

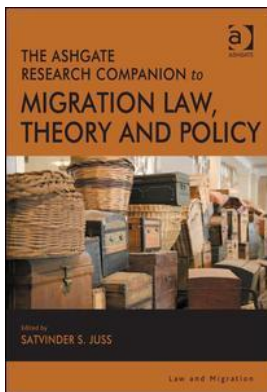
This article was downloaded by: 10.2.98.160

On: 21 Oct 2020

Access details: *subscription number*

Publisher: *Routledge*

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: 5 Howick Place, London SW1P 1WG, UK



The Ashgate Research Companion to Migration Law, Theory and Policy

Satvinder S. Juss

EU Immigration and the New EU Treaty Framework

Publication details

<https://test.routledgehandbooks.com/doi/10.4324/9781315613239.ch3>

Elsbeth Guild

Published online on: 19 Mar 2013

How to cite :- Elsbeth Guild. 19 Mar 2013, *EU Immigration and the New EU Treaty Framework from: The Ashgate Research Companion to Migration Law, Theory and Policy* Routledge
Accessed on: 21 Oct 2020

<https://test.routledgehandbooks.com/doi/10.4324/9781315613239.ch3>

PLEASE SCROLL DOWN FOR DOCUMENT

Full terms and conditions of use: <https://test.routledgehandbooks.com/legal-notices/terms>

This Document PDF may be used for research, teaching and private study purposes. Any substantial or systematic reproductions, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The publisher shall not be liable for an loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

EU Immigration and the New EU Treaty Framework

Elsbeth Guild¹

Introduction

The European Union finally adopted and ratified its new legal framework after ten years of difficult negotiation and reluctance on the part of some of its citizens. On 1 December 2009, two treaties replaced the rather heterogeneous group of treaties that formed the basis of the EU – the Treaty on the European Union and the Treaty on the Functioning of the European Union. Among the most startling of consequences of these two treaties is the formal end of the perplexing Pillar framework of the EU, with different policy areas subject to very different constitutional treatment. The so-called collapsing of the Pillars simplified matters for the Area of Freedom, Security and Justice, which for ten years between 1999 and 2009 unhappily straddled two Pillars but has now brought immigration, asylum and borders into one camp together with judicial cooperation in criminal matters, policing, terrorism and other rather heterogeneous subject matters. Nonetheless, the framework transforms EU immigration and policy in ways that became rapidly evident. In this chapter I shall outline some of these.

Fast on the heels of the Lisbon Treaty came the Stockholm Programme in December 2009, a five-year plan for the development of the EU's Area of Freedom, Security and Justice, within which the policy field of immigration lies. In this chapter, I shall examine what the entry into force of the Lisbon Treaty meant for EU immigration law and policy. In short, I shall make two main claims about the impact:

- The Lisbon Treaty lifts the limitation on access to the European Court of Justice by courts of all instances in the field of borders, immigration and asylum. This will bring about a dramatic acceleration of the harmonizing effect of EU law in this field.
- The Treaty gives legal force to the Charter of Fundamental Rights. This will be felt quickly in the immigration field if the experience of the European Court of Human Rights is indicative. Human and fundamental rights have become an important source of friction between Member States and third-country nationals (i.e. nationals of states outside the EU) that have moved beyond the national courts of the Member States.

¹ Jean Monnet Professor *ad personam*, Radboud University, Nijmegen.

These areas where the impact of the Lisbon Treaty is likely to be highest in the field of immigration are also sensitive areas of sovereignty in a number of Member States and countries outside the EU. The front-page effect of EU immigration law is not likely to diminish over the following years.

The Lisbon Treaty and Powers in Respect of Immigration

The Lisbon Treaty is composed of two treaties (and their protocols and declarations). The first is the Treaty on the European Union (TEU), which contains the rules on how the EU operates. The TEU will be important when I come to consider the position of the Charter of Fundamental Rights in EU immigration. The other treaty that is part of the Lisbon Treaty package is the Treaty on the Functioning of the European Union (TFEU). The first step towards examining the Lisbon Treaty and immigration is to compare the previous powers and the new ones and ask the question, what has changed?

Title V, Chapter 2 TFEU sets out the competences of the Union on border checks, asylum and immigration. These remain fairly close to their earlier (pre-2009) position. Now the TFEU charges the Union with developing 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 the Member States, and the prevention of and enhanced measures to combat illegal immigration and trafficking in human beings (Article 79 TFEU).

In the Treaty on the European Community (TEC), which was replaced by the TFEU and TEU, the competence was slightly more limited to measures on conditions of entry and residence and standards on procedures for the issue of long-term visas and residence permits, including for family reunification. The EU had competence for illegal immigration and illegal residence, including repatriation of illegal residents and measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States (Article 63 TEC).

There are two differences that may be significant between the old and new treaties. In the earlier treaty there is no specific reference to fair treatment for third-country nationals legally residing in the EU, while now in the TFEU this is present. This wording comes from the first five-year plan for the implementation of the immigration powers of the EU adopted in Tampere, Finland in 1999. In the Tampere Milestones, for the first time the EU set out the objective of fair treatment of third-country nationals resident in the EU.² This objective has been widely repeated (although limited to the preambles) in much of the secondary legislation that the EU has adopted in the field of immigration such as the Long Term Residents' Directive³ and the Family Reunification Directive.⁴ The inclusion of the reference in the Treaty will have the effect of strengthening the importance of fair treatment and, indeed, this may become the subject of judicial scrutiny in due course.

² See http://www.europarl.europa.eu/summits/tam_en.htm (accessed: 23 July 2012).

³ Directive 2003/109.

