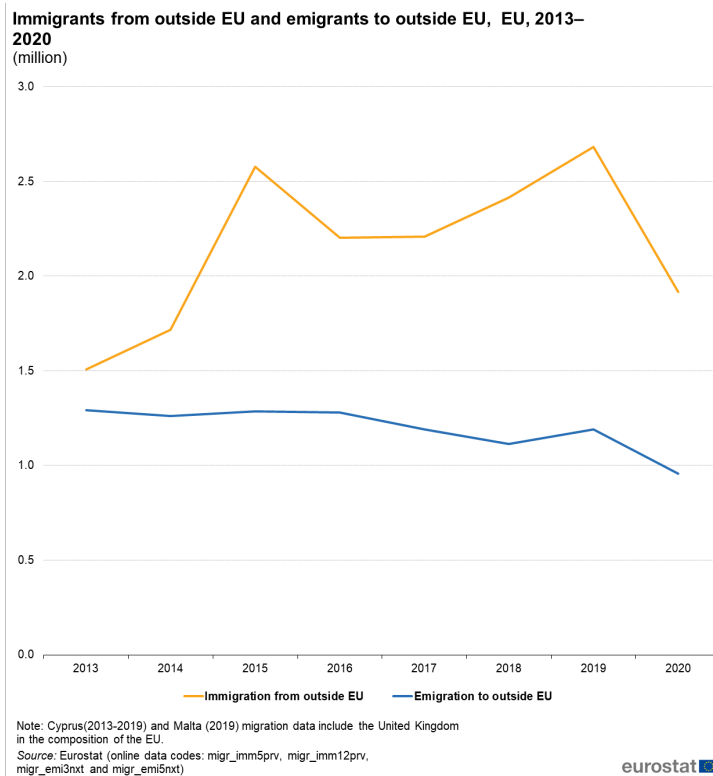
Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and *without prejudice to any of their specific provisions*, any discrimination on grounds of nationality shall be prohibited.

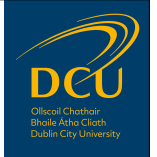
Who are the 'Migrants' in the EU? –A Statistical Overview

➤ Migration 'flows' (Eurostat, March 2022)

- In 2020: 1.9 million immigrants to the EU: A decrease of almost 30% compared to 2019
- Main Member States of immigration: Germany, Spain, France and Italy
- EU Member States with the highest rate of immigration: Luxembourg, Cyprus and Malta



Who are the 'Migrants' in the EU? –A Statistical Overview



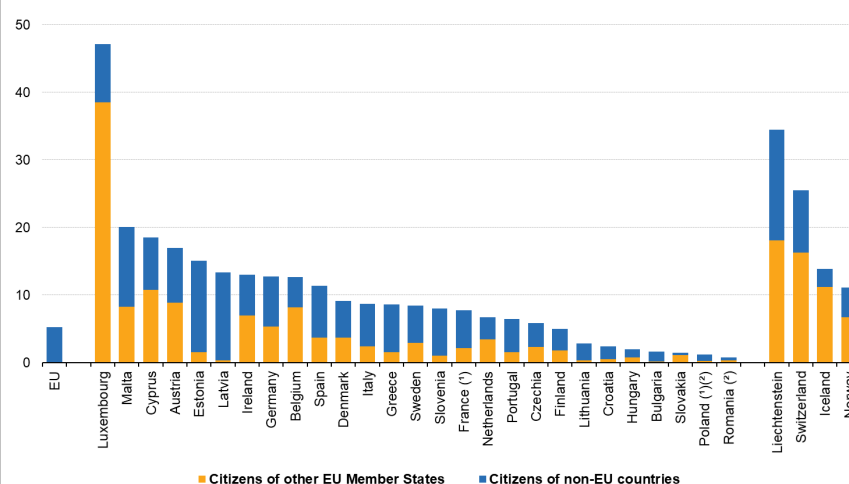
- **Profile of immigrants to the EU (Eurostat, March 2022)**
 - More men (55%) than women (45%)
 - Younger immigrant population (30.3) compared to the median age of the total EU population (44.1)

Who are the 'Migrants' in the EU? –A Statistical Overview

➤ Migration 'stocks' (Eurostat, March 2022)

- On 1st January 2021: 23.7 million TCNs (5.3 % of the EU population)
- Main Member States of immigration: Germany, Spain, France and Italy
- Member States where non-nationals are mainly citizens of other Member States: Belgium, Ireland, Cyprus, Luxembourg, Austria and Slovakia

Share of non-nationals in the resident population, 1 January 2021 (%)



⁽¹⁾ Provisional.

