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Social security rights of third country nationals under EU Law and under the European Convention of Human Rights

Paul Minderhoud

1. EU law protecting social security rights for third country nationals

Until very recently the EC treaty did not address the issue of social security and social assistance rights of third country nationals. The only exception was in case a third country national could derive rights from EU citizens exercising their freedom of movement (as a family member or as a worker of an EC company providing services in another Member State) or from an Association agreement concluded between the EC and a third country (on the base of Art. 310 EC).1

This has been altered after the 1999 Amsterdam Treaty, which empowered the Community to adopt measures regarding immigration and asylum policy areas.

Relevant articles on the social rights of third country nationals can now be found in three asylum related directives, a directive for victims of trafficking in human beings and two directives and one regulation, applicable to regular migrants, all based on Art. 63 ECT.2

* Radboud University Nijmegen.
1 I will not deal with this in this contribution. See also the contribution of Rob Cornelissen in this Liber Amicorum.
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261, 06/08/2004, p. 19-23.
1.1 Regulation 859/2003

In 2003, after a long discussion, the Member States extended the provisions of Regulation 1408/71, which coordinates the social security entitlements of cross border EU migrant workers, to third-country nationals in Regulation 859/2003.³

There was already a proposal for this extension in 1997 but it was disputed whether the pre-Amsterdam EC Treaty provided a sufficient legal basis for this extension in its Articles 42 and 308 (old). In the end the competence for this extension was based on the competence of the EU in immigration and asylum matters, inserted by the Amsterdam Treaty. Article 63(4) ECT became the legal basis for this regulation.⁴

The adoption of this regulation, however, is not a straightforward application of equal treatment between Community and non-Community nationals, because legally residing third-country nationals do not enjoy automatically the right to free movement according to Community law. On the contrary, Regulation 859/2003 emphasizes that the application of 1408/71 does not give third country nationals “any entitlement to enter, to stay or to reside in a Member State or to have access to its labour market”⁵. Furthermore, the regulation sets out explicitly that 1408/71 is “not applicable in a situation which is confined in all respects within a single Member State”.⁶ Only the small number of non-Community nationals who, due to international law or bilateral agreements, can move between Member States will, therefore, be able to practice these newly granted rights.⁷

If we look at the practical meaning of this Regulation so far, inquiries with the Dutch authorities showed that according to their knowledge no benefits have been granted to third-country nationals on the basis of regulation 859/2003 in the Netherlands, yet. There are also no court cases known in the Netherlands in which an appeal to this regulation has been made. This right to intra-European social security has been very limited, because third-country nationals lacked until recently the underlying right of free movement.⁸

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⁴ See the judgment of the ECJ in the Khalil case (11 October 2001) [2001] ECR I-7413: The Court did not conclude Community nationality to be an absolute premise for inclusion in personal scope of Regulation 1408/71 on the basis of Article 42 TEC. The Court made a contextual analysis, referring to international law, and concluded that the context and political commitment at the time when Regulation no. 3 (the predecessor of 1408/71) was formulated and adopted, made it a natural choice to include refugees and stateless persons in the personal scope of 1408/71.
⁵ Recital 10 preamble.
⁶ Recital 12 preamble. After the replacement of Regulation 1408/71 by Regulation 883/2004, Article 90 of that Regulation rules that regulation 859/2003 will still be applicable to third country nationals.
⁷ Sindbjerg Martinsen 2003, p. 33.
1.2 Directive 2003/109

The implementation of Council Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents, which provides for partial free movement for long-term residents from third countries could change this non-use of the rights secured under Regulation 859/2003.9

If third-country nationals want to obtain the long term resident status, firstly they must have resided legally and continuously in the territory of the Member State concerned for five years.10 They only get this status if they provide evidence that they have for themselves and for their family members, stable and regular resources, which are sufficient to maintain them without recourse to the social assistance system and a sickness insurance covering all risks normally covered in the Member State concerned.11

Article 11 contains a general equal treatment provision but allows Member States to make exceptions to that principle. According to Article 11(1)(d) of the Directive long-term residents shall also enjoy equal treatment with nationals as regards social security, social assistance and social protection as defined by national law. But according to Article 11(4), Member States may limit equal treatment in respect of social assistance and social protection to so called “core benefits”. Core benefits are not defined in the Directive itself but are described in recital 13 of the preamble as: “minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care”. The modalities for granting such benefits should be determined by national law.