⁴ Directive 2003/86.

The second notable change relates to trafficking in human beings. Until the Lisbon Treaty collapsed the Pillars of the EU, this competence had remained in the somewhat more intergovernmental third Pillar of the EU.⁵ Article 29 (old) TEU provided that a high level of safety within the Area of Freedom, Security and Justice (the objective of the section) would be achieved by preventing and combating crime including trafficking in persons. This objective has now been subsumed into the TFEU competence that covers the field.

The TFEU focus on the efficient management of migration flows as an objective of immigration policy may have a further consequence of bringing the EU's policy on integrated border management closer to its rules on immigration.⁶ The intersection of policies on visas, border control and controls within the territory of the Member States is a priority in this field. One of the difficulties, however, is how to align the two – to what extent should policies regarding admission at the EU's external frontier be linked closely with the treatment of third-country nationals once they have joined the labour force or a community in a Member State? Just before moving to how the pre-2009 powers have been exercised, it must be noted that Denmark does not participate in any of these measures according to a protocol to the previous treaty and renewed with the Lisbon Treaty. Ireland and the UK are entitled by virtue of a protocol to the previous treaty to opt into any measure in the field of immigration or to remain opted out of its effects. This protocol is transferred to the new treaty. Generally, they have opted out of the legal migration measures but into the asylum ones. The UK has opted into some of the irregular migration measures as well. By 2012 the UK had notified the Commission that it would not opt into most of the second-phase asylum measures.

What are the Existing EU Measures in Legal Immigration?

The power to adopt EU measures in the field of immigration was a novelty of the Amsterdam Treaty in 1999. Since then, in the area of legal migration, the EU had adopted ten measures,⁷ of which four regulate the longer-term entry and residence of third-country nationals. Ireland and the UK have opted out of these measures. The first and most important measure is the

⁵ For an excellent explanation of how the pillar structure worked in this field see S. Peers, *EU Justice and Home Affairs Law*, Oxford: OUP, 2006.

⁶ Communication, *Preparing the Next Steps in Border Management* COM(2008), 69.

⁷ 1. Regulation 1030/2002 on residence permit format (OJ 2002 L 157/1), amended by Reg. 330/2008 (OJ 2008 L 115/1).

2. Regulation 859/2003 on third-country nationals' social security (OJ 2003 L 124/1).

3. Directive 2003/86 on family reunion (OJ 2003 L 251/12): deadline Oct. 2005.

4. Long-term residents' Directive 2003/109 (OJ 2004 L 16/44): deadline Jan. 2006.

5. Directive 2004/114 on migration of third-country students, pupils, trainees and volunteers (OJ 2004 L 375/12): deadline 12 Jan. 2007.

6. Directive 2005/71 on admission of researchers (OJ 2005 L 289/15): deadline 12 Oct. 2007.

7. Recommendation on admission of researchers (OJ 2005 L 289/26).

8. Decision on asylum and immigration information exchange (OJ 2006 L 283/40).

9. Decision establishing European integration Fund (OJ 2007 L 168/18).

10. Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ('Blue Card' Directive) (OJ 2009 L 155/17).

Directive on Family Reunification. This was adopted in 2003 and had to be transposed by the Member States by October 2005. The objective of the Directive is to create a right to family reunification for third-country nationals who reside legally in the Member States. The way this is pursued is by establishing minimum standards for the admission and treatment of third-country national family members. Family reunification is an EU right, according to the Directive, for spouses and minor children. The conditions for its exercise are:

- stable and regular resources to support the family;
- adequate housing;
- comprehensive sickness insurance.

Member States are permitted to apply an integration measures condition to family members either before or after admission to the state. This is a derogation from the right to family reunification.⁸

In October 2008, the Commission published the first report on implementation of the Directive in the Member States (COM (2008) 610 final). The report reveals a number of weaknesses in the way in which Member States have transposed the Directive. Key among the problem areas are:

- Two Member States, AT and BE, require evidence of accommodation prior to entry of the family members, which can impose a considerable financial burden on the sponsor.
- Only half the Member States require the family to have sickness insurance.
- All Member States require evidence of stable and regular resources except SE. However, the modalities vary substantially. CY provides no precision on the meaning of the term, while FR, LU, RO and LT make reference to the minimum wage. The range of specified income goes from €120 in PL to €1,484 in NL.
- Three Member States, NL, DE and FR, apply integration measures before the family will be admitted to the Member State, though some categories are exempted (more Member States have subsequently added integration measures as a condition of residence).
- Four Member States (CZ, HU, LV and PL) do not have a specific procedure for family reunification but deal with this in the general immigration rules.
- All Member States except IT and PT require fees but these range from €35 in CZ and EE to €1,368 in NL.
- There are very substantial variations among the Member States regarding access to employment. In the Commission's view the national provisions in DE, HU and SI exceed what is permitted under the Directive.

In general, the Commission expressed concern that the Directive, which is aimed at creating a level playing field for third-country nationals' family reunification, in fact seems to be resulting in very substantial variations in access to the right. By 2011, the Court of Justice of the European Union (CJEU) had twice been required to consider the Directive, first at the request of the European Parliament that challenged three exceptional provisions in the

⁸ R. van Oers, E. Ersboll and D. Kostakopoulou (eds), *A Re-definition of Belonging? Language and Integration Tests in Europe*, The Hague: Brill, 2010.

