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General Principles of EU Law and Their Application to Third-country Nationals

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Summary

Both the EU and Member States in treatment of third-country nationals have to follow so-called "international minimum standard of treatment of aliens", meaning that states are allowed to treat aliens in the same way as their own nationals, but in no case such treatment to be less than fundamental human rights stipulated in contemporary international instruments. Such standard is not stipulated in any international legal instrument, however, has a status of customary norm with human rights as its core.

Under the Treaties third-country nationals are not entitled to exercise rights of free movement[1], establishment and provision of services, as these are reserved exclusively to EU nationals.

In the past 10 years major developments in secondary legislation with regards to third-country nationals took place with the adoption and entering into force of directives.

Directive 2003/109/EC on third-country nationals who are long-term residents had a far-reaching idea to grant those third-country nationals rights, which are as close as possible to those enjoyed by EU citizens. However, in my opinion, that objective was not achieved and long-term residents were not granted "near equality" rights.

Directive 2003/86/EC on family reunification sets out condition for third-country nationals to legally resident in Member States to be joined by their family members. Range of conditions is broad itself, added by certain derogations given to Member States, which can be considered as disproportionate and not in line with protection of family life, however, the ECJ in its judgment in *Parliament* v. *Council* has decided opposite.[2]

Directive 2004/38/EC regulates status of third-country nationals who are family members of EU citizens exercising free movement rights. Even though the Directive grants equal treatment rights to third-country nationals on equal footing with EU citizens, those rights are derivative and dependant on family ties with EU citizens and may be lost if family relationships cease to exist.

With regard to international agreements concluded between the EU and Member States on one the hand and third countries on the other one can say that rights given to third-country nationals vary from one agreement to another. Citizens of richer states whose presence is desired in EU in principle are granted quite extensive rights. This very fact can be supported

[1] Even though Articles 45-48 TFEU (ex Articles 39-42 TEC) on free movement of workers do not contain any explicit reference to nationality, ECJ has ruled that those rights may be exercised by EU nationals only.
[2] Case C-540/03 *Parliament* v. *Council* [2006] ECR I-5769.

by extensive rights given to non-EU nationals under Agreement on the European Economic Area and the EC-Switzerland Bilateral Agreement on Free Movement of Persons. On the other hand, the Agreement Establishing an Association between the European Economic Community and Turkey is a completely different story. Turkish nationals were granted only limited equal treatment rights in certain spheres.

Analysis of the Directives and international agreements as well as case-law of the ECJ shows that none of third-country nationals can rely on Treaties' provisions directly and consequently on the general principles, as those are reserved for EU citizens only. However, they can exercise rights which are explicitly granted to them by respective pieces of secondary legislation.

Preface

I owe a heartfelt thanks to Associate Professor Xavier Groussot who has provided me with scholastic guidance and supervision for completion of the present thesis. Though Mr Groussot had a very busy schedule, he was always receptive to provide me guidance on the topic of my research.

Moreover, I got an idea and inspiration for this research while taking the course of European Law Moot Court Competition led by Mr Groussot during my second year of master studies. I have to give him a great credit for making this course both interesting and beneficial, which eventually influenced my decision on selection of the topic.

I would also like to thank Swedish Institute that provided me with financial assistance during the entire period of my studies, which allowed me to develop both personally and professionally during these two years. I am fully aware of the fact that it could have never been possible, had not this Authority spurred me on by giving me funds.

It is impossible to leave without attention people who we have been studying together and who made the entire educational process interesting, competitive and beneficial.

I honestly hope that results of the present research will have a long way especially among scholars and third-country nationals in particular who in fact are the main subject of the research.

Abbreviations

Charter	Charter of Fundamental Rights for European Union
ECJ	the Court of Justice of the European Union
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	the European Court of Human Rights
EU	the European Union
TEC	Treaty Establishing the European Community
TEU	Treaty Establishing the European Union
TFEU	Treaty on the Functioning of European Union

1 Introduction

Being a third-country national myself, I chose this topic because legal status of third-country nationals in EU law was of a particular interest to me during the Master Program in Lund University and I would like to do more research on this issue.

Throughout the history of development of the EU its goals have shifted considerably from purely economic and now take into account cultural, social and political aspects as well, due to progress in European integration. Therefore, from integrationist perspective it would be unfair to leave third-country nationals outside the scope of attention. Nowadays third-country nationals became not only economic, but also actors who to some extent influence legislative development within the EU. Such situation requires EU legislator to consider third-country nationals and adopt relevant secondary legislation to define their status in the Union and regulate relations they are parties to. Third-country nationals residing in the EU amount to 18 million, which is around 4 percent of the total population of the Union.[3] Number of third-country nationals varies from State to State and sometimes constitutes up to 20 percent of total population in particular cases (for instance, Estonia).

The European Council, at its special meeting in Tampere on 15 and 16 October 1999, stated that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the EU. Certain pieces of secondary legislation already contain this provision.[4]

There is no general primary law framework for rights of movement of third-country nationals as there is for EU citizens who exercise free movement rights. The general view followed by the ECJ is that third-country nationals as opposed to EU citizens cannot directly invoke the Treaties' provisions on the free movement of persons and the related rights such as the right to equal treatment.[5] Third-country nationals can, however, invoke the secondary legislation that brings them within the scope of EU law, which means that they can only rely on specific rights conferred upon them by this legislation explicitly and not overall rights granted by EU law including the general principles. However, despite such a conservative approach with regard to free movement rights other areas of EU law are much more inclusive. For instance, nationality does not play any role when it comes up

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[3] MEMO/05/290 on Integration of Third-Country Nationals, Brussels, 1 September 2005.

[4] The Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Recital 2.

[5] Case C-230/97 *Awoyemi* [1998] ECR I-6781.

to free movement of capital or transfer of undertakings and third-country nationals are recognized as recipients of services on equal footing with EU nationals.[6]

1.1 Purpose

The purpose of this master thesis is to define whether third-country nationals can rely on the general principles of EU law before national courts of Member States and the ECJ, and if so, under what conditions.

In order to show legal status of third-country nationals in the EU it is important to define the basis from which aliens in general derive their respective rights and obligations. To do this I will elaborate on the minimum standard of treatment of aliens in international law, which defines the status of foreigners in host country. Further I will comment on status and rights that third-country nationals receive under EU primary law. The following issues will be addressed: right of free movement of workers, right of establishment and right to provide services.

In the second part of my thesis, I will show that rights given to third-country nationals are very limited by reviewing legislative instruments, which bring them within the scope of EU law. Provisions of secondary legislation on movement of third-country nationals will be analyzed in the present research. Namely, I will discuss the following pieces of secondary legislation: Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (hereinafter referred as "Directive 2003/109/EC"); Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereinafter referred as "Directive 2003/86/EC); Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereinafter referred as "Directive 2004/38/EC"). General overview of the EC-Turkey Association Agreement, the Agreement on European Economic Area and the EC-Switzerland Agreement will be provided. Major attention I will devote to EC-Turkey Association Agreement, since the status of Turkish workers in EU can be now described as somewhere between EU citizens and third-country nationals.[7]

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[6] Case C-13/95 *Ayse Süzen* v. *Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR I-1259 (a third-country national relying on Directive 1977 EC on transfer of undertakings; Joined cases C-163/94, C-165/94 and C-250/94 *Criminal proceedings against Lucas Emilio Sanz de Lera and Others* [1995] ECR I-4821 (a third-country national invoking provisions on free movement of capital and consumer credit).