The limitation of social security is not mentioned in Article 11(4), but as it is national law and not Community law, which defines in this Directive12 what the difference is between social security, social assistance and social protection, there is no guarantee that this notion has the same meaning as under Regulation 1408/71 (and 859/2003). Halleskov argues therefore that equality of treatment is only required by the Directive in respect of social security if the national legislation defines this concept as having an independent meaning from social assistance and social protection.13

An important question for the future will be how Member States will interpret Article 11(4). So far, most studies do not show that there are many concrete examples of social assistance or social protection benefit, not being a core benefit, which are granted to Union citizens but not to long-term residing third-country nationals.14

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9 The UK, Ireland and Denmark are not bound by the Directive. Regulation 859/2003 does not apply to Denmark.
10 Article 4(1).
11 Refugees and those benefiting from temporary or subsidiary protection are excluded from the personnel scope of the Directive. The same goes for persons pursuing studies or vocational training, au pairs, seasonal workers or posted workers.
12 See Art 11(1)(d).
14 See C.A. Groenendijk, E. Guild & R. Barzilay, The Legal Status of Third Country Nationals who are Long-Term Residents in a Member State of the European Union, Brussels 2001. See also T.A. Aleinikoff & D. Klusmeyer, Citizenship Policies for an Age of Migration, Washington 2002, p. 65: “Most of the nations examined in this study (Austria, UK, France, NL, Germany) make permanent residents eligible for the constellation of noncontributory and contributory benefits programs provided to citizens”.
Another limitation lies in the fact that the long-term residents’ Directive does not cover refugees or persons with subsidiary protection, yet. In June 2007, however the Commission has presented a proposal to amend this Directive in order to extend its scope to these beneficiaries of international protection. The possibilities for restrictions of the principle of equal treatment referred to in Article 11 may apply to these beneficiaries of international protection only to the extent that they are compatible with the provisions of Directive 2004/83 (see paragraph 1.4).

1.3 Directive 2005/71

The most recent Directive in which social security rights of third-country nationals are explicitly addressed, is Directive 2005/71 on a specific procedure for admitting third-country nationals for the purposes of scientific research. This Directive provides for a fast-track procedure for the admission of researchers from non-EU countries. Accredited research organisations play a major role in this process, as they will have to certify the status of the researchers in a hosting agreement which will acknowledge the existence of a valid research project, as well as the possession by the researcher of the necessary scientific skills, sufficient resources and sickness insurance. Delivery of a residence permit to a researcher will automatically imply the right to work without an economic needs test to be carried out. On the basis of the hosting agreement, the immigration authorities of the host country will deliver a residence permit in an accelerated procedure. Holders of such a residence permit enjoy equal treatment with nationals in a number of areas, for example social security or working conditions.

This Directive adds according to recital 16 of the preamble a very important improvement in the field of social security as the non-discrimination principle also applies immediately to persons coming to a Member State directly from a third country. Nevertheless, this Directive should not confer more rights than those already provided in existing Community legislation in the field of social security for third-country nationals who have cross-border elements between Member States. This Directive furthermore should not grant rights in relation to situations which lie outside the scope of Community legislation like for example family members residing in a third country.

Article 12 of the Directive, which deals with equal treatment advises that “holders of a residence permit shall be entitled to equal treatment with nationals as regards (c) branches of social security as defined in Regulation 1408/71”. This limitation means that equal access to social assistance is excluded from this provision.

To improve the entry and residence conditions for third-country nationals seeking access to the EU labor market, the Commission presented in October 2007 the Single

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15 Com (2007)298 final. The main aim of this proposal is to offer beneficiaries of international protection legal certainty about their residence in a Member State and rights which are comparable to those of EU nationals after 5 years of legal residence, thus closing the gap left open by Directive 2004/83.

16 Therefore the insertion of a paragraph 4a in Article 11 is proposed: “As far as the Member State which granted international protection is concerned, paragraphs 3 and 4 are without prejudice to the provisions of Directive 2004/83”.