Directive – a further one allowing Member States to exclude children over 12 years (provided that they had adopted legislation by the time of entry into force of the Directive); another allowing Member States to exclude children over 15 years; and one allowing Member States to delay family reunification for up to three years if existing legislation so provided at the time of entry into force. In the Parliament's view, these exceptions were of questionable human rights compatibility. The CJEU did not find any of the provisions specifically problematic, instead finding that it would be on the transposition by the Member States that attention needed to be focused.⁹ In the event, as the Commission's report shows, only two Member States, Cyprus and Germany, used the exception to exclude children over 12 years (although the documents available regarding the negotiations indicate that it was the Netherlands that sought the exception). No Member States used the exception to exclude children over 15 years (which had been championed by Germany). However, the fact that the first challenge to the Directive was on the basis of human rights compatibility indicates the importance that the EU Charter of Fundamental Rights (which incorporates all the rights contained in the European Convention on Human Rights (ECHR)) is likely to have in this field. I shall return to this point later.

The CJEU was once again troubled by the Directive in respect of a reference from a Dutch court.¹⁰ Here the key issues were twofold: what income could Member States require of a third-country national seeking family reunification with his or her spouse and what constitutes social assistance for the purposes of the Directive? The relevant Dutch law that transposed the Directive required a sponsor to have an income equivalent to 120 per cent of the minimum wage. However, Dutch law provided that there are two categories of social assistance – a lower level called general assistance, which is the minimum wage, and special assistance, which is the equivalent of 120 per cent of the minimum wage. Which level then was applicable for the application of the Directive? If only the general social assistance level, then the third-country national sponsor, Mr Chakroun's, income was sufficient; if the special assistance level applied, then it was not.

The problem was compounded by another specificity of Dutch law – where a couple marries before either of them moves to the Netherlands. Then the applicable rate for income for family reunification is the lower general assistance level. But if the couple marries after one of them has moved to the Netherlands (as Mr and Mrs Chakroun had done), then the higher special assistance level is applicable to the income requirement. The couple complained that this constituted unlawful discrimination in light of the Directive's objectives. The CJEU pointed out that the Directive creates a right of family reunification which an individual can rely upon. There is no margin of appreciation for the Member States. Because the Directive creates this, the conditions for the exercise of the right must be restrictively interpreted. Therefore the CJEU found:

- social assistance in the Directive has an EU meaning, not a national one, and it means 'social assistance granted by the public authorities, whether at national, regional or local level' (para. 45);
- 'stable and regular resources' must be determined by reference to social assistance (para. 46);

⁹ C-540/03 *Parliament v. Council* [2006] ECR I-5769.

¹⁰ C-578/08 *Chakroun*, 4 March 2010.

- the assessment of income must not undermine the objective of the Directive to promote family reunification (para. 47);
- the actual situation of each applicant must be examined as well as the threshold that the state has put into the regulations (para. 48);
- social assistance in the Directive is the level of general assistance only, not special assistance (para. 52);
- different income requirements that are dependent exclusively on where and when the couple married (or was formed) are by definition problematic and incompatible with the Directive (para. 51);
- the Directive does not permit a difference in income levels to be applied on the basis of when and where the marriage took place (i.e. either before or after one party migrated) (para. 66).

In other words, the Dutch legislation was found fully incompatible with the Directive. In its finding the CJEU relied not only on the European Convention on Human Rights for guidance but referred to the EU Charter of Fundamental Rights on numerous occasions as a source of interpretation.

The second substantial measure that the EU has adopted in this field is the Long Term Residents' Directive. A number of studies on the application of the Directive have been undertaken by academics, indicating substantial variations across the Member States.¹¹ The principle of the Directive is that any third-country national not coming within an excluded group (such as students or diplomats) who has resided lawfully in a Member State for five years will obtain a long-term residence status in EU law so long as three conditions are fulfilled:

- the individual fulfils the residential requirement;
- the individual has stable and regular resources to support him or herself and dependants;
- the individual has fully comprehensive sickness insurance.

However, similar to the Family Reunification Directive, a fourth condition may be applied by the Member States – that the individual complies with integration conditions. It is this requirement that has been the source of most concern among academic researchers regarding the implementation of the Directive.¹² Once an individual acquires EU long-term residence status under the Directive, this can only be lost in accordance with the terms of the Directive, which are very limited. Further, the person is entitled to full equal treatment with own nationals within the Member State where the status was acquired (with exceptions for political rights and economic activities which are not open to EU nationals). Finally, the status gives an entitlement to move and exercise activities, economic and otherwise, in other Member States subject to a (fairly limited) labour market conditions test in the second Member State and a potential delay of up to 12 months in accessing economic rights. As yet, there has been no reference to the CJEU regarding the correct interpretation of the Directive. If the cases that go

¹¹ L. Halleskov, 'The Long Term Residents' Directive: A Fulfilment of the Tampere Objective of Near Equality?' *European Journal of Migration and Law* 7(5), 2005, 203–11.

¹² E. Guild, K. Groenendijk and S. Carrera, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Farnham: Ashgate, 2009.

to the ECHR are any indication of what are likely to be the issues of disagreement between state authorities and individual third-country nationals, it is likely to be the protections against expulsion that will need clarification soonest.