⁽²⁾ Estimate.

Source: Eurostat (online data code: migr_pop1ctz)

Who are the 'Migrants' in the EU? –A Statistical Overview

➤ Reasons for delivering first residence permits in 2020 (Eurostat, September 2021)

- **A drop** from 3 million (2019) to 2.2 million (2020) of first residence permits delivered
- **Employment** (40%)
- **Family** (28%)
- **Other reasons** (21%) (Beneficiaries of international protection, pensioners, etc.)
- **Education** (11%)

First residence permits issued, by reason, 2020

| | Permits issued (number) | Family | | Education | | Employment | | Other | |
|---------------|-------------------------|----------|-----------------------------|-----------|-----------------------------|------------|-----------------------------|----------|-----------------------------|
| | | (number) | (% of total permits issued) | (number) | (% of total permits issued) | (number) | (% of total permits issued) | (number) | (% of total permits issued) |
| EU | 2 247 362 | 621 121 | 27.6 | 247 650 | 11.0 | 903 398 | 40.2 | 475 193 | 21.1 |
| Belgium | 47 640 | 25 712 | 54.0 | 5 675 | 11.9 | 4 110 | 8.6 | 12 143 | 25.5 |
| Bulgaria | 10 267 | 2 902 | 28.3 | 1 154 | 11.2 | 2 388 | 23.3 | 3 823 | 37.2 |
| Czechia | 54 332 | 13 423 | 24.7 | 7 550 | 13.9 | 29 217 | 53.8 | 4 142 | 7.6 |
| Denmark | 23 853 | 8 053 | 33.8 | 6 184 | 25.9 | 8 350 | 35.0 | 1 266 | 5.3 |
| Germany (1) | 312 692 | 130 701 | 41.8 | 14 605 | 4.7 | 14 345 | 4.6 | 153 041 | 48.9 |
| Estonia | 4 992 | 2 120 | 42.5 | 556 | 11.1 | 2 035 | 40.8 | 281 | 5.6 |
| Ireland | 30 382 | 1 835 | 6.0 | 14 730 | 48.5 | 7 131 | 23.5 | 6 686 | 22.0 |
| Greece | 19 821 | 8 323 | 42.0 | 687 | 3.5 | 1 632 | 8.2 | 9 179 | 46.3 |
| Spain | 311 789 | 119 468 | 38.3 | 28 131 | 9.0 | 80 992 | 26.0 | 83 198 | 26.7 |
| France | 225 890 | 80 240 | 35.5 | 72 705 | 32.2 | 26 817 | 11.9 | 46 128 | 20.4 |
| Croatia | 35 138 | 2 487 | 7.1 | 225 | 0.6 | 31 816 | 90.5 | 610 | 1.7 |
| Italy | 105 729 | 62 274 | 58.9 | 8 428 | 8.0 | 10 243 | 9.7 | 24 784 | 23.4 |
| Cyprus | 16 910 | 2 704 | 16.0 | 2 403 | 14.2 | 7 897 | 46.7 | 3 906 | 23.1 |
| Latvia | 5 532 | 1 395 | 25.2 | 1 211 | 21.9 | 2 545 | 46.0 | 381 | 6.9 |
| Lithuania | 22 511 | 970 | 4.3 | 1 353 | 6.0 | 19 534 | 86.8 | 654 | 2.9 |
| Luxembourg | 5 707 | 2 894 | 50.7 | 249 | 4.4 | 1 554 | 27.2 | 1 010 | 17.7 |
| Hungary | 54 835 | 3 626 | 6.6 | 8 976 | 16.4 | 31 840 | 58.1 | 10 393 | 19.0 |
| Malta | 11 107 | 879 | 7.9 | 2 041 | 18.4 | 6 592 | 59.3 | 1 595 | 14.4 |
| Netherlands | 73 511 | 28 872 | 39.3 | 11 644 | 15.8 | 13 345 | 18.2 | 19 650 | 26.7 |
| Austria | 34 759 | 11 634 | 33.5 | 2 718 | 7.8 | 2 739 | 7.9 | 17 668 | 50.8 |
| Poland | 598 047 | 12 250 | 2.0 | 27 244 | 4.6 | 502 342 | 84.0 | 56 211 | 9.4 |
| Portugal | 84 397 | 35 735 | 42.3 | 12 285 | 14.6 | 32 666 | 38.7 | 3 711 | 4.4 |
| Romania | 17 844 | 2 789 | 15.6 | 3 028 | 17.0 | 10 788 | 60.5 | 1 239 | 6.9 |
| Slovenia | 19 010 | 7 105 | 37.4 | 1 830 | 9.6 | 9 929 | 52.2 | 146 | 0.8 |
| Slovakia | 18 251 | 2 901 | 15.9 | 2 332 | 12.8 | 12 077 | 66.2 | 941 | 5.2 |
| Finland | 24 752 | 7 930 | 32.0 | 2 780 | 11.2 | 13 753 | 55.6 | 289 | 1.2 |
| Sweden | 77 664 | 41 899 | 53.9 | 6 926 | 8.9 | 16 721 | 21.5 | 12 118 | 15.6 |
| Iceland | . | . | . | . | . | . | . | . | . |
| Liechtenstein | . | . | . | . | . | . | . | . | . |
| Norway | 17 402 | 7 301 | 42.0 | 2 244 | 12.9 | 6 456 | 37.1 | 1 401 | 8.1 |
| Switzerland | . | 15 893 | . | 9 470 | . | . | . | . | . |