[7] Boelaert-Suominen, Sonja, *Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals Who are Long-term Residents: Five Paces Forward and Possibly Three Paces Back*, 42 Community Market Law Review, 2005, p. 1040.

Based on the above findings and thorough analysis of relevant case-law of the ECJ I will comment on the status of third-country nationals in European legal framework and possibility to invoke the general principles of EU law before national courts of Member States and the ECJ by those individuals who fall within the scope of EU legal order.

1.2 Delimitations

The research will be limited to those third-country nationals already established in the EU and exercise free movement rights. I will leave the special legislation on stateless persons, asylum seekers and refugees out of the scope of research intentionally. I will provide my observations and findings with regard to the following general principles: equality, proportionality, fundamental rights. Moreover, I will also comment on legal effect of the Charter on third-country nationals and its binding force with regard to application of general principles to them. Obviously, there is a wide range of general principles in different spheres of individual's life, hence, it is literally impossible to cover all or most of them in this thesis. By analyzing applicability of the above general principles to third-country nationals and evaluation of the results thereof, I will draw a general picture whether third-country nationals may rely on them.

1.3 Method

The traditional legal method is peculiar to a legal science and coming from its nature. The legal method assists to describe, generalize, classify, and systematize the obtained knowledge by clear and definite language. Using this method I will search books and articles for relevant information. I will also use the qualitative research methodology by studying relevant material and case-law as well as historical approach with consist of collection and evaluation of data related to past occurrences in order to test hypotheses concerning causes, effects, or trends of these events that may help to explain present events and anticipate future events.

At the next stage I will analyze the material gathered and draw my own conclusions based on research and interpretation of scholastic opinions and theories as well as approaches taken by the ECJ in its case-law. Together with the legal dogmatic method I will use the method of comparative analysis. This method represents a general legal method correspondingly adapted to the conceptualized perception of legal phenomena, compared with one another on the basis of various forms of expression of the formal equality principle.

It is as well appropriate to compare positions taken in EU law and international public law with regard to treatment of foreigners. I will also

compare recent and past approaches taken by the ECJ in its case-law concerning legal position of third-country nationals in different situations. Recent and past opinions of prominent scholars will also be analyzed and compared. It is important not to be limited by analysis of compared legal material, but also draw relevant conclusions based on the results of comparison by way of interpretation.

1.4 State of Law

So far the ECJ follows its view expressed in *Awoyemi* case that for third-country nationals the establishment of a legal link to Community law (at that time) does not have the effect that they can rely on primary law and all the rights based on it in all entirety, but only on legislation they have established a legal link with. Concerning third-country nationals who are family members of EU citizens a general view is that they are in a rather tenuous position as they only obtain an indirect and derivative right to reside in order to guarantee the full effectiveness of the rights granted to the EU citizen.[8]

Awoyemi judgment was delivered by the ECJ in 1998 and since that time lots of developments in legislation concerning third-country nationals took place. An important question to be answered is, whether the ECJ will continue to follow its old view in the future or whether the recent EU rules concerning third-country nationals will inspire it to rule that third-country nationals also fall within the scope of primary law and can, thus, invoke the general principles of EU law.[9]

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[8] AG Mazák in Case C-310/08 *Ibrahim*, on 20 October 2009, paras. 34-35.

[9] Slot, Piet Jan and Bulterman, Mielle, *Harmonization of Legislation on Migrating EU citizens and Third Country Nationals: Towards a Uniform Evaluation Framework?* 29 Fordham International Law Journal, 2006, p. 767.

2 Foreigners under International and EU Law

2.1 International Minimum Standard of Treatment of Aliens

The Minimum Standard of Treatment can claim a long existence in international law throughout its origins in the ancient doctrine of denial of justice and the origins of the latter can be traced back as far as ancient Greece. Traditionally, conditions on admission and departure of aliens have been within the competence of the receiving state. In principle a host state does not have general obligation to accept aliens unless it is required to do so under the treaty. However, once aliens are admitted a state is required to treat them in particular way, otherwise it will be in breach of international obligation. This was addressed in Declaration of Human Rights of Individuals who are not Nationals of the Country in which they live,[10] which stipulates that human rights have to be protected by a host state.[11] Aliens are granted certain rights such as the right of equality in judicial process[12], protection from torture[13] and cruel or inhuman treatment[14]. Aliens are, however, required to follow the laws of a host state and to respect customs and traditions.

The National Standard of Treatment

Approach generally supported by Latin American countries in 19-20 centuries which is followed today by newly-formed and developing countries that consider the international minimum standard as an instrument to interfere in its internal affairs by developed (welfare) states.[15] According to the national treatment standard all aliens are to be treated in the same way as nationals of a host state. An obvious disadvantage of such standard is that a host state can subject alien to, let's say, inhuman treatment and justify such action on the grounds that nationals could be treated the same way.[16] In response international arbitration tribunals and developed states have denied such approach in the event that the treatment of aliens falls under the scope of the international minimum standard.[17]

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[10] Declaration of Human Rights of Individuals who are not Nationals of the Country, adopted by General Assembly Resolution 40/144 of 13 December 1985.
[11] Ibid., Article 2 (1).
[12] Ibid., Article 5 (1) (c).
[13] Ibid., Article 6.
[14] Ibid.
[15] Shaw, Malcolm, *International law*, 5th ed., Cambridge: Cambridge University Press 2003, p. 734.
[16] Wallace M.M., Rebecca and Martin Ortega, Olga, *International Law*, 6th ed., London: Thomas Reuters, 2009, p. 207.
[17] *Asian Agricultural Products Ltd* case (1990) 30 International Legal Materials, p. 577.

The International Minimum Standard of Treatment of Aliens

The International minimum standard is quite a vague concept which definition is not provided in international law. Attempt to provide a definition was made by International Law Commission while working on the Second Report on the State Responsibility of its Special Rapporteur[18] which stated that states are allowed to treat aliens in the same way as their own nationals, but in no case such treatment to be less than fundamental human rights stipulated in contemporary international instruments.

In order to violate the international minimum standard states have to disregard civilized behavior so that every reasonable and impartial man would readily recognize its insufficiency.[19] For instance, responsibility will arise for a state when alien is physically ill-treated[20] or his property is damaged[21] in case the lack of protection was either willful or due to neglect.[22]

Nevertheless, states enjoy discretion to deport aliens when their presence is threat to public policy and public security. For instance, Article 18 TFEU (ex. Article 12 TEC) prohibits any discrimination on ground of nationality between the nationals of Member States and Articles 45-48 TFEU (ex. Articles 39-42 TEC) talk about free movement of workers. Member States can, however, deny the enjoyment of that right on the ground of public policy, public health and public security. Therefore, even though, not stipulated in any legal instrument, the international minimum standard of treatment of aliens exists as a customary norm and shall be followed by states when dealing with foreigners in all situations.