The Commission published its report on Member State implementation of the Directive in September 2011.¹³ It reaffirms that the Directive is a crucial tool for achieving the promotion of integration and non-discrimination of third-country nationals. However, it notes that the Member States implementation leaves much to be desired. Among the key findings are the following:

- The personal scope: too many Member States incorrectly exclude third-country nationals from the scope of the Directive by designating as ‘temporary’ their residence status in circumstances where it is clear that this is not the case, as for instance in respect of low-skilled migrant workers, researchers, family members of third-country nationals and others (AT, CY, EL, IT, PL).
- Lawful residence: a third-country national qualifies for permanent residence under the Directive after five years’ lawful residence: a number of Member States have defined too narrowly, in the opinion of the Commission, the meaning of lawful residence for the purpose of acquisition of rights under the Directive, thus reducing the number of persons eligible for protection (FR, IT, LU, SE, SK).
- Resources and sickness insurance: a requirement to obtain permanent status is that the individual has resources and sickness insurance; according to the Commission, too many Member States incorrectly require family members of the principal also to have resources, thus defeating the objective of the Directive as regards the stability of their situation (BG, EE, EL, MT, PL, RO).
- The optional imposition of integration requirements, much criticized by academics in the negotiation of the Directive, has been used by many Member States.¹⁴ However, there is very substantial variation among the Member States on what integration requirements are and how they are evidenced. The Commission expresses concern that the provision must be implemented in a manner consistent with the EU principle of *effet utile* but does not go on to analyse each Member State’s rules.
- Some Member States, according to the Commission, fail properly to apply the Directive as to do so requires too much documentation (DE, SE, NL).
- Some Member States have introduced additional requirements of dubious consistency with the Directive; for instance Austria has a quota system not allowed under the Directive.
- Intra-EU mobility for holder of long-term residence permits has been enhanced according to the Commission, but there are still problems. For instance Italy, Romania and Slovenia apply quotas that are not specified in the Directive. Other Member States apply an integration test even where the third-country national has already fulfilled that condition in the first Member State, contrary to the express provision of the Directive (AT, EE, FR, DE, LV).

¹³ COM (2011), 585 final.

¹⁴ AT, CZ, DE, EE, EL, FR, IT, LT, LU, LV, MT, NL, PT and RO. This confirms the concerns of academics regarding the provision.

In general, the Member States are far from applying the Directive correctly and the incorrect application appears mainly to hinder the ability of third-country nationals to enjoy the benefits of the Directive.

The third measure that has been adopted and provides long-stay immigration rights for third-country nationals is Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (the Blue Card Directive). This Directive seeks to regulate highly qualified migration to the EU in pursuit of the EU's objective of becoming the most competitive and dynamic knowledge-based economy in the world. It applies only to highly qualified employment, which is defined as that which requires adequate and specific competence as proven by high professional qualifications. These are attested by means of any diploma, certificate or other evidence of formal qualifications issued by a competent authority attesting the successful completion of a post-secondary higher education programme on condition that the studies lasted at least three years. Professional experience of at least five years can be substituted. In order to qualify for a Blue Card, the individual must hold the necessary qualification and the employment proposed in the Member State must pay at least 1.5 times the average gross annual salary in the Member State concerned. After 18 months' employment in one Member State, the Blue Card holder is privileged as regards movement to another Member State for highly qualified employment.

A substantial number of categories of persons are excluded from the scope of the Directive, such as refugees, seasonal workers, postal workers etc. However, for the rest, the Directive provides: the criteria for admission for the purpose of employment; the procedure for the issue of the Blue Card; and the grounds for refusal and the rights that the worker is entitled to enjoy, which include more favourable terms of family reunification than those contained in the Directive of that name. The Member States had until 19 June 2011 to transpose the Directive into national law. The Directive was intended to prevent Member States from competing for the best-qualified foreigner workers by reducing standards and criteria for their admission. However, it does not affect the right of Member States to adopt or retain more favourable provisions for third-country national workers in some key areas:

- salary requirements when a Blue Card holder moves to another Member State after 18 months in the first one do not need to meet the 1.5 times gross annual salary level;
- procedural safeguards may be enhanced;
- a 24-month limitation on equal treatment with own nationals as regards access to highly qualified employment may be relaxed;
- a 24-month restriction on changing employer unless so permitted by a prior authorization mechanism can be dispensed with;
- withdrawal of the Blue Card after three months' unemployment or repeated periods of unemployment can be abandoned;
- equal treatment rights set out in the Directive may be provided earlier than required;
- family reunification (which is in any event more generous than that which applies to other third-country nationals who have to rely on Directive 2003/86) can be further facilitated;
- acquisition of long-term resident status may be made available on more favourable grounds than in the Directive of that name.

If there is competition among the Member States for highly qualified and thus desirable migrants, then these are the areas in which that competition can be played out.

The fourth measure that the EU has adopted regarding long-stay migration for economic activities is regarding researchers. In October 2005 the Directive on admission of third-country nationals for the purpose of scientific research was adopted.¹⁵ It had to be transposed into national law by 12 October 2007.¹⁶ According to the preamble, it is intended to contribute to achieving the goal of 'opening up the Community to third-country nationals who might be admitted for the purposes of research'; the EU objective of investing 3 per cent of GDP in research and increasing the number of researchers in the EU by 700,000 was set by the Barcelona Council 2002 to be achieved by 2010.¹⁷ By doing this, the institutions believed that the EU would be more attractive to researchers from around the world, which in turn would boost its position as an international centre for research. Attention is paid in the preamble to the question of brain drain and back-up measures to support researchers' reintegration in their countries of origin. In accordance with the Lisbon Process, fostering mobility within the EU is also an objective.¹⁸ The preamble calls for Member States to permit family unity for researchers but does not actually deal with the issue, leaving it to the Member States to determine where appropriate, in accordance with Directive 2003/86.

The Directive defines research, researcher and research institution in wide terms. Research means creative work undertaken on a systematic basis in order to increase the stock of knowledge of humanity, culture and society, and the use of this stock of knowledge to devise new applications. A researcher is someone who holds higher education qualifications that give access to doctoral programmes. A research organization must have been approved for the purposes of the Directive by a Member State in accordance with legislation or administrative practice. As the Directive is written in terms of a research institution holding the key to mobility, Member State control over access to the territory for researchers takes place through the qualification of a research institution. According to the Directive, the research institution must initiate the procedure. In the event that a foreign researcher overstays his or her permitted time in a Member State, the state is allowed to require the research organization to reimburse costs related to the stay and return of the individual. The Directive allows Member States to hold the institution responsible for costs for up to six months after the termination of the hosting agreement.