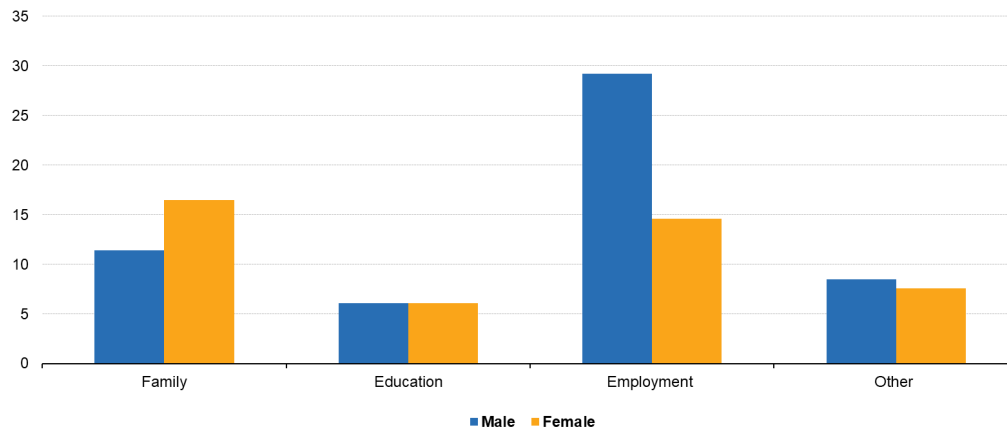
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Source: Eurostat (online data code: migr_resfirst)

First residence permits issued, by reason and by sex, EU, 2020

(% of total number of permits issued)



Note: estimates based on information for 25 of the EU Member States (excluding Malta and Slovakia). Partial data available for Germany (missing results by sex for employment and other-related reason), Italy (missing results by sex for the category 'family reasons') and Latvia (for the category 'education reasons').
Source: Eurostat (online data code: migr_resfas)

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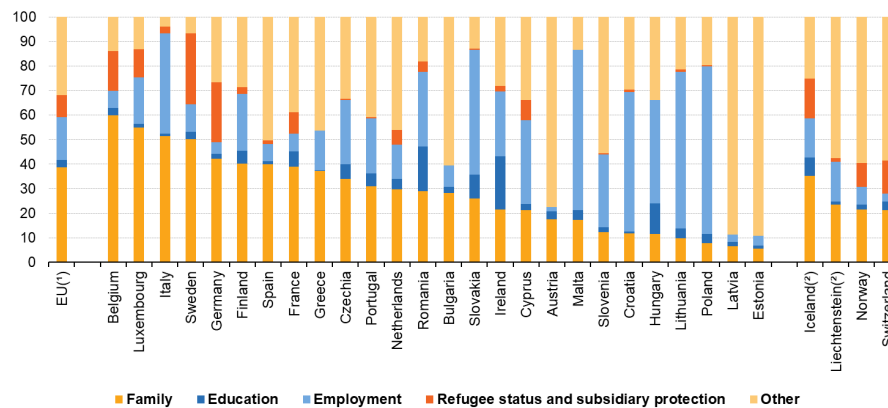
Who are the 'Migrants' in the EU? –A Statistical Overview