2.2 Status of Third-country national under Primary EU Law While Exercising Free Movement Rights

2.2.1 Right to Provide Services

Article 56 TFEU (ex Article 49 TEC) expressly limits freedom to provide services within the Union to EU citizens. However, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions on services to nationals of a third country who provide services and who are established within the Union.

[18] Yearbook of International Law Commission, 1957, II, p. 104.
[19] *Neer* Claim 4 Reports for International Arbitral Awards 60 at 62 (1926).
[20] *Roberts* Claim 4 Report of International Arbitral Awards 77 (1926) and *Quintanilla* Claim 4 Reports of International Arbitral Awards 101 (1926).
[21] *Zafiro* case 6 Reports for International Arbitral Awards 160 (1925).
[22] *Janes* Claim 4 Reports for International Arbitral Awards 82 (1926).

Nevertheless, third-country nationals still may both, to provide and receive services, but such right is only passive.[23] Meaning that third-country national is still able to receive services if EU citizen has decided to provide them across the border or provide services if EU citizen decides to cross the border to receive them. Such rights of third-country nationals are passive and conditional on EU national crossing the border either for provision or receipt of services. In order for third-country nationals established in the EU to exercise freedom to provide services in full, the Council has to use its powers and extend the services provisions to them.

2.2.2 Right of Establishment

Chapter 2 of TFEU regulates freedom of establishment. The core right of establishment granted expressly to EU nationals in Article 49 TFEU (ex Article 43 TEC), but the Council's powers in Article 50 TFEU (ex Article 44 TEC) are not limited to such individuals only. Moreover, Article 52 TFEU (ex Article 46 TEC) expressly refers to foreign nationals and not nationals of EU Member States. Furthermore, Article 54 TFEU (ex Article 48 TEC) states that companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall be treated in the same way as natural persons who are nationals of Member States. Such formulation means that third-country nationals can be sent as personnel or can exercise free movement rights, however indirectly, as managers of companies duly registered on territory of the EU.[24]

2.2.3 Right of Movement of Workers

Articles 45-48 TFEU (ex Articles 39-42 TEC) on free movement of persons contain no reference to nationality. All Articles refer to workers in general and, therefore, it is not clear whether "workers" have the same meaning in all of them.[25] Moreover, the definition of "workers" is not expressly stated and limited to EU nationals in the Treaties. Article 45 TFEU (ex Article 39 TEC) stipulates that freedom of movement of workers shall be secured within the EU. However, such freedom shall entail abolition of discrimination only between workers of Member States with regard to employment, remuneration and other conditions. In its early judgements the ECJ has ruled that third-country nationals do not enjoy rights under primary EC legislation,[26] meaning that application of right of freedom of movement of workers has been defined based on nationality, therefore, third-country nationals were left outside the scope of this freedom.[27] However, plain

[23] Peers, Steve and Rogers, Nicola (Eds.), *EU Immigration and Asylum Law*, Leiden: Martinus Nijhoff, 2006, p. 109.
[24] Case C-299/02 *Commission* v. *Netherlands* [2004] ECR I-9761.
[25] Supra note 23, p. 101.
[26] Case 238/83 *Meade* [1984] ECR 2631, para. 7.
[27] Kostakopoulou, Theodora, *Citizenship, identity and immigration in the European Union:*

reading of the provisions on free movement of workers shows that the term "workers" covers not only EU nationals, but workers who exercise their rights on the territory of the Union in general.

Another judgement was delivered by the ECJ in 1998 in *Awoyemi*[28] case, where the ECJ stated that Mr. Awoyemi, a Nigerian citizen, falling within the personal scope of directive may not exercise free movement rights based on primary law, since rules governing free movement of persons apply only to EU citizens.[29] An argument contrary may be that nothing precludes third-country nationals legally resident and being part of the labour force of the Union to rely on free movement of workers provisions. However, present state of case-law and doctrine do not support this idea in a strong manner stating that Treaties' rights may be exercised only by EU citizens.

Between past and future, Manchester University Press, Manchester, 2001, p. 42.
[28] Case C-230/97 *Awoyemi* [1998] ECR I-6781.
[29] Ibid., para. 30.

3 Limited Rights to Third-country nationals?

3.1 Rights under Directive 2003/86/EC

One might argue that family reunification is essentially an issue of settling down and developing roots in a new environment. However, it is not interpreted as such in welfare EU Member States, where the very phenomenon of mobility of third-country nationals seems to raise feelings of malignance. Therefore, family reunification was, is and will be a major political issue.

Scope

Directive aims to establish common rules of EU law which regulate family reunification rights of third-country nationals residing lawfully on the territory of Member States. The purpose of the Directive is to determine the conditions under which third-country nationals lawfully resident on the territory of Member States may exercise right to family reunification.[30] The Directive also aims to highlight the importance of developing an integration policy that will grant third-country nationals rights and obligations comparable to those of citizens of the EU.[31] Third-country nationals who possess a residence permit valid for at least one year in one of Member States and who have reasonable prospect of obtaining long-term residence can apply for family reunification.[32]

The following family members are also eligible for family reunification: (1) the sponsor's spouse; (2) children of the couple, including adopted children, who are minors (minors meaning unmarried children below the legal age of majority in the Member State concerned).[33] Member States are free to adopt provisions allowing for family reunification the following persons: (1) first-degree ascendants in the direct line; (2) unmarried children above the age of majority; unmarried partners.[34]

Conditions

The sponsor may be required to have accommodation that meets general safety and health standards, sickness insurance and stable resources sufficient to maintain family without recourse to the social assistance system of the Member State concerned.[35] Furthermore, Member States may

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[30] Directive 2003/86/EC, Article 1.
[31] Ibid., Recital 3.
[32] Ibid., Article 3 (1).
[33] Ibid., Article 4 (1).
[34] Ibid., Article 4 (2).
[35] Ibid., Article 7.

require the sponsor to fulfill integration measures under national law, as well as to reside in a Member State for a certain period of time (two years maximum) before family members can join him or her.

In addition to a residence permit of the same duration as that of the sponsor, members of the family will obtain access to education, employment and vocational training under the same terms. After five years of residence at the latest, the spouse or unmarried partner, as well as the children who have reached the majority, may be granted an autonomous residence permit.[36] In the event of fraud (falsification of documents, marriage of convenience, etc.), the application will be rejected. All persons whose application is rejected have the right to mount a legal challenge.