Under the Directive, a hosting agreement must be signed between an authorized organization and a researcher. This agreement must include details of the purpose and duration of the research and the availability of financial resources, evidence of the researcher's qualifications, evidence of resources and travel costs for the researcher (beyond the social assistance system), sickness insurance and working conditions. Member States are to admit a researcher once their authorities have checked that the individual has a valid travel document, a hosting agreement has been signed as well as a statement of financial responsibility from the research organization, and that the individual is not a threat to public policy, security

¹⁵ Directive 2005/71.

¹⁶ Denmark, Ireland and the UK do not participate in this Directive either.

¹⁷ The goal does not appear to have been reached.

¹⁸ The Lisbon Process: http://www.eu2005.lu/en/actualites/documents_travail/2005/03/22lisboa/index.html (accessed: 23 July 2012).

or health. However, Member States may still require visas for researchers who meet the conditions of the Directive (Article 14(4)), though every facility must be provided to obtain one. The Member State is obliged to issue a residence permit to the individual for at least one year (unless the research is to last less than that period). Researchers are allowed to teach but only in accordance with national rules. Once admitted as a researcher under the Directive in one Member State, he or she can normally carry out research activities in any other Member State for not more than three months without further formality. Member States must make a decision as soon as possible and, if appropriate, have an accelerated procedure for these applications. Refusal of an application must be accompanied by an appeal procedure available to the individual or the organization.¹⁹

As set out above regarding legal immigration, before the adoption of the TFEU a number of key areas were the subject of harmonizing measures based on the principle of minimum standards. Specifically, family reunification, long-term resident status, highly qualified migration and admission of researchers have all enjoyed some degree of harmonization in this way. The Commission submitted further proposals regarding other areas of first admission for labour market access, specifically, seasonal workers and inter-corporate transferees in 2010. On the other hand, the 2009 five-year plan for the development of the Area of Freedom, Security and Justice, the Stockholm Programme,²⁰ called for another assessment of the Family Reunification Directive. In particular it called for an evaluation and, where necessary, review of the Directive taking into account the importance of integration measures (para. 6.1.4). This is unlikely to mean making family reunification easier for third-country nationals (other than highly qualified migrants coming under the Blue Card Directive who are not subject to integration conditions as regards their family members). Those Member States which have opted to use the integration measures option as a requirement for family reunification have done so in a way that makes family reunification more difficult for third-country nationals in their states.²¹

The TFEU objective of fair treatment for legally resident third-country nationals may well be tested in this area of integration measures and conditions. Some Member States such as the Netherlands and Germany have introduced integration measures for family reunification that must be fulfilled before the admission of the family members.²² But nationals of some states, such as the USA or Japan, are excluded from the requirement as regards the Netherlands. Is this fair treatment consistent with the TFEU objective? It will be the job of the CJEU to determine the meaning of fair treatment should a national court request it.

¹⁹ Although there is an obligation on the Commission to report on the implementation of this Directive by 12 October 2010, at the time of writing in November 2011 no report had been published.

²⁰ See <http://register.consilium.europa.eu/pdf/en/10/st05/st05731.en10.pdf> (accessed: 23 July 2012).

²¹ K. Groenendijk, R. Fernhout, D. Van Dam, R. Van Oers and T. Strik, *The Family Reunification Directive in EU Member States: The First Year of Implementation*, Nijmegen: Wolf Legal Publishers, 2007.

²² R. van Oers, 'Integration Tests in the Netherlands, Germany and the UK', in Van Oers, Ersboll and Kostakopoulou (eds), *A Re-definition of Belonging?*, 51–106.

What are the Existing EU Measures in Irregular Immigration?

The EU institutions prefer to use the term ‘illegal’ immigration rather than ‘irregular’ or ‘undocumented’ migration favoured by other international organizations and institutions.²³ This is notwithstanding the fact that not only has the Council of Europe’s Parliamentary Assembly called on the EU institutions to use more neutral language, but the European Parliament has similarly done so with noticeably little effect.²⁴ In this area the EU institutions have been quite active, adopting over 20 measures by 2011 since acquiring competence to do so.²⁵ The most controversial of the measures has been the Return Directive (2008/115), which was denounced by the heads of state of all countries in South America.²⁶ What the Directive seeks to do is establish clear, transparent and fair rules for an effective return policy that the EU considers to be a necessary element of a well-managed migration policy. The ending of an irregular stay by a third-country national is to occur through a coherent procedure culminating in expulsion.

‘Illegal stay’, which is a key concept of the Directive, means the presence on the territory of a Member State of a third-country national who does not fulfil or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code (on short-stay entry for three months or less) or other conditions for entry, stay or residence in that Member State.

²³ Council of Europe High Commissioner for Human Rights, *Criminalization of Migration in Europe: Human Rights Implications*, Strasbourg: Council of Europe, 2009.

²⁴ S. Carrera and M. Merlino, *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making*, Brussels: CEPS, 2009.

²⁵ 1. Directive 2001/40 on mutual recognition of expulsion decisions (OJ 2001 L 149/34); implement 2 Dec. 2002.