➤ 'Stocks' of valid residence permits at the end of 2020 (Eurostat, November 2021)

- **19.6 million valid residence permits granted to non-EU citizens in the EU**
- **Family (38.6%)**
- **Employment (17.4%)**
- **International protection (8.9%)**
- **Education (3.1%)**
- **Other reasons (32%)**

Distribution by reason of the number of valid residence permits granted to non-EU citizens, 2020
(% share of total number of permits)



Note: Denmark, data not available.

(¹) Excluding Denmark.

(²) 2019.

Source: Eurostat (online data code: migr_resvalid)

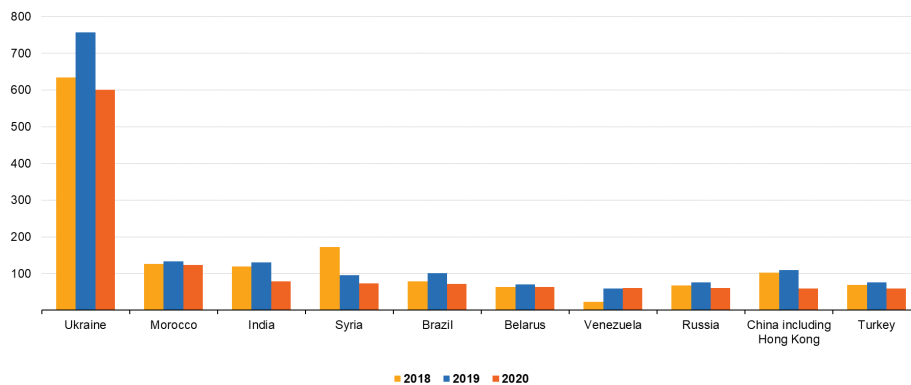
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Who are the 'Migrants' in the EU? –A Statistical Overview



- **Main nationalities at the end of 2020** (Eurostat, November 2021)
 - Moroccan nationals (1.9 million)
 - Turkish nationals (1.6 million)
 - Ukrainian nationals (1.3 million)
- **Main nationalities for first residence permits in 2020** (Eurostat, September 2021)
 - Ukrainian nationals (27%)
 - Moroccan nationals (5%)
 - Indian nationals (4%)

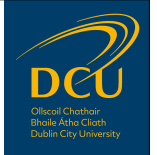
Developments in the top 10 countries whose citizens received a first residence permit, by country of citizenship, EU, 2018-2020
(thousands)



Note: the figure shows the 10 non-member countries with the highest number of citizens granted a residence permit in the EU (based on the ranking for 2020).
Source: Eurostat (online data code: migr_resfirst)

eurostat

Who are the 'Migrants' in the EU? –A Statistical Overview



- **Ukrainian refugees** (EU Agency for Asylum, April 2022)
 - From 24 February to 25 April 2022: 5.3 million people displaced from Ukraine
 - 2.3 million persons fleeing Ukraine registered for **temporary protection**
 - Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof
 - Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection

Sources of EU Migration and Asylum Law – The Fragmentation of Migrants’ Status and Treatment



- Article 67 (2) TFEU: ‘[The Union] (...) shall frame a common policy on asylum, immigration and external border control (...), which is *fair* towards third-country nationals (...)’.
- Article 79(1) 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.’