Indeed, the Directive sets out conditions of family reunification, but it, nevertheless, allows Member States in certain circumstances to apply national legislation derogating from the rules that apply in principle. For instance, they may impose conditions for integration on children aged over 12 years,[37] request that applications for family reunification of minor children to be submitted before the age of 15,[38] require a two-year waiting period and defer family reunification for three years.[39]

Once again it was left up to Member States by way of derogation to decide on conditions which third-country nationals have to fulfill in order to get the rights. No wonder that the European Parliament did not agree with the above derogations under the Directive and considered them to be in breach of fundamental right to family life and non-discrimination.[40] Advocate General Kokott agreed with the Parliament that Article 8 of the Directive results in disproportionate interference in private and family life and is contrary to Community law.[41] However, the ECJ had a different opinion.[42]

3.2 Rights under Directve 2003/109/EC

Historical background

16-17 October 1999 in Tampere Member States emphasized on need to provide equal treatment to third-country nationals legally resident on territory of the EU. For instance, all third-country nationals who have been resident in Member States for certain period of time shall be granted a set of uniform rights which are as close as possible to those enjoyed by EU citizens.[43] Directive 2003/109/EC is adopted on the basis of Article 63(3)(a)

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[36] Ibid., Article 15.
[37] Ibid., Article 4 (1).
[38] Ibid., Article 4 (6).
[39] Ibid., Article 8.
[40] Supra note 2, para. 30.
[41] AG Kokott in Case C-540/03 *Parliament* v. *Council* on 8 September 2005, para. 105.
[42] Broad analysis of the case will be provided in section 4.2.1 of this Thesis.
[43] Tampere European Council meeting of 15-16 October 1999, Presidency Conclusions, point 21.

EC and Article 63(4) EC and is aimed to fulfill a dual purpose: (1) to approximate national legislation and practice regarding the grant of long-term residents status to third-country nationals residing legally in a Member State, and (2) to determine the conditions under which long-term residents may exercise a right to freedom of movement.[44]

Scope of the Directive 2003/109/EC

Article 3 (1) stipulates that the Directive applies to all third-country nationals who legally reside on territory of Member States. Some categories of third-country nationals are excluded from its scope because their situation is precarious or because they are resident on a short-term basis (refugees, asylum seekers awaiting a decision on their status, seasonal workers or workers posted for the purpose of providing cross-border services, persons who have been granted temporary protection or a subsidiary form of protection, persons residing in order to pursue studies or vocational training). The Directive must be applied in accordance with principle of non-discrimination stipulated in Article 19 TFEU (ex 13 EC Treaty) and Article 21 of the Charter.

Conditions

Firstly, third-country nationals have to meet a number of conditions before they can obtain long-term residence status and enjoy the rights based on it. Article 4 (1) of the Directive states that third-country nationals must reside legally and continuously in the territory of a Member State for 5 years.

Secondly, third-country nationals shall provide evidence that they have, both for themselves and their family members, stable and regular resources, which are sufficient to maintain them without recourse to the social assistance system,[45] and a sickness insurance covering all risks normally covered in the Member States concerned.[46]

Thirdly, in addition to the conditions described above, Member States may require third-country nationals to comply with further integration conditions (such as sufficient knowledge of a national language). As there is no precise definition of "integration" such wording gives Member States a wide margin of appreciation to introduce vast number of integration conditions.[47] It enables States to put the bar of integration conditions so high that third-country nationals under certain circumstances may never obtain the status of long-term resident.[48] Insertion of integration clauses in the Directive reflects new tensions in some Member States to set forward new integration

[44] Directive 2003/109/EC, Article 1.
[45] Ibid., Article 5 (1)(a).
[46] Ibid., Article 5 (1)(b).
[47] Guild, Elspeth, *Integration and Identity: Long Resident Third Country Nationals* in Guild, E., *The Legal Elements of European Identity, EU Citizenship and Migration Law*, The Hague; Boston: Kluwer Law International, 2004, pp. 4 and 14-15.
[48] Supra note 7, p. 1023.

requirements that lead to selection and exclusion.[49] Some misunderstanding also exists with the formulation of Article 7(1) which states that Member State authorities may demand documentation of appropriate accommodation. [50] At the same time Article 7(3) stipulates that long-term residence permit shall be issued if applicants fulfills the conditions of Articles 4, 5 and do not present any threat to public policy and public security within the meaning of Article 6. Seems that a legislator lacks consistency on the matter of conditions that third-country nationals have to fulfill in order to be granted long-term residence status.

Long-term resident status

The competent authority is required to take a decision within 6 consecutive months once an application is lodged.[51] Decisions to reject an application must be notified in writing to the person concerned in accordance with the procedures under national legislation, stating the reasons and indicating the redress procedures available and the deadline for action on the part of the applicant.[52] Long-term residents receive a permanent and automatically renewable resident permit which is standard for all Member States.[53] Long-term resident status may be withdrawn only on certain grounds which are set out in the Directive (absence from the territory of the EU for more than twelve consecutive months, fraudulent acquisition of the status, adoption of a measure to expel the person concerned).

Equality

Special attention shall be payed to provisions of the Directive on equality of third-country nationals and EU citizens in certain spheres. Third-country nationals who have been granted long-term resident status enjoy equal treatment with EU nationals which is limited to the following areas: (1) access to paid and unpaid employment, conditions of employment and working conditions (working hours, health and safety standards, holiday entitlements, remuneration and dismissal); (2) education and vocational training, recognition of qualifications and study grants; (3) welfare benefits (family allowances, retirement pensions, etc.) and sickness insurance; (4) social assistance (minimum income support or retirement pensions, free health care, etc.); (5) social benefits, tax relief, access to goods and services; (6) free access to entire territory of the Member State concerned; (7) freedom of association and union membership; freedom to represent a union or association.

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[49] Groenendijk, Kees, *The Long-Term Residents Directive, Denizenship and Integration*, in Baldaccini, Anneliese; Guild, Elspeth and Toner, Helen (Eds.), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy, Oxford: Hart Publishing, 2007.
[50] Peers, Steve, *Implementing equality? The directive on long term resident third country nationals* 29(4) European Law Review, 2004, p. 444.
[51] Directive 2003/109/EC, Article 7(2).
[52] Ibid., Article 10(1).
[53] Ibid., Article 8(2).

In certain cases, Member States may restrict equal treatment with EU nationals concerning access to employment and to education (for example, by requiring proof of language proficiency). In the field of social assistance and social protection, Member States may limit equal treatment to core benefits. They are, nevertheless, free to add to the list of areas in which they grant equal treatment with nationals or the list of benefits they provide for their nationals.

Long-term residents enjoy enhanced protection against expulsion. The conduct on which expulsion decisions are based must constitute an actual and sufficiently serious threat to public policy or public security. Such decisions may not be founded on economic considerations. Member States have to consider specific factors before taking a decision to expel a long-term resident (for instance, age of the person concerned, duration of residence).

The provisions of the Directive do not prevent Member States from issuing permanent residence permits under more favorable conditions than those stated in the Directive. Nevertheless, such residence permits do not confer the right of residence in the other Member States. Provisions of the Directive on equality will be addressed further in Section 4.2.3 of this Thesis in light of the general principles of EU law. Intention of the drafters of the Directive was to grant third-country nationals who are long-term residents more rights equivalent to those enjoyed by EU citizens. However, as it often happens, intentions and the reality may differ.