2. Directive 2001/51 on carrier sanctions (OJ 2001 L 187/45); implement 11 Feb. 2003.

3. Regulation 2424/2001 on funding SIS II (OJ 2001 L 328/4).

4. Decision 2001/886/JHA on funding SIS II (OJ 2001 L 328/1).

5. Framework Decision on trafficking in persons (OJ 2002 L 203/1).

6. Directive and Framework Decision on facilitation of illegal entry and residence (OJ 2002 L 328).

7. Directive 2003/110 on assistance with transit for expulsion by air (OJ 2003 L 321/26).

8. Conclusions on transit via land for expulsion – adopted 22 Dec. 2003 by Council.

9. Regulation 378/2004 on procedure for amendments to Sirene manual (OJ 2004 L 64).

10. Regulation 377/2004 on ILO network (OJ 2004 L 64/1).

11. Decision on costs of expulsion (OJ 2004 L 60/55).

12. Directive 2004/81 on res. permits for trafficking victims (OJ 2004 L 261/19).

13. Regulation 871/2004 on new functionalities for SIS (OJ 2004 L 162/29).

14. Directive 2004/82 on transmission of passenger data (OJ 2004 L 261/64).

15. Decision on joint flights for expulsion (OJ 2004 L 261/28).

16. Decision on early warning system (OJ 2005 L 83/48).

17. Regulation 1987/2006 establishing SIS II (OJ 2006 L 381/4).

18. Regulation 1988/2006 on SIS II, amending Reg. 2424/2 001 (OJ 2006 L 411/1).

19. Decision on European return programme (OJ 2007 L 144).

20. Directive 2008/115 (Returns Directive) (OJ 2008 L 348/98) – deadline 24 Dec. 2010.

21. Directive 2009/52 on sanctions for employers of irregular migrants (OJ 2009 L168/24). *The UK opts in to all except 7, 12, 13, 17, 20, 21.*

²⁶ D. Acosta Arcazo, *Latin American Reactions to the Adoption of the Returns Directive*, Brussels: CEPS, 2009.

Return is defined as voluntary or enforced compliance with an obligation to return to either his or her country of origin or a country of transit in accordance with Community or bilateral readmission agreements or other arrangements or another third country to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.

The first step that the Return Directive requires a Member State to take is to decide whether to issue an individual with an autonomous residence permit or other authorization offering a right to stay for compassionate, humanitarian or other reasons or not (Article 6(4)). If the Member State decides not to issue some sort of authorization, then it is obliged under the Directive to issue a return decision, though execution can be delayed apparently indefinitely. Return can be voluntary, which the Directive appears to promote, or enforced if the individual does not leave (Article 8). Where a Member State enforces a return decision it must also issue an entry ban on the individual that in principle should be for a five-year period (Article 11). The most controversial part of the Directive is that relating to detention. In Chapter IV of the Directive detention is incorporated as a normal part of the return process, although it is specifically stated to be a final resort where there is a risk of absconding or the individual is hampering the return procedure. Detention is subject to a series of safeguards regarding the making of the decision, the right to remedies against the decision, and judicial supervision of the detention. The initial limit to the length of detention is six months, but this can be extended for a further 12 months (Article 15). The transposition period of the Directive has not yet expired – Member States must implement it into their national law by 24 December 2011.

Like the Family Reunification Directive, the Return Directive has already been the subject of judicial consideration by the CJEU.²⁷ It was one of the last judgments of the CJEU before the entry into force of the Lisbon Treaty and it was subject to the urgent procedure in view of the fact that the individual was in detention. The case revolved around a Mr Kadzoev or Huchbarov, whose identity is never fully certain. He had been arrested by the Bulgarian authorities near their border with Turkey. He was detained from 3 November 2006 and was still in detention when the case was heard by the CJEU in 2009. The man stated he was Mr Huchbarov, a Chechen, but he did not wish the assistance of the Russian authorities. The Bulgarian authorities decided that he was Mr Kadzoev, a Chechen with a Georgian mother. The Bulgarian authorities sent the identity documents that they had in respect of Mr Kadzoev to the Russian authorities, but the latter stated that the documents were from persons and authorities unknown to the Russian Federation and thus no proof of Russian nationality. Various applications for the man to be released from detention failed, not least as he had no address in Bulgaria. In 2007 he applied for asylum. The authorities continued to detain him and eventually in 2009 refused his application definitively without any further appeal right.

In the meantime, the Bulgarian authorities were having no luck in finding a country to which to send the man. They struck out with the Russians, tried and failed with the Georgians, and even approached the Austrian authorities to see whether they would take him, again without success. Finally, a Bulgarian court, once again faced with an application for the man's release from custody, asked the CJEU whether the 18-month maximum period of detention under the Return Directive applied in this case. The CJEU found that the Directive was applicable in light of the Bulgarian law that transposed it (notwithstanding the fact that

²⁷ C-357/09 PPU *Kadzoev (Huchbarov)*, 30 November 2009.

the period for transposition had not yet expired). Two central issues arose – first, whether the man’s detention while he was seeking asylum count towards the 18-month maximum on detention; second, whether periods of detention during judicial review count towards the 18-month maximum.

On the first question the CJEU looked long and hard at the Asylum Procedures Directive (2004/85). It held that, if the requirements of the procedures which permit limits to be placed on an individual’s freedom of movement were followed (and which provide substantial guarantees and freedoms to the individual), then that time when liberty is restricted does not count towards the 18-month maximum under the Return Directive. But if the detention continued to be on the basis of national rules which effectively correspond to detention under the Return Directive, then it does count (para. 47). On the second question, the CJEU held that 18 months means 18 months, irrespective of whether judicial review or other legal challenges were launched by the individual. After 18 months the state must release the individual. In no case can the maximum period be exceeded, irrespective of whether the individual is aggressive, has no means of supporting himself, or has no travel or identity documents (paras 68–9). Further, the CJEU held that the possibility of detaining a person on grounds of public order and public safety cannot be based on the Return Directive (para. 70). The CJEU accomplished this without even once referring to the EU Charter of Fundamental Rights or the European Convention on Human Rights.