18 Once such a permit has been granted, the researcher will also be free to move within most Member States (Schengen countries & Ireland) to carry out the research project.
Permit Proposal and the Highly Qualified Employment Proposal.\textsuperscript{19} These Proposals hold the same equal treatment provision as formulated in Article 12 Directive 2005/71 for all third-country workers\textsuperscript{20} and for holders of an EU Blue Card.\textsuperscript{21} However, regarding third-country workers the Single Permit Proposal allows Member States to restrict this equal treatment to third-country workers who actually are in employment except for unemployment benefits.\textsuperscript{22} Holders of a Blue Card also enjoy equal treatment with nationals regarding social assistance as defined by national law.\textsuperscript{23}

1.4 The Asylum Directives and the Directive on victims of trafficking

The three directives on asylum provide different rights to social assistance. In the area of access to social assistance rights we find differences according to the respective group to which the third-country national belongs.

For beneficiaries of refugee status the same necessary social assistance as provided to nationals of a Member State shall be ensured by the Member State that has granted such status.\textsuperscript{24} But Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as to nationals.\textsuperscript{25} Recital 34 of the preamble to Directive 2004/83 tries to define what has to be seen as core benefits:

\begin{quote}
"With regard to social assistance and health care, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned."
\end{quote}

The importance of this recital lies in the fact that the EU defines for the first time what the minimum standards for core benefits for beneficiaries of subsidiary protection have to be.\textsuperscript{26}

Recital 33 of the same preamble advises that:

\begin{quote}
"Especially to avoid social hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence."
\end{quote}

\textsuperscript{20} Art. 12(1)(e) Single Permit Proposal.
\textsuperscript{21} Art. 15(e) Highly Qualified Employment Proposal.
\textsuperscript{22} Art. 12(2)(e) Single Permit Proposal.
\textsuperscript{23} Art. 15(f) High Qualified Employment Proposal.
\textsuperscript{24} Art. 28(1) of Directive 2004/83.
\textsuperscript{25} Art. 28(2) of Directive 2004/83.
\textsuperscript{26} The definition of core benefits in recital 13 of the preamble of the Long-Term Residence Directive is: “minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care”. This last category is not included in the definition of Directive 2004/83.
Persons enjoying temporary protection shall receive the necessary assistance in terms of social welfare and means of subsistence without defining the relation to the level for nationals (Art. 13 (2) and (4) of Directive 2001/55):

2. The Member States shall make provision for persons enjoying temporary protection to receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources, as well as for medical care. Without prejudice to paragraph 4, the assistance necessary for medical care shall include at least emergency care and essential treatment of illness.

4. The Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence.27

And the most restrictive formula is used for asylum seekers in the Reception Conditions Directive.28 Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence (Art. 13(2) of Directive 2003/9).29

A comparable provision can be found in Articles 7(1) and 9(1) of Directive 2004/81 on a residence permit for victims of trafficking in human beings, who cooperate with the competent authorities. According to this provision Member States shall ensure that the third-country nationals concerned who do not have sufficient resources are granted standards of living capable of ensuring their subsistence and access to emergency medical treatment. They shall attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, psychological assistance.30

2. The protection of social security rights under Article 14 ECHR

If EU legislation fails to provide sufficient protection for the social security rights of third-country nationals, Article 14 of the European Convention of Human Rights (ECHR), which prohibits discrimination by nationality, can provide an instrument, when the refusal of social security rights can be seen as discrimination by nationality.

As Article 14 ECHR is an accessory right, it can only be applied if the social security right concerned could be brought under the scope of the Convention. Until re-

27 For persons enjoying temporary protection who are engaged in employed or self-employed activities, the general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall also apply. See Article 12 Directive 2001/55.
29 These material reception conditions may be provided in kind, or in the form of financial allowances or vouchers or in a combination of these provisions (Art. 13(5) Directive 2003/9).
30 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 6 August 261, p. 19.
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cently this was done by classifying these benefits as ‘property rights’ under Article 1 Protocol 1 to the Convention. This happened in the cases of Gaygusuz\(^{31}\) and Poirrez\(^{32}\).

