

BORDERS AND DISCRIMINATION in the European Union

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Borders and discrimination in the European Union: executive summary

As a result of the shifting of the borders from the Member States to the external borders of the EU, the rules regulating who can cross these, and under what terms, have taken on a whole new significance. This study examines the scope of EU rules concerning the entry of third-country nationals into EU territory and the distinctions made therein on the basis of nationality.

The distinctions made are between nationals of EU Member States and EU citizens, between EU citizens and third-country nationals, and between particular groups of third-country nationals. The study concludes that the fundamental right to be free from discrimination is undermined considerably by EU rules on the crossing of external borders, and by rules concerning the issuing of visas to third-country nationals. It is argued that there is no reasonable and objective justification for these rules, and that they may in fact be masking discrimination based on more invidious grounds such as race, ethnic or national origin and religion. Serious deficiencies can be identified not only in the way these rules are formulated, but in the way they are applied in practice.

CHAPTER 1

EU rules and practice on borders and visas examined

Chapter 1 examined the EU rules relating to entry into EU territory, and their practical application in respect of five groups of persons:

Group 1: Nationals of EU Member States and EU citizens exercising their free movement rights and third-country nationals within EU territory;

Group 2: Third-country nationals whose countries are on the EU 'positive' ('white') visa list, i.e. those who do not require a visa to enter the EU for visits of up to three months;

Group 3: Third-country nationals whose countries are on the EU 'negative' ('black') visa list, i.e. those who must be in possession of a 'Schengen uniform visa' to enter the EU for visits of up to three months;

Group 4: Third-country nationals who must also be in possession of an airport transit visa to pass through an international airport in EU territory;

Group 5: Third-country nationals of one nationality who are singled out for different treatment on the basis of race, ethnic origin or religion.

The relevant European law is found in Title IV EC Treaty on Visas, Asylum, Immigration and other policies related to free movement of persons, and Schengen rules as found in the Schengen Implementing Agreement (SIA) and accompanying measures (collectively, 'the Schengen *acquis*').

The following statements can be made regarding the entry of third-country nationals into EU territory. The implications of each have been examined to establish the extent to which they may lead to discrimination:

There is a gulf in treatment between EU citizens and third-country nationals regarding their entry into the EU.

This difference in treatment has however been accepted by the European Court of Human Rights on the grounds that the EU regime constitutes a 'special legal order'.

The rules enable third-country nationals to be treated differently from EU citizens when physically crossing the EU external border.

No persons are immune from checks at the EU external border. However, whereas EU citizens have the right to enter, no such right exists for third-country nationals, unless they are already lawfully resident in a Member State, or they come within the scope of a Community agreement with their country. Checks on third-country nationals are, in line with Article 6(2) SIA, more stringent than those on EU citizens. Further, the Common Manual on the Crossing of the External Border, which implements the Schengen rules in this area, goes further than Article 6(2), requiring a thorough check on both entry and exit (Article 6(2) foresees such a check only on entry), and can be said to invite arbitrary treatment. The more ambiguous the instructions and the greater the discretion granted, the more likely the discrimination in practice.

Significant differences are found in the treatment of three groups of third-country nationals: those who can enter without a visa; those who require a visa; and those who also need an airport transit visa.

Article 5 SIA provides for the conditions of entry, and Article 15 SIA makes the issuing of a visa dependant on the fulfilment of these conditions. The possession of a visa thus does not entitle automatic entry (confirmed also in Chapter 1, paragraph 2.1 of the Common Consular Instructions). This discretionary approach is often justified on the grounds of the international law principle that it is the sovereign right of the State to determine who should be permitted to enter their territories. However, it is submitted that by signing the Schengen Implementing Agreement, States have already ceded sovereignty in this area:

Article 5(2) SIA imposes *an obligation* on States to refuse entry into Schengen territory if the conditions in 5(1) are not satisfied. In any case, such discretion on the part of the States would be qualified by international human rights norms. The author is of the opinion that the rule of law requires that third-country nationals have the right to enter the EU once they have satisfied the conditions of entry in Article 5(1).

The study contends that the criteria used in placing a country on either the negative visa list or the positive visa list carry the risk of discrimination. The overt distinctions made on the basis of nationality appear to have an adverse impact on large groups of persons distinguished by reference to their race or colour. The majority of the world's non-white people would require a visa to enter the EU, and people of Islamic faith are in a similar position (the only three countries on the positive list with large Muslim populations are Brunei, Malaysia and Singapore).