A second urgent reference under the Directive was decided by the CJEU on 28 April 2011.²⁸ The reference, from an Italian court, concerned Mr El Dridi, a third-country national who entered Italy illegally and does not hold a residence permit. According to the court, a deportation decree was issued against Mr El Dridi by the Prefect of Turin (Italy) on 8 May 2004. An order requiring his removal from the national territory, issued on 21 May 2010 by the Questore di Udine pursuant to that deportation decree, was notified to him on the same day. The reasons for that removal order were that no vehicle or other means of transport was available, that Mr El Dridi had no identification documents, and that it was not possible for him to be accommodated at a detention facility as no places were available in the establishments intended for that purpose. A check carried out on 29 September 2010 revealed that Mr El Dridi had not complied with that removal order. He was sentenced at the conclusion of an expedited procedure by a single judge to one year’s imprisonment for the criminal offence of unlawful presence. He appealed against that decision and the higher court was in doubt as to whether a criminal penalty could be imposed during administrative procedures concerning the return of a foreign national to his country of origin due to non-compliance with the stages of those procedures, since such a penalty seems contrary to the principle of sincere cooperation. The CJEU found that the Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal under the Directive, provide for a custodial sentence on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory has been notified to him or her and the period granted in that order has expired. Instead, Member States must pursue their efforts to enforce the return decision, which continues to produce its effects. The CJEU found that a custodial penalty, due to its conditions and methods of application, risks jeopardizing the attainment of the objective pursued by that directive,

²⁸ C-61/2011 *El Dridi*.

namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals. Such legislation is liable to frustrate the application of the procedural measures of the Directive and delay the enforcement of the return decision. However, this does not preclude the possibility for the Member States to adopt provisions regulating the situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory.

The Judicialization of Immigration

When the EU was provided with competences in the field of immigration in 1999, Article 68 TEC provided that only courts against whose decision there was no further appeal could refer questions to the CJEU on measures arising from the new treaty bases. The result was that only courts of final instance could refer questions on EU immigration matters. Member States' courts of final instance tend to be conservative in their use of reference powers.²⁹ Often they will prefer to deal with the issue themselves under national law. Courts of first instance often ask the most challenging questions of EU law to the CJEU as they are faced with the immediate problem and often are under substantial pressure regarding the preferred outcomes of the parties. The consequence of limiting the reference power to courts of final instance was to slow dramatically the oversight that the area might receive from the CJEU. In addition to preferences between courts, there is also the simple arithmetic – there is only one court of final instance in each state but many courts of first instance. Few cases regarding immigration ever get to courts of final instance, while many arrive at the doors of courts of first instance, particularly in Member States where there are specialized courts for immigration and asylum issues.

For the moment, it is the field of EU asylum measures that is giving rise to the largest number of references to the CJEU from courts across the Member States. One might well expect, however, that immigration measures will catch up rapidly. After all, the Family Reunification Directive has already given rise to two judgments. The consequences of the arrival of the CJEU as an important actor in this field are very likely to include the following:

- definitions of terms in the Directives will be given consistent meanings rather than be left to Member State national rules;
- terms that are identical to or very similar to one another or to terms used elsewhere in EU law are likely to be interpreted consistently – thus grounds for expulsion that use the term 'public policy' are likely to be given the same interpretation as the same phrase that applies to EU citizens (this has been the approach of the CJEU regarding the EC Turkey Association Agreement);
- the relationship of the rule and the exception or derogation from the rule is likely to be clarified, giving priority to the rule and a restrictive interpretation to the exception;

²⁹ G. de Burca and J. H. H. Weiler, *The European Court of Justice*, Oxford: OUP, 2001.

- the scope for divergent national rules that stray from a common EU interpretation of the Directives will be diminished unless it is specifically based on higher standards (i.e. more favourable to the migrant) permitted in the principle of minimum standards.

The CJEU has a critical role to play in the development of the EU field on immigration, a role that is now coming into its own. The direction that the TFEU provides to the CJEU regarding the importance of the principle of fairness may be critical. From the initial decisions of the CJEU (discussed above) it appears that the CJEU perceives the field of immigration as one that merits interpretation consistent with the usual rules of EU law. There is nothing exceptional or extraordinary about immigration that sets it apart as regards the judicial consideration of its consistent elements.

The EU Charter of Fundamental Rights and the Lisbon Treaty

Article 6 TEU provides that the EU Charter of Fundamental Rights, first adopted in 2000, shall have the same legal value as the Treaties. The Charter was drafted and adopted in 2000, but it was denied legal effect as a result of disagreements among the Member States (primarily the UK in disaccord with the others) about the added value of a legally binding charter. The version to which the TEU refers is fundamentally the same as the 2000 version, which amends the mechanisms of application. According to its preamble, the Charter sets out the Union's foundation on indivisible, universal values of human dignity, freedom, equality and solidarity. It confirms that the EU is based on the principles of democracy and rule of law. In order to promote the four freedoms of the EU – free movement of goods, persons, services and capital – the Charter states that it is necessary to strengthen the protection of fundamental rights and thus recognizes the rights, freedoms and principles set out. A protocol to the Lisbon Treaty provides that the legal effect of the Charter is limited in the UK and Poland.