In the Gaygusuz-case, Austria rejected the application for emergency assistance for the unemployed of Mr. Gaygusuz, a Turkish citizen, who had resided there legally for many years, on the grounds that the applicant did not have Austrian nationality, which was one of the conditions laid down in the Austrian legislation. The relevant benefit was paid partly out of contributions, partly out of public funds. According to the European Court of Human Rights (ECtHR) the refusal of the benefit constituted a violation of Article 14 ECHR read together with the right to property guaranteed in Article 1 of the First Protocol to the ECHR. According to the European Court, very weighty reasons would have to be submitted before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention and there were no such very weighty reasons in this case.\(^{33}\)

Poirrez was a physically disabled Ivory Coast national who was adopted at the age of 21 by a French national. He applied for a non-contributive “allowance for disabled adults” but this was refused solely on the ground that he was neither a French national nor a national of a country which had entered into a reciprocity agreement with France in respect of this benefit (para 38). The ECtHR establishes that the claim is within the scope of Article 1 Protocol 1 (denying that only contributory benefits can give rise to a pecuniary right) and Article 14 ECHR. No very weighty reasons to justify this different treatment based exclusively on the ground of nationality were to be found.

A very interesting aspect of this case was that the French court, hearing the appeal of Poirrez had decided to ask the Court of Justice of the European Communities for a preliminary ruling on the compatibility between the relevant French law and Community law, on the basis that the applicant was a direct descendant of a citizen of the European Union. The Court of Justice however found that Community law did not apply to the facts of the case: although the applicant’s adoptive father was indeed a national of a Member State of the European Communities, he did not qualify as a migrant worker since he had always lived and worked in France. On the strength of this Luxemburg judgment, all the French courts which successively dealt with the appeal rejected the applicant’s request for a disability allowance. Poirrez then applied to the Strasbourg Court which more than 13 years after he had originally applied, found that the applicant had been the victim of discrimination based on nationality, contrary to Article 14 of the Convention taken together with Article 1 of Protocol 1, and, ruling on an equitable basis, awarded him € 20,000 for the damage he had suffered.

After the judgment in Poirrez it was still unclear whether this approach could be followed for all welfare benefits. But in Stec, the ECtHR held that the distinction between various funding methods (by contribution or by public means or through general taxation) had become increasingly artificial and that it would be preferable to hold Article 1

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\(^{32}\) Koua Poirrez v. France ECtHR 30 September 2003, Application no. 40892/98.

Protocol 1 applicable to all welfare benefits.\textsuperscript{34} However, one still has to bear in mind that Article 1 Protocol 1 does not guarantee the right to acquire possessions.

On 25 October 2005 the ECtHR showed another interesting way to invoke the protection of Article 14 ECHR in social security rights matters. This happened in the cases of Niedzwiecki and Okpisz.\textsuperscript{35} Niedzwiecki was a Polish citizen, who immigrated to Germany in 1987. His request for asylum was rejected, but his expulsion was suspended. In 1991 he was issued with a limited residence permit for exceptional purposes, which has to be renewed every two years. In 1997 he obtained an unlimited residence permit. In 1995 he applied for child benefits for his new-born daughter. This application was rejected because of his weak residence permit. Various courts dismissed the applicant’s appeal with the argument that the legislature had only intended to grant child benefits to aliens who were likely to stay in Germany on a permanent basis.

The position of Mr Niedzwiecki was more or less similar to that of Ms Martínez Sala in the judgment of the ECJ of 1998. Ms Sala also had a limited residence permit and did not get any child benefits. In her case, however, the fact that she was an EU citizen helped her to receive her child benefits in the end based on Articles (now) 12 and 18 EC.\textsuperscript{36} As Mr Niedzwiecki was not an EU citizen at that moment, he had no alternative than to go to the European Court of Human Rights, where he complained that the refusal of child benefits amounted to discrimination, racism and inhuman treatment, violating therefore Article 14 ECHR. Surprisingly, he did not file his complaint in conjunction with a violation of his property rights, protected by Article 1 Protocol 1, as had been done in the earlier judgments of the ECtHR in the cases Gaygusuz and Poirrez mentioned already before, but he conjuncts it with a violation of Article 8 ECHR on the right to respect for family life.\textsuperscript{37}