Examination of Directive 2003/109/EC shows that some provisions are quite wide and, therefore, can be interpreted in different ways. This means that Member States have their hands free how to interpret those provisions and which rights to grant to third-country nationals when implementing the Directive. It is unfortunate that the Council did not include standstill clause when adopting the Directive.[54] Due to wide margin of appreciation it is most likely that States will continue to interpret their obligations under Directive 2003/109/EC as narrow as possible and will try to control granting of rights to third-country nationals. Such a situation makes the ECJ to play a great role in determining impact of the Directive and limiting to certain extant margin of discretion given to Member States.[55]

Peers in his analysis of the Directive noted that "any ambiguity in the text of this Directive should be resolved in favor of the long-term resident and family members as far as possible. As a corollary any exception to their rights should be interpreted narrowly".[56] In general the Directive is structured in the way that the rights granted to third-country nationals are

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[54] Halleskov, Louise, *The Long-Term Residents Directive: A Fulfilment of theTampere Objective of Near-Equality?,* 7 European Journal of Migration and Law, 2005, p. 187.
[55] Ibid.
[56] Supra note 50, p. 440.

conditional.[57] As there are no primary law provisions with regard to free movement rights of third-country nationals as there are for EU citizens, Member States will always retain a wide margin of discretion in implementation of secondary legislation concerning third-country nationals. Unfortunately, this leads to a situation that third-country nationals will always be granted limited free movement rights...

The weak points of the Directive are mostly related to the limited nature of the free movement right provided, link made between the residence in one Member State and the acquisition of the long-term resident status in the EU, limited geographical scope of application of the Directive, and a total lack of any guarantees of political rights to be by the third-country nationals who are long-term residents.[58]

3.3 Rights under Directive 2004/38/EC

Scope

The Directive merges in a single act all the legislation which regulated the right of entry and residence for EU citizens, which consists of 9 directives and 2 regulations. It has been successful in reducing the formalities that EU citizens together with their family members, regardless of their nationality, have to fulfill in order exercise movement and residence rights. Since third-country nationals and their rights are the main concern of this thesis, an overview of the Directive will be made from the perspective of rights that third-country nationals obtain. The Directive aims to set conditions under which EU nationals and their family members have to fulfill in order to exercise rights to free movement and residence within the EU; right of permanent residence in EU Member States; restrictions on the above rights on grounds of public policy, public health and public security.

Conditions

Family members of EU nationals who do not possess the nationality of EU Member States enjoy the same right to enter another Member State as EU national who they accompany for the period of up to three months.[59] However they may be required to obtain short-stay visa. When stay in another Member State is more than three months certain conditions have to be fulfilled. Applicants have to be engaged in economic activity (employed or self-employed); or have enough resources and sickness insurance to support themselves in order not to become an unreasonable burden on social assistance system of the Member State concerned; or participate in

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[57] For instance, recital 12 of Directive 2003/109/EC stipulates that third-country nationals long-should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive.
[58] Kochenov, Dimitry, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights*, 15 Columbia Journal of European Law, 2008-2009, p. 226.
[59] Directive 2004/38/EC, Article 5 (1).

vocational training as a student and have sufficient financial resources and sickness insurance not to become a burden on the social assistance system the host Member State; or be a family member of EU citizens who falls under one of the categories above. [60]

Residence permits are abolished for EU citizens. However, the host State may require them to register with competent authorities within the period of not less than three month upon the date of arrival.[61] Non-EU national family members have to apply for residence permit which is issued for a period of not less than five years.[62] Death of EU citizen, separation of partnership, divorce does not influence a residence right of third-country national, provided that certain conditions are met.

EU citizens acquire permanent residence in the host State after 5 years of legal residence. From this moment the right of permanent residence is not subject to any conditions. The same applies to third-country nationals who are family members of EU citizens and have been residing with them for five years in the Member State concerned.[63] The right of permanent residence may be lost only in case of absence on the territory of the host State during two years in a row. Residence permits issued to third-country national family member are valid indefinitely and renewed automatically every ten years.

An interesting point stipulated in the Directive is that third-country national family members of EU citizens as well as EU citizens themselves, once they obtained residence or permanent residence, are granted equal treatment right in the areas covered by the Treaties with host-country nationals meaning that third-country nationals can derive rights directly from the primary EU law.[64] However, there are certain conditions to be fulfilled in order third-country nationals could exercise those rights. For instance, they loose their right to directly rely on the Treaties (TEU and TFEU) when family relations with EU citizen cease to exist.[65] Previously the ECJ in *Chen*[66] and *Carpenter*[67] cases also ruled that based on family relationships with EU citizen third-country nationals can derive rights from the EC Treaty. Nevertheless, rights in the Treaties those third-country nationals receive on the ground of family ties with EU citizens are conditional, since those may be obtained only in case of accompanying of EU citizen who exercises his or her free movements rights.

EU citizens as well as their family members irrespective of their nationality may be expelled from the territory of the host State only on the basis of public policy, public security or public health when their action represents

[60] Ibid., Article 7 (1).
[61] Ibid., Article 8 (2).
[62] Ibid., Article 9 (1).
[63] Ibid., Article 16 (2).
[64] Ibid., Article 24 (1).
[65] Supra note 9, p. 770.
[66] Case C-200/02 *Chen* [2004] ECR I-9925.
[67] Case C-60/00 *Carpenter* [2002] ECR I-6279.

present and sufficiently serious breach of fundamental interests of the State concerned.[68] Such decisions in no way can be taken on purely economic grounds and must comply with principle of proportionality. From my view the Directive grants quite extensive rights to third-country nationals who are family members of EU citizens, since they are able to rely on equal treatment rule stipulated in the Treaties.

3.4 Rights under International Agreements Concluded with Third Countries

Both the EU and Member States have entered in a number of association and cooperation agreements with third countries. Consequently, the EU developed a bundle of provisions for third-country nationals that vary by agreement and provide different rights with regard to residency, employment, free movement.[69] It is settled case-law of the ECJ that provisions of international agreements which are formulated in clear, precise and unconditional manner and confer rights on individuals have direct effect and constitute an integral part of EU legal order.[70]

An interesting point is that the range of rights given to third-country nationals on the ground of international agreements generally correlates with the economic development of third country.[71] For instance, Swiss or Norwegian nationals under respective international agreements have more rights comparing to for example to Pakistani or Algerian citizens and even Turkish (even though Turkey is a candidate for accession to the EU).[72]

Majority of the agreements concluded by the Community and Member States with third countries do not provide free movement and residence rights in EU for nationals of foreign states. However, some of the agreements grant foreigners rights comparable to those enjoyed by EU citizens. For instance, the EEA Agreement grants nationals of EFTA States right to reside freely anywhere in the EU if they under EU law fall within the category of workers[73], are self-employed[74], or provide services[75]. So to

