

# Recent developments in EU case-law with regard to the free movement of TCN

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**Funded by the European Union's Justice Programme (2014-2020).**

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# Outline

## Introduction

- Treaty Framework / Principles
- Legislative development
- EU Migration law / EU Free movement

## Case- law overview

- Family members of EU citizens
- General Regime of TCN
- Privileged TCN and international agreements

# Introduction

- No free movement of TCN as such :
  - Treaty provisions on Free movement of EU citizens
  - Treaty provisions on the Common Migration Policy
  - Agreements with third countries
- Two dimensions of free movement:
  - Intra – EU mobility
  - Extra – EU mobility
- Third country nationals:
  - Privileged because of connection with EU citizens
  - Privileged because of an international agreement
  - General Regime

# Privileged TCN – family connection with EU citizens

- Family connection with EU citizens

Two regimes:

a) Directive

b) Treaty

i) Article 20: children of irregular parents

ii) Article 20: spouses of returning citizens in their own MS

- International Agreements

# Non privileged TCN- The Common Migration Policy (CMP)

## General features:

- Normalisation of the CMP in Lisbon
- BUT
  - Art 72 TFEU- public order and public security
  - Opt outs –
- Normalization of ECJ competence
  - Preliminary rulings (ex art 68 TCE)
  - PPU
  - Art 276 TFEU
- Ordinary legislative procedure – a true common policy!
- Broad competences on TCN's status (legal and irregular migration)
  - But: Art 79 (5) TFEU

# CMP General Framework

## Overarching 'constitutional' principles:

- 1. *The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.*
- 2. *It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.*

(Art 67 TFEU)

# CMP General Framework

## Legislative development re TCN status

- Directive 2003/86/EC – Family reunification
- Directive 2003/109/EC- Long-term residents (modified by D 2011/51/EU)
- Regulation 859/2003/EC- extending Regulations 1408/71 and 574/72
- Directive 2009/50/EC- Blue Card (highly qualified workers)
- Directive 2011/98/EU – Single Permit
- Directive 2014/36 – Seasonal workers
- Directive 2015/66 Intra corporate Transferees
- Directive 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange
  
- Directive 2008/115/EC – Returns

# CMP General Framework

## Specific features of EU legislation in the field of migration

- Decision making procedure until the Lisbon Treaty (legal)- unanimity
- Preservation of the margin of appreciation of MS- Methods

Ambiguous drafting

'may clauses'

*stand still* clauses

derogations

more favourable provisions

transitional periods

references to national law

# Material implications

## **-Respect of different legal systems / Limitation of the margin of appreciation**

- a) Effectiveness of EU measures
- b) Fundamental Rights
- c) The end of 'exceptionalism'?

## **- "Fair treatment of TCN"- Interaction with between migration policy and free movement law**

- a) Interpretation by analogy of EU migration law
- b) Redirection of citizenship cases to migration rules
- c) Amplification of reverse discrimination

# Recent case-law 1: EU family Members

Directive 2004/ 38

- ***X c. Belgian State C-930/19***

Article 13(2) and the right to retain citizenship in case of divorce

Facts involving domestic violence

Interpretation of Article 13 of the Directive

Interaction with the previous case –law (NA C-115/15 - overruling)

Interaction with CMP – Directive 2003/86

Article 13(2) of Directive 2004/38 provides as follows:

'1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, ... shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; ...

...

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; ...

...

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements....

Such family members shall retain their right of residence exclusively on a personal basis.'

## Recent case-law 2 : TCN general regime

### **case C-350/20 OD and others v Istituto nazionale della previdenza sociale**

legislation of a MS excluding single permit holders from access to maternity and paternity benefits

## Recent case-law 2 : TCN general regime

### **case C-94/20, Land Oberösterreich v. KV**

- Directive 2003/109
- access of long term residents to equal treatment in the field of social assistance to access to housing and the possibility of Member States to subordinate that assistance to linguistic requirements.

# Recent case-law 3: international agreements and privileged TCN

## **case IN and Ruska Federacija C-897/19 PPU**

- “extended” scope of free movement
- implications of free movement rights of the nationals of the States of the European Economic Agreement
- protection against extradition to third States

# Conclusion

- Field fraught with enormous interpretative difficulties → exponential increase in preliminary references?
- Interpretation of margin of appreciation → progressive limitation of 'migration exceptionalism'
- Balance between respect to national systems / effectiveness of EU rules / Fundamental Rights
- EU migration law as fall back category → alleviation of pressure on EU citizenship
- EU migration law as unveiling mechanism of the shortcomings of EU citizenship
- 'Fair treatment' → progressive emergence of a correlative construction of EU citizenship / EU migration law