In the meantime, the German Federal Constitutional Court ruled (in another case) that the provision on which the child benefit of Mr Niedzwiecki was refused, was incompatible with the right to equal treatment under Article 3 of the German Basic Law. According to the Federal Constitutional Court the different treatment of parents who were and who were not in possession of a stable residence permit lacked sufficient justification. As the granting of child benefits related to the protection of family life under Article 6 of the Basic Law, very weighty reasons would have to be put forward to justify equal treatment and such reasons were not apparent according to the Court.\textsuperscript{38}

In the proceedings for the ECtHR, the German government maintained that child benefits did not fall within the ambit of Article 8, as the State’s general obligation to promote family life did not give rise to concrete rights to specific payments. The Court however held a totally different opinion. According to the Court, by granting child

\textsuperscript{34} Stec and Others v. the United Kingdom, Admissibility Decision 6 July 2005, Application no. 65731/01 and 65900/01.
\textsuperscript{35} ECtHR 25 October 2005, Application no. 58453/00 and 59140/00.
\textsuperscript{36} Case C-85/96, Martínez Sala [1998] ECR I-2691.
\textsuperscript{37} As indicated above, this is necessary because Article 14 ECHR is only applicable if the facts at issue fall within the ambit of one or more of the substantive provisions of the Convention and its Protocols.
\textsuperscript{38} In so far as the provision was aimed at limiting the granting of child benefits to those aliens who were likely to stay permanently in Germany, the criteria applied were inappropriate to reach that aim. The fact that a person was in possession of a limited residence permit did not form a sufficient basis to predict the duration of his or her stay in Germany (para 24).
benefits, States are able to demonstrate their respect for family life within the meaning of Article 8. The benefits therefore come within the scope of that provision and therefore Article 14, taken together with Article 8 is applicable.39

The Court then refers to the abovementioned decision of the German Constitutional Court and also finds no sufficient reasons justifying the different treatment with regard to child benefits of aliens who are in possession of a stable residence permit on the one hand and those who are not, on the other. The Court concludes that there has been a violation of Article 14 in conjunction with Article 8 ECHR.

Interesting is the accepted conjunction of Article 14 with Article 8 for the prohibition of discrimination of social security benefits. This judgment will have its most impact on the social security rights in systems in which it is possible that aliens can be kept for a long time on a limited permit. In systems where the right to child benefit is residence based, I foresee less problems with the compliance with this judgment.

The judgment of the Federal Constitutional Court did not leave the ECtHR much room to decide otherwise. The obvious link between the right to family life and entitlement to child benefits and the wording to express that justification of refusal was only possible in case of very weighty reasons left the space for the ECtHR very small.40 The problem of the German system is that the instrument of limited permits can be used for such a long time that there is no situation of short stay any more.41

For child benefits or parental benefits the relation with family life is clear. But for other benefits it can be less obvious, because there always has to be an element of violating the right to respect family life.

3. Conclusion

The social security position of third-country nationals in the EU is still vulnerable in some ways. In 2003 the EU extended the provisions of Regulation 1408/71 to third-country nationals. The success of adopting this measure must be weighed against the practical limitation that this Regulation 859/2003 is confined to legally residing third-country nationals in cross-border situations. It does not secure the social security rights of third country nationals who have not moved between Member States. However, Regulation 859/2003 will become more important now Directive 2003/109 on long-term residents is applied by the Member States, establishing the right to free movement for long residing third-country nationals. The combination of these two measures will probably strengthen the social security position of long-term residents in the European Union. The long-term residents’ Directive, however, does not cover refugees or persons with subsidiary protection yet and leaves substantive opportunities to the Member States to set limits on the right to move.

Directive 2005/71 forms an improvement in the field of social security as the non-discrimination principle also applies immediately to persons coming to a Member State directly from a third country.

39 See para 31.
40 The same day the ECtHR delivered an almost identical judgment in the Okpisz case.
41 The fact that a person was in possession of a limited residence title did not form a sufficient basis to predict the duration of his or her stay in Germany, according to the Constitutional Court.
If EU legislation fails to provide sufficient protection, Article 14 of the European Convention of Human Rights can provide an instrument combating the refusal of social security rights, which is based on discrimination by nationality. The European Court of Human Rights has made it clear that there is an obligation to afford equal treatment to social security without discrimination on the basis of nationality, either in combination with Article 1 Protocol 1 or in combination with Article 8 ECHR.