The Charter includes the rights found in a variety of sources, primarily those already existing in the Treaties, the European Social Charter, and most importantly contained in the ECHR. The Charter's Article 52(3) provides that Charter rights that correspond to ECHR rights shall have the same meaning and scope of those in the ECHR. Thus the way in which the European Court of Human Rights (ECtHR) has interpreted the ECHR rights in immigration matters becomes a subject of substantial importance for the EU. This is not the place to set out the jurisprudence of the ECtHR in immigration matters, which has been extensively examined elsewhere.³⁰ Nor is it the place to examine how the CJEU has incorporated the ECHR into its jurisprudence,³¹ though it is worth noting that both the Lisbon Treaty and the Stockholm Programme mandate the accession of the EU to the ECHR. The point that I want to make here is that immigration measures in the EU are no longer self-

³⁰ N. Blake QC and R. Husain, *Immigration, Asylum and Human Rights*, Oxford: OUP, 2003; J. Sikuta and E. Hubalkova, *The European Court of Human Rights: Case Law of the Grand Chamber*, Amsterdam: TMC Asser, 2007.

³¹ E. Guild and G. Lesieur (eds), *The European Court of Justice on the European Convention on Human Rights: Who Said What When*, The Hague: Kluwer Law International, 1997.

referential. All of the EU immigration measures contain a standard preamble that confirms their compatibility with the ECHR and EU fundamental rights standards contained in the Charter. Most of the measures, when they were proposed, were subject to a fundamental rights impact assessment that the Commission carried out. But there was no external assessment of the human rights and fundamental rights consequences for individuals of the measures. Further, within the EU system there was no obvious way consistent across the Member States in which an individual could lay claim to fundamental rights in light of the implementation of an EU measures on immigration. Now, with the legal effect of the Charter within the scope of EU law, this ambiguity has been cleared up. Further, the accession of the EU to the ECHR also required by the post-Lisbon TEU will facilitate the interaction of the two courts, the CJEU and the ECtHR, without limiting the role of either.

Conclusions

In this chapter I have sought to examine the impact of the Lisbon Treaty on immigration law in the EU. To do so I compared the changes in the EU objectives in including immigration as a competence of the EU, focusing in particular on the importance of the objective of fair treatment for third-country nationals. Then I looked at the measures that the EU has already adopted in immigration, both legal and irregular, and considered what impact the Lisbon Treaty changes bring to these already-existing measures, in particular considering the role of the CJEU after 1 December 2009. Finally, I looked at the EU Charter of Fundamental Rights – what does the legal effect of the Charter mean for EU immigration measures?

Two key conclusions emerge from this analysis:

- The direct engagement of national courts of any level with the CJEU over the interpretation of the EU immigration measures that was introduced by the Lisbon Treaty is extremely important in the development of the field. The consistency of interpretation that is emerging will be central to the further development of immigration in the EU.
- The Charter of Fundamental Rights brings to the EU's table the disputes that the Member States have been having with third-country nationals about immigration and rights and which, until now, have been taken to the ECtHR on human rights grounds. These disputes are likely now to appear before the CJEU on EU immigration measures but present similar conflicts regarding family reunification, protection of residence rights, equality of treatment, and protection from detention and expulsion. The role of fundamental rights in the interpretation of the EU's immigration measures will be a central feature over the next 20 years, made possible by the Lisbon Treaty.

Finally, in my view, the main measures of the EU's immigration policy have now been adopted. While there will be more legislative initiatives, these will probably be in minority interest areas, such as the regulation of seasonal workers, or consolidation measures. The main thrust of EU immigration law will move from the legislative phase to one of implementation and judicial control over implementation and application in the Member States.

References

- Acosta Arcarazo, D., *Latin American Reactions to the Adoption of the Returns Directive*, Brussels: CEPS, 2009.
- Blake, N. QC and R. Husain, *Immigration, Asylum and Human Rights*, Oxford: OUP, 2003.
- Carrera, S. and M. Merlino, *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making*, Brussels: CEPS, 2009.
- Council of Europe High Commissioner for Human Rights, *Criminalization of Migration in Europe: Human Rights Implications*, Strasbourg: Council of Europe, 2009.
- De Burca, G. and J. H. H. Weiler, *The European Court of Justice*, Oxford: OUP, 2001.
- Groenendijk, K., R. Fernhout, D. Van Dam, R. Van Oers and T. Strik, *The Family Reunification Directive in EU Member States: The First Year of Implementation*, Nijmegen: Wolf Legal Publishers, 2007.
- Guild, E. and G. Lesieur (eds), *The European Court of Justice on the European Convention on Human Rights: Who Said What When*, The Hague: Kluwer Law International, 1997.
- Guild, E., K. Groenendijk and S. Carrera, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Farnham: Ashgate, 2009.
- Halleskov, L., 'The Long Term Residents' Directive: A Fulfilment of the Tampere Objective of near Equality?', *European Journal of Migration and Law* 7(5), 2005, 203–11.
- Peers, S., *EU Justice and Home Affairs Law*, Oxford: OUP, 2006.
- Sikuta, J. and E. Hubalkova, *The European Court of Human Rights: Case Law of the Grand Chamber*, Amsterdam: TMC Asser, 2007.
- Van Oers, R., 'Integration Tests in the Netherlands, Germany and the UK', in R. van Oers, E. Ersboll and D. Kostakopoulou (eds), *A Re-definition of Belonging? Language and Integration Tests in Europe*, The Hague: Brill, 2010, 51–106.
- Van Oers, R., E. Ersboll and D. Kostakopoulou (eds), *A Re-definition of Belonging? Language and Integration Tests in Europe*, The Hague: Brill, 2010.

This page has been left blank intentionally