[68] Ibid., Article 27.
[69] Becker, Michael A., *Managing Diversity in the European Union: Inclusive European Citizenship and Third- Country Nationals*, Note, 2003, p. 151.
[70] Case 181/73 *Haegeman* [1974] ECR 449, para. 5; Case 104/81 *Kupferberg* [1982] ECR 3641 para. 13; Case C-321/97 *Andersson* [1999] ECR I-3551, para. 26; Case C-431/05 *Merck Genéricos* [2007] ECR I-7001, para. 31 and Case C-301/08 *Bogiatzi (épouse Ventouras)* [2009] n.y.r., para. 23.
[71] Ibid.
[72] Hedemann-Robinson, Martin, *An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident Within the European Union*, 38 Common Market Law Review, 2001, p. 527.
[73] The Agreement on the European Economic Area (OJ 1994 L 1/3), Article 28, Annexes V and VI.
[74] Ibid., Article 31.

say almost all free movement rights including non-discrimination right were stipulated in the agreement.[76]

The EC-Switzerland Agreement also grants vast rights to Swiss nationals, however, they are more limited in comparison to those under the EEA Agreement. For instance, nationals of contracting parties may be refused a right to take up employment in the public service, which involves an exercise of public power and is intended to protect the general interests of the state or other public bodies.[77] Moreover, social benefits granted to each EU citizen under Regulation 1612/68[78] are excluded from the scope of equal treatment provisions stipulated in the EC-Switzerland Agreement.[79]

In 1963 the Community and its Member States in Ankara concluded the Association Agreement with Turkey to promote continuous and balanced strengthening of trade and economic relations between the parties and prepare Turkey for the eventual accession to the Community.[80] In contrast with the EEA and the EC-Switzerland Agreements, the Association Agreement with Turkey looks very modest as far as free movement rights are concerned, since Turkish workers are not granted any free movement rights comparable to those enjoyed by EU citizens or even third-country national permanent residents.[81] Turkish nationals do get certain benefits once they are admitted to the Member State. However, those rights are mostly related to non-discrimination at place of employment, continuation of residence and access to job market once Turkish nationals are accepted as workers in a Member State.[82] The Association Agreement with Turkey also contains so called "standstill clause" meaning that Member States may not impose additional conditions on Turks and make enjoyment of rights under agreement more difficult.[83]

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[75] Ibid., Article 36.
[76] See supra n. 69, p. 538.
[77] The EC-Switzerland Agreement on Free Movement of Persons, OJ 2002 L 114, Annex 1, Article 10.
[78] Regulation 1612/68, Article 7(2).
[79] Supra note 77, Article 9.
[80] The Agreement Establishing an Association between European Economic Community and Turkey, OJ 1964 217, Article 2.
[81] Supra note 58, p. 232.
[82] Decision No. 2/76 of the Association Council, Article 2(i)(b) (not published in the O.J.); Decision No. 1/80 of the Association Council, Article 6(1).
[83] Decision No.1/80 of the Association Council, Article. 13.

4 General Principles of EU law and Their Application to Third-Country Nationals

4.1 History and Nature of General Principles of EU Law

General principles of law may be found in every legal system in Europe. They are derived from the constitutional traditions of Member States, treaties and international law. The development of general principles has taken place over a number of years. General principles were induced into the legal order to supplement the written sources of law, treaties and secondary legislation, as well as to interpret it. Additionally, the ECJ may also fill gaps in EU law by employing general principles. Certain general principles also were listed as the source of EU law. General principles have a constitutional status[84] and, thus, apply throughout the entire legal order of the Union. It is settled case-law of the ECJ that Member States are obliged to uphold general principles not only when they apply and implement measures enacted by the European Union,[85] but also more generally, whenever they act within the scope of EU law.[86]

Different general principles have developed and applied in various areas of EU law throughout the passage of time. For example, the origins of non-discrimination and proportionality can be found in case-law of 1950s, when the ECJ has invoked them to regulate restrictive effect on internal market of measures introduced by High Authority.[87] Case-law of 1980's established that general principles bind not only Community institutions, but also Member States when they implement Community law.[88] Extension of application of general principles to national authorities increased the role of national courts in development of EU legal order.[89] Also in recent years, fundamental rights as general principles started to play a great role in EU legal order, which can be proved by now binding character of the Charter, which came into force together with the Lisbon Treaty. As Takis Tridimas commented about general principles in his book: "They are flexible, lend

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[84] Case C-101/08 *Audiolux* [2009] n.y.r. para. 63.
[85] Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, para. 21 and Case 5/88 *Wachauf* [1989] ECR 2609, para. 19.
[86] Case C-260/89 *ERT* [1991] ECR I-2925, para. 43; Case C-60/00 *Carpenter* [2002] ECR I-6279, para. 41; see also Case C-34/09 *Ruiz Zambrano* (pending), where the Court will need to consider whether general principles even apply in wholly internal situations.
[87] Tridimas, Takis, *The General Principles of EU Law*, 2nd ed., Oxford: Oxford University Press, 2006, p. 7.
[88] Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477 and Case C-260/89 *ERT* [1991] I-2925.
[89] Supra note 87, p. 8.

themselves to an evolutionary interpretation of the law, and make for judiciary more responsive to social change."[90]

According to Article 5 TFEU (ex Article 5 TEC) the limits of Union competences are governed by the principle of conferral. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with Member States. Moreover, the use of the Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. The legitimacy of EU legislation and its scope of application are, thus, limited by a partial transfer of sovereignty from Member States.[91]

As the ECJ has stated, general principles only apply within the scope of EU law.[92] Due to the fact that this scope is limited, it is necessary for a person who wants to rely on general principles to establish a legal link with the EU legal order. The requirements for doing so vary depending on different areas regulated by Community law. With regard to free movement of persons it is settled case-law that the Treaties' provisions and rules of secondary legislation cannot be applied to situations in which the freedom to move within the Union has never been exercised, as these are considered as wholly internal matter and, consequently, fall outside the scope of EU law. Even EU citizens in order to exercise free movement rights under EU legal order have to cross an internal border. Third-country nationals, in comparison to EU citizens, do not have general free movement rights under EU law. However, they can establish a link with EU legal order by falling within the personal scope of secondary legislation.

When EU nationals cross the border they exercise freedom of movement and automatically fall within the scope of EU law. This means that the Treaties, case-law and general principles apply to them in full. Article 20 TFEU (ex Article 17 TEC) expressly refers to EU citizens and third-country nationals, are, therefore, excluded from its scope. Hence, so far third-country nationals, even when falling within the personal scope of EU secondary legislation, may not rely on the provisions of the Treaties, but

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[90] Ibid., p. 11.

[91] Case 6/64 *Costa* v. *ENEL* [1964] ECR 585; Barnard, Catherine and Odudu, Okeoghene, *The outer limits of European Union Law*, Oxford: Hart, 2009, p 3f. Furthermore, Judgment of the German Constitutional Court, BVerfG, 2 BvE 2/08, of 30 June 2009 and Judgment of the Czech Constitutional Court, Lisbon Treaty II, of 3 November 2009.