Sources of EU Migration and Asylum Law – The Fragmentation of Migrants’ Status and Treatment



- **Fragmented Status**
 - Beneficiaries of international protection
 - TCNs staying regularly in the EU
 - Irregular immigrants

The regulation of labour migration and the variable reach of equal treatment for migrant workers under EU law



➤ Legal immigration

➤ Art. 79(2)(a) and (b) TFEU

➤ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

➤ Judgment of the Court (Grand Chamber) of 27 June 2006, *European Parliament v Council of the European Union*, C-540/03, ECLI:EU:C:2006:429

➤ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Equal Treatment (art. 11(1)... With possible derogations (art. 11(2))

Article 79 TFEU

(...) 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

- (a) the **conditions of entry and residence**, and standards on the issue by Member States of long-term visas and residence permits, **including those for the purpose of family reunification**
- (b) the definition of the **rights of third-country nationals residing legally** in a Member State, **including the conditions governing freedom of movement and of residence** in other Member States (...)

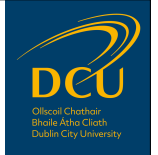
Article 11 (Long-Term Resident Directive)

Equal treatment

1. 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.

The regulation of labour migration and the variable reach of equal treatment for migrant workers under EU law



➤ Legal immigration

➤ Art. 79(5)

- 'This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'.

The regulation of labour migration and the variable reach of equal treatment for migrant workers under EU law



➤ Legal immigration

- Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (**'Employers Sanctions Directive'**)
- 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 (**'Single Permit Directive'**)

The regulation of labour migration and the variable reach of equal treatment for migrant workers under EU law



➤ Legal immigration

- Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (**'Seasonal Workers Directive'**)
- Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (**'Intra-Corporate Transfer Directive'**)

The regulation of labour migration and the variable reach of equal treatment for migrant workers under EU law

- **Working status of TCN workers**
 - **Access to the labour market**
 - 'First' access,
 - 'Secondary' access
 - 'Derived' access
 - Intra-EU mobility
 - **Not a free access:** 'Labour market test'

The regulation of labour migration and the variable reach of equal treatment for migrant workers under EU law

- **Working status of TCN workers**
 - **Treatment**
 - 'Fair'
 - Equal
 - Equal with respect to whom?

The regulation of labour migration and the variable reach of equal treatment for migrant workers under EU law

➤ Working status of TCN workers

➤ 'Exit'

- No access to the labour market for irregular migrant workers
- But some protection of their rights as workers
 - Judgment of the Court (Fifth Chamber), 5 November 2014, *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, C-311/13, ECLI:EU:C:2014:2337

The regulation of labour migration and the variable reach of equal treatment for migrant workers under EU law

➤ The right to Equal Treatment in EU labour migration law

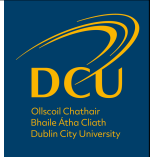
- The twin labour law principles of equal treatment and non-discrimination
- Immigration law as 'divisive' for labour law (C. Costello and M. Freedland)
- Art. 12(1) of the Single Permit Directive

Article 12 (Single Permit Directive)

Right to equal treatment

1. **Third-country workers as referred to in points (b) and (c) of Article 3(1) shall enjoy equal treatment with nationals of the Member State where they reside with regard to:**
 - (a) **working conditions**, including pay and dismissal as well as health and safety at the workplace;
 - (b) **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;
 - (c) **education and vocational training**;
 - (d) **recognition of diplomas, certificates and other professional qualifications** in accordance with the relevant national procedures;
 - (e) branches of **social security**, as defined in Regulation (EC) No 883/2004;
 - (f) **tax benefits**, in so far as the worker is deemed to be resident for tax purposes in the Member State concerned;
 - (g) **access to goods and services and the supply of goods and services made available to the public** including procedures for obtaining housing as provided by national law, without prejudice to the freedom of contract in accordance with Union and national law;
 - (h) **advice services afforded by employment offices (...).**

The regulation of labour migration and the variable reach of equal treatment for migrant workers under EU law



- Art. 12(2) of the Single Permit Directive: (Possible) derogations
 - Education and vocational training (art. 12(2)(a))
 - Social Security (art. 12(2)(b))
 - Tax benefits (art. 12(2)(c))
 - Access to goods and services and the supply of goods and services made available to the public including housing (art. 12(2)(d))

Conclusion

- Equal treatment: An effective right or an 'Empty Shell' (A. Beduschi)?
 - Judgment of the Court (Seventh Chamber) of 21 June 2017, *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS) and Comune di Genova*, C-449/16, ECLI:EU:C:2017:485
 - Judgment of the Court (Fifth Chamber) of 25 November 2020, *Istituto nazionale della previdenza sociale v WS*, C-302/19, ECLI:EU:C:2020:957