The preamble of the Visa Regulation identifies irregular migration, public policy considerations as they relate to crime, and international relations as determining the status of a country on the visa lists. It is submitted that the first two purport to focus on the activities of individuals rather than on the relations between the states, which was traditionally the main criterion. This approach is at least suspect, since the risk is assessed not in respect of the activities of an individual, but on the basis of the broad criterion of nationality. While it is accepted that the inclusion of a country on the negative or black visa list does not automatically exclude the individual from entry into the EU, profiling categories of individuals as risks in terms of illegal immigration and crime, and thus placing them in the position of having to meet the visa conditions analysed below, increases the risk of discrimination.

In examining the conditions for the issuing of a visa in Article 5(1) SIA the study finds that these are subject to the potentially broad application of discretionary powers and are thus hardly conducive to the equal and consistent application of the visa issuing rules in Member State embassies or consulates. This increases the risk of differences in the treatment of visa applicants that are in fact in an analogous situation. For example, the number and nature of the supporting documents required may differ considerably depending on where the application is lodged. The rules also clearly favour more affluent migrants.

Third-country nationals who require an airport transport visa (ATV) are subject to the most stringent EU visa rules. There are no clear reasons why these special visas are issued, the most clarification being offered by the 1996 Joint Action on airport transport arrangements which identified a particular risk of illegal immigration posed by persons from these countries as a criterion. Given the stringent restrictions imposed by ATVs on the movement of nationals from the listed countries and the additional vigilance required of consular officials in the issue of ATVs, very good reasons must arguably be advanced for the significant difference in treatment between this category of third-country nationals and other categories.

CHAPTER 2

The Community non-discrimination principle and its potential application to the EU rules on borders and visas

The changes introduced by the Amsterdam Treaty in extending the competence of the Community and in broadening the ambit of the non-discrimination principle, both in terms of its personal scope and its reach beyond sex and nationality discrimination, constitute the focus of this chapter.

A central question is whether Community norms prohibiting non-discrimination can be applied to the EU rules on borders and visas outlined in Chapter 1. However, these norms contain a number of important exceptions and omissions, which, if interpreted too broadly, are unlikely to be of much assistance to third-country nationals, particularly when they apply for a visa in a EU Member State consulate or present themselves at the EU external border. Moreover, the existence of these exceptions and omissions demonstrates clearly that Member States recognise that they are making explicit distinctions on the basis of nationality and arguably also that they are acutely aware that immigration control activities are particularly

susceptible to discrimination on the grounds of race, ethnic or national origin or religion. It is contended that such exceptions and omissions are drawn far too widely and thus risk undermining the commitments Member States have made under international human rights law to guarantee the right to equal treatment and non-discrimination.

Non-discrimination on the grounds of nationality is at the heart of the Community enterprise, as is reflected in Article 12 EC. Before the adoption of the Treaty of Amsterdam, it was accepted by Member State governments that Article 12 EC, despite its apparently broad prohibition of 'any discrimination on grounds of nationality', applied only in the context of ensuring equal treatment between EU citizens. It is strongly arguable, however, that this position has since changed with the entry into force of the Amsterdam Treaty amendments in May 1999. While the very inclusion of Title IV EC implies that full equality between EU nationals and third-country nationals is not envisaged, this does not necessarily preclude the application of Article 12 EC, particularly in the context of distinctions that are made between the different groups of third-country nationals identified in Chapter 1.

The insertion of a more comprehensive non-discrimination clause in the EC Treaty, Article 13, has been generally welcomed. However, it contains a number of inherent limitations. The first part of this provision indicates that its scope is limited to that of Community law and consequently it differs little in this respect from Article 12 EC. A further limitation is that Article 13 EC, in contrast to non-discrimination provisions in international human rights instruments, would appear to be exhaustive and thus does not encompass discrimination based on nationality. The Council has already adopted two measures implementing Article 13 EC. The first is concerned with the general prohibition of discrimination based on racial or ethnic origin (Racial Equality Directive)¹, whereas the second is a Framework Directive outlawing discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation.²

Unfortunately, the impact of the Racial Equality Directive on the treatment of third-country nationals in the field of immigration control is likely to be nominal, largely as a result of the measure's limited material scope.

¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

Although the draft Directive held out considerable promise for the protection of the right of third country-nationals to be free from discrimination, its substantive content in this regard was watered-down by the Council on adoption. These drafting changes are quite significant in revealing the fears of Member States that their immigration control activities might be particularly susceptible to challenges on the basis that they discriminate on the grounds of nationality, race, ethnic or national origin and religion.

The exclusion of religious and nationality discrimination from the scope of the Directive, the unwillingness of the Council to expressly protect third-country nationals from distinctions purportedly based on nationality from constituting indirect discrimination on the grounds of racial and ethnic origin and the failure to explicitly identify immigration authorities as public bodies the actions of which are covered by the material scope of the Directive, are unfortunate developments in the overall context of combating discrimination against third-country nationals in the EU. These exceptions and omissions in the Racial Equality Directive identified are hardly in keeping with the Community's commitment to combat racism, xenophobia and intolerance.

Nonetheless, a broad judicial interpretation of the Directive is justified given that Article 13 EC was adopted to strengthen the human rights credentials of the EU. Moreover, in the light of Article 6 of the Treaty on European Union, which views respect for human rights as a cornerstone of the EU, and the recently proclaimed Charter of Fundamental Rights, any other interpretation would be an anathema to the progress that has been made by the EU in this area. Despite its non-legally binding nature, the Charter may nevertheless have an impact on the development of Community law depending on the willingness of the Court of Justice to consider it as a source of human rights forming part of the general principles of Community law and of EU institutions to refer to it in the adoption of legislation.

The adoption of the proposed Council Directive on the status of third-country nationals who are long-term residents³ would strengthen the case for applying the non-discrimination principle to third-country nationals at the EU external

border, whether this be at the physical border or at the 'extended' border in the consulates. Otherwise, a serious disjunction would be created between the aim of protecting third-country nationals residing within the EU territory against discrimination by both private and public bodies on the grounds of race and ethnic origin and the complete absence of such protection at the EU external border of Member States, irrespective of where this border is to be found.

CHAPTER 3

The international human rights framework

The fundamental character and importance of the principle of non-discrimination is not in dispute. It is recognised as constituting customary international law and also as the cornerstone of international human rights law. Non-discrimination is also a universal principle for the protection of all human beings, regardless of citizenship or nationality or legal status. Although non-discrimination provisions in international human rights instruments do not actually specify 'nationality' as a prohibited ground of discrimination, they are nonetheless phrased in open-ended and non-exhaustive language.

Therefore, the enjoyment of the right to be free from discrimination is not confined to the citizens of a state, but must also be protected in respect of all those persons who come within the state's jurisdiction. The scope of this principle should clearly encompass first, those third-country nationals who are required to apply for a visa to enter a EU Member State in the consulate of that state or another Member State. Second, those third-country nationals who are turned away at the EU external border irrespective of whether they require a visa to enter should be included. Moreover, it should also apply to third-country nationals in transit through a EU Member State, whether this amounts to transit through the actual territory of that state or an international airport.

The non-discrimination norms in the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the European Convention on Human Rights (ECHR) are of sufficiently broad scope to scrutinise the distinctions adopted by the EU in respect of its border and visa controls.

³ COM (2001) 127 final of 13 March 2001.

The overall assertion of Chapter 3 is that there remains a significant gap between the commitments EU Member States have made to the principle of non-discrimination in international human rights law, and the implementation of this principle in practice, as this pertains to distinctions adopted between nationals and non-nationals and particularly between groups of non-nationals. These distinctions also risk discriminating indirectly against certain non-nationals defined by reference to their race, ethnic or national origins, or religion.

With regard to the position under the ECHR, there would appear to be clear obstacles to arguing successfully under the non-discrimination provision (Article 14) that the application of EU rules on the crossing of the external border and the issuing of visas discriminate on the grounds of nationality, or indirectly on the grounds of race, ethnicity or religion. First, the relevant action needs to be tied to one of the rights listed in the ECHR and cannot be based exclusively on 'a right to equal treatment'. The limitations of Article 14 in this respect have been recognised by the Council of Europe and its Member States with the adoption of Protocol No. 12, which will introduce a free-standing equality guarantee when it enters into force.

A second obstacle to taking successful action under the ECHR is the unwillingness of the European Court of Human Rights to take a bolder approach in justifying distinctions between EU citizens and third-country nationals. Fewer difficulties in this respect are presented by the distinctions applied between different groups of third-country nationals in respect of their entry into the EU. Finally, the concept of indirect discrimination awaits further development by the European Court of Human Rights.