[92] Case 12/86 *Demirel* [1987] ECR 3719; para. 28; Cases 60 and 61/84 *Cinéthèque SA* [1985] ECR 2605, para. 26; Case C-260/89 *ERT* [1991] ECR I-2925, para. 42; see also Peers, Steve, *EU justice and home affairs law,* Oxford: Oxford University Press, 2006, p. 66.

merely on specific rights granted to them by this secondary legislation. The next section is aimed to prove this approach and will provide a general overview of legislative instruments of EU secondary law (directives and international agreements) which regulate the legal status of third-country nationals in EU with regard to application of general principles.

4.2 Can Third-Country National Rely on the General Principles of EU Law?

4.2.1 Proportionality

The principle of proportionality is a general principle of EU law.[93] As an instrument of market integration, it regulates actions of Member States within the scope of EU law and examines the acts they adopt.[94] The ECJ has also consistently held that the principle of proportionality is one of the general principles of Community law.[95] This principle is a valuable tool that protects both Member States and individuals against excessive effect of EU law.[96] In particular, it is partially included in Article 5 TFEU (ex Article 5 TEC) and provides that the content and the form of a Union action shall not go beyond what is necessary to achieve the objectives pursued by the Treaties. Proportionality can be used to challenge both the legality of the Union and Member State's action within the sphere of application of the Union law. In any proportionality test the relevant interests shall be identified, then balanced and weighed. Usually proportionality test includes three steps: (1) whether the measure was suitable to achieve the desired result, (2) whether it was necessary to achieve the desired result at all, and (3) whether the measure imposed a burden on an individual is excessive in comparison to the objective achieved. The ECJ in its case-law does not always follow the above three-step test, since under certain circumstances it is possible to resolve whether measure is proportionate or not by passing only one or two steps.

The general principle of proportionality can be used with regard to three different types of case: (1) when individuals argue that his or her rights were unreasonably restricted by the Union action; (2) when individuals challenge the amount of penalty imposed claiming that it is excessive; and (3) where individual argues that the choice of policy made by governmental authority is disproportionate.[97]

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[93] Schwarze, Jürgen, *The European Administrative Law*, Sweet and Maxwell 2000, p. 1414.
[94] Jacobs, Francis G., *Recent Developments in the Principle of Proportionality in Community law,* in Ellis, Evelyn (Ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford: Hart, 1999, p. 3.
[95] Case C-331/88 *Fedesa* [1990] ECR I-4023, para. 13; Case C-538/07 *Assitur* [2009] n.y.r., para 23 and Case C-213/07 *Michaniki* [2009] n.y.r., para. 48.
[96] Supra note 87, p. 92.
[97] Craig, Paul and de Burca, Grainne, *EU Law, Text, Cases and Materials*, 4th ed., Oxford University Press, 2008, pp. 546-548.

Directive 2003/109/EC refers to proportionality in Recital 24 stating that it shall not go beyond what is necessary in determination of terms for granting and withdrawing long-term resident status and the rights pertaining thereto and terms for the exercise of rights of residence by long-term residents in other Member States. Reference to proportionality principle is also made in Directive 2004/38/EC. Recital 23 of this Directive stipulates that measures of public policy, public security and public health, which may result in expulsion of EU nationals and their family members have to be limited in accordance to the principle of proportionality. Therefore, a degree of integration of the persons concerned, length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin shall be taken into account. The principle of proportionality is also stipulated in Recital 16 of Directive 2003/86/EC. It indicates that the Directive shall not go beyond what is necessary to establish a right to family reunification for third country nationals to be exercised in accordance with common rules.

The ECJ in number of occasions had referred to the proportionality principle with regard to third-country nationals. For instance, in *Awoyemi*[98] case the ECJ ruled on application of proportionality with regard to imposition of penalties for criminal offense. The case concerned Mr Awoyemi, a Nigerian citizen, who lived in the United Kingdom for a time and was in possession of Community model driver's license and has been living in Belgium since 1990. In year 1993 Mr Awoyemi was stopped by the police in Belgium and found to be driving a motor vehicle without being in possession of a Belgian driving license. The national criminal court in Belgium has decided that Mr Awoyemi is to be found as driving without being in possession of Belgian driver's license, which is considered a criminal offense under Belgian national law, and was ordered to pay a fine. Moreover, Mr Awoyemi failed to exchange his UK driver's license to the Belgian one within the prescribed period under national law.

The ECJ ruled that Mr Awoyemi, even though not being a national of the Member State, still falls under the personal scope of Directive 80/1263[99]. However, the Directive did not have any provision on penalties to be imposed in the event of breach of obligation to exchange driver's license and, therefore, Member States remain competent, in principle, to impose penalties for breach of such an obligation.[100] The ECJ, furthermore, stated that Member States may not impose a criminal penalty in this area so disproportionate to the gravity of the infringement as to become an obstacle to the free movement of persons, in view of the effect which the right to drive a motor vehicle has on the actual exercise of a trade or profession by an employed or self-employed person, particularly with regard to access to

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[98] Case C-230/97 *Awoyemi* [1998] ECR I-6781.

[99] Directive 80/1263 of 4 December 1980 on driving licenses of 31 December 1980 (OJ 1980 L 375/1).

[100] Case C-193/94 *Skanavi* [1996] ECR I-929, para. 36.

certain activities or certain offices.[101] However, the ECJ ruled that Mr Awoyemi may not rely on this case-law by stating that the justification for the restriction imposed on the power of Member States to provide for criminal penalties in the event of breach of the obligation to exchange driving licenses is the free movement of persons established by the Treaty.[102] The rules governing free movement of persons under the Treaty only refer to nationals of Member States who exercise their free movement rights and third-country nationals are excluded from the scope of those provisions. Thus, Mr Awoyemi was excluded from the scope of application of the general principle of proportionality with regard to penalty imposed on him for violation of national law.

Hence, by this decision the ECJ has ruled that third-country nationals even when falling within the personal scope of EU secondary legislation and consequently exercising rights within the scope of EU law may not rely on the general principle of proportionality in its entirety and the ECJ case-law with regard to freedom of movement. This means that none of the categories of third-country nationals under Directive 2003/109/EC, Directive 2002/86/EC and Directive 2004/38/EC may rely on general principles, but merely on specific rights granted to them by these directives, which do indeed contain certain elements of general principles, but may not be considered as those in full.

Another case to be mentioned is *Sahin*[103], where the ECJ has ruled on proportionality of fees imposed on Turkish national for issue of residence permit. The case concerned Mr Sahin, a Turkish national, who was issued a residence permit in the Netherlands to live with his Dutch wife. In February 2003 Mr Sahin applied for prolongation of his residence permit, however, was refused on the ground that he did not pay an administrative fee in the amount of 169 Euro. The main question raised by national court was whether the standstill clause laid down in Article 13 of Protocol 1/80 to EC-Turkey Association Agreement precludes a Member State to impose administrative charges to Mr Sahin for consideration of his application on extension of residence permit.