Recommendations

- 1 The human right to be free from discrimination on the grounds of race, ethnic or national origin and religion as well as nationality must be protected in the immigration field. The perception that discrimination is permissible in the immigration field more than in other fields of activity can only have a negative impact on the treatment of third-country nationals already in EU Member States and also has a detrimental effect on the quality of race relations generally.
- 2 Differences in treatment in the immigration field that have a disparate impact on a particular group of persons defined by reference to race, ethnic or national origin or religion (indirect discrimination) should only be permitted if they can be objectively justified. Legitimate, relevant and sufficient reasons for the differences in treatment must be provided and made publicly available, particularly where such reasons are based, for example, on statistics relating to irregular migration. The actions taken to achieve the legitimate objective sought must be proportionate, and the justifications relied upon must not be related to the grounds of discrimination. Direct discrimination can only be justified for humanitarian reasons in the context of positive discrimination in favour of a particular ethnic group with a view to its protection.
- 3 The Racial Equality Directive should be amended to expressly apply to Title IV of the EC Treaty and the measures adopted thereunder.
- 4 The principle of 'mainstreaming' equality into EU measures concerning borders and visas, and those relating to third-country nationals generally, should be applied. It is important that all the Community instruments proposed and adopted in this field contain a clear statement of non-discrimination, using the EU Charter of Fundamental Rights as their reference point.
- 5 EU rules on borders and visas must be developed on the basis of harmonised standards, such as those advanced in the *ILPA/MPG Amsterdam Proposals*, and not on the basis of mutual or cross-recognition of national decisions, an approach which inevitably results in unequal treatment of persons in like situations.
- 6 There should be a right or at least a presumption of entry for third-country nationals seeking to enter the EU unless the criteria for refusal of entry are clear. Rule of law principles demand a Community-wide notion of public policy to be developed based on the approach adopted under Community law in respect of the restrictions imposed on the free movement rights of EU citizens.
- 7 The profiling of third countries on the basis of criteria relating to the risks of irregular migration and crime is extremely suspect from the standpoint of non-discrimination, and the only criterion that should be applied in determining whether the nationals of a particular country should be subject to a visa requirement or otherwise is that of international relations.

If such profiling is to be pursued, however, the Community can only avoid allegations of discrimination if it adopts, on the basis of reliable and responsible statistical evidence, strict and objective criteria, which are drawn up using a common approach and placed in the public domain, and by which the risks relating in particular to irregular immigration can be objectively assessed in respect of specific countries. Such a system would also have to include a transparent mechanism to ensure that relevant developments in a third country can be taken into account, both in terms of imposing a visa requirement and removing that country from the negative visa list.

- 8 Transparency in the making and practical application of EU border and visa policy is essential. Regular and updated statistics should be publicly available on visas issued and refused, as well as on refusals of entry at the external border. Uniform criteria must be applied to clearly define the visa application as well as the refusal of a visa application and to assess the length of time of such an application. A clear distinction should be made between visas rejected for the reasons in Article 5(1) SIA and situations where the visa application is deemed incomplete. The nationality of persons refused visas or entry at the external border should be recorded. Monitoring of the available statistics on the basis of racial and ethnic origin should also be conducted to ascertain which categories of third-country nationals are most likely to be subject to the refusal of visa applications, and in those cases where uniform visas are issued, to establish whether third-country nationals from particular categories are more likely to obtain a certain type of uniform visa. An expert working party should be formed to establish the necessary mechanisms to collect such data and to analyse this data.
- 9 A Visa Ombudsman, supported by adequate EU resources, should be introduced to monitor practices at the external border and in Member State consulates or embassies and to accept complaints in cases of systematic abuse. In those instances where the application of border and visa rules depends on the exercise of individual discretion, appropriate training of officials should be conducted, based on commonly developed principles, with a view to heightening awareness of the risks of discrimination.
- 10 Reasons for negative visa decisions or refusals at the external border should be provided in writing to individual visa applicants and travellers from third countries as soon as the decision is made and in a language they understand. Information on the possibility of having the decision withdrawn or reviewed and of appealing against it should also be provided.
- 11 Clear remedies should be made available to individuals who wish to challenge a negative decision. These remedies should conform to the two-stage process found in Council Directive 64/221/EEC.
- 12 EU Member States, EEA countries and EU candidate countries, which are also all Council of Europe Member States, should ratify Protocol No. 12 to the ECHR without reservation, thus demonstrating their commitment to combating discrimination in all public spheres of activity.