The ECJ has confirmed its previous rulings and stated that Article 13 of Protocol 1/80 has a direct effect and prohibits Member States from introducing new restrictions concerning the conditions of access to employment applicable to Turkish workers and members of their families who have fulfilled the legal requirements.[104] Furthermore, the ECJ stresses that Article 59 of Additional Protocol to the Association Agreement with Turkey prohibits Member States from granting more favorable treatment to Turkish citizens than that granted to EU nationals.[105]

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[101] Ibid., para. 38.
[102] Case C-230/97 *Awoyemi* [1998] ECR I-6781, para. 28.
[103] Case C-242/06 *Sahin* [2009] n.y.r.
[104] Ibid., para. 63; by analogy in relation to establishment and freedom to provide services see also Case C-228/06 *Soysal and Savatli* [2009] n.y.r., para. 47.
[105] Ibid., para. 67.

The ECJ ruled that Member States may introduce new restrictions to Turkish nationals when these same restrictions also apply in relation to EU citizens.[106] The ECJ, however, specifies that in such a case, Member States may not subject Turkish citizens to new obligations which are disproportionate as compared with those established for EU nationals.[107]

It was considered that an administrative fee in amount of 169 EURO imposed on Turkish nationals for issue or renewal of residence permit is excessive and disproportionate in relation to fee of 30 EURO charged to EU nationals for the same service who also receive residence permits with a longer period of validity, so that they do not have to apply for the renewal of residence permits so often.[108]

This decision by the ECJ can be considered as landmark with regards to rights granted to Turkish nationals under EC-Turkey Association Agreement and is a great example of application of proportionality test. It also proves that Turkish nationals are able to rely on proportionality against actions of Member States within the areas covered by the Association Agreement. However, since provisions of Turkish Association Agreement on proportionality are worded in much narrower sense than the respective provisions of Article 5 TFEU (ex Article 5 TEC) and cover only specific spheres regulated by the agreement, it is possible to conclude that Turkish nationals may not rely on the general principle of proportionality in its full meaning.

4.2.2 Fundamental Rights

In recent years third-country nationals became an important part of EU integration process. Therefore, I consider it necessary to address applicability of fundamental rights as general principles to third-country nationals when the Charter became binding. EU legislator has previously in number of occasions referred to the Charter in secondary legislation that regulates the status of third-country nationals in EU.

Directive 2004/38/EC stipulates that it respects the fundamental rights and freedoms and observes the principles recognized in particular by the Charter and in accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries on various grounds.[109]

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[106] Ibid., paras. 70-71.
[107] Ibid.
[108] Ibid. para. 72.
[109] Directive 2004/38/EC, Recital 31.

Directive 2003/109/EC also respects the fundamental rights and observes the principles recognized in particular by the Charter and, moreover, by the ECHR.[110]

Directive 2003/86/EC provides that measures concerning family reunification should be adopted in conformity with an obligation to protect family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognized in particular in Article 8 of the ECHR and in the Charter.[111]

As we can see all of the Directives above include provisions requiring the protection of fundamental rights, some of them are more extensive, some less. The most specific provision is included in Directive 2003/86/EC and it's no wonder since the Directive regulates an issue of family reunification which is directly linked with Article 8 of the ECHR.

It is obvious that fundamental rights as a part of the general principles can be relied upon by EU nationals when they fall within EU legal order. However, the question remains whether third-country nationals can rely on fundamental rights before the ECJ and national courts of Member States.

The ECJ has consistently held that fundamental rights form an integral part of the general principles and protection of which it ensures.[112] In number of occasions the ECJ held that when national rules do fall within the scope of EU law, and reference is made to the ECJ for a preliminary ruling, it must provide all the criteria of interpretation needed by a national court to determine whether those rules are compatible with the fundamental rights the observance of which it ensures and which derive in particular from the ECHR.[113]

One of the landmark cases with regard to importance of fundamental right in EU legal order concerned the validity of Directive 2003/86/EC is *Parliament* v. *Council*[114] where the European Parliament started procedure against the Council with regard to a number of the provisions of the Directive. Parliament's concern was addressed specifically to some derogations given to Member States. For instance, when a child is aged over 12 years and arrives independently from the rest of the family, Member State may, before authorizing entry and residence, verify whether this child meets an integration criteria provided for by its existing legislation on the date of implementation of the Directive. In addition, Member States may require applications for family reunification in respect of minor children to

[110] Directive 2003/109/EC, Recital 3.
[111] Directive 2003/86/EC, Recital 2.
[112] Case C-260/89 *ERT* [1991] ECR I-2925, para. 41; Case C-540/03 *Parliament* v. *Council* [2006] ECR I-5769, para. 35 and Case C-246/06 *Velasco Navarro* [2008] ECR I-105, para. 31.
[113] Case C-260/89 *ERT* [1991] ECR I-2925, para. 42.
[114] Supra note 2.

be submitted before the age of 15, as provided for by their existing legislation on the date of the implementation of the Directive. The Parliament submitted that the above provisions are against fundamental right to family life and shall be annulled.

However, the ECJ had another thought on this issue. It stated that fundamental rights are part of general principles which are protected by the ECJ, therefore, for that purpose, inspiration is drawn from the constitutional traditions of Member States and international agreements to which they are signatories.[115] But it held that those international instruments do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification.[116] The Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on Member States, since it requires them, in the cases determined, to authorize family reunification of certain members of the sponsor's family, without being left a margin of appreciation.[117] Since obligation of Member States is positive under the Directive, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the ECtHR, in its case-law relating to the right of family life, for weighing, in each factual situation, the competing interests.[118]

Finally, the ECJ concludes that the Directive does not confer a greater discretion on Member States than that already enjoyed under international legal instruments and, therefore, may not be considered as being in breach of right to family life or contrary to the principle of non-discrimination on grounds of age or to the obligation to have regard to the best interests of children.[119]

The ECJ also ruled that derogation given to Member States to require applications for family reunification in respect of minor children to be submitted before the age of 15 can not be considered as contrary to the principle of non-discrimination on grounds of age or to the obligation to have regard to the best interests of children.[120]

The ECJ, furthermore, continues that provisions of the Directive allowing Member States to apply requirement of maximum 2 years of lawful residence to sponsor before to be joined by family members as well as apply in national legislation 3 years of waiting period condition, taking into consideration of reception capacity of each particular Member State, from the moment when application is filed and receipt of residence permit does not have the effect of precluding any family reunification. On the opposite,

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[115] Supra note 2, para. 35.
[116] Ibid., para. 59.
[117] Ibid., para. 60.
[118] Ibid., para. 62.
[119] Ibid., para. 76.
[120] Ibid., para. 90.

it preserves a limited margin of appreciation for Member States by permitting them to make sure that family reunification will take place in favorable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration.[121]

Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family life set out in particular in Article 8 of the ECHR as interpreted by the ECtHR.[122]

From the first glance ruling of the ECJ appears to be rather controversial. If the main objective of the Directive is family reunification, how can the Union achieve this aim by allowing Member States to derogate from the provisions of the Directive and differentiate the process of family reunification for children on the basis of age and impose 2 year condition on length of stay for the sponsor and waiting period for issue of residence permit for 3 years? The general principle of proportionality proclaims that the measure shall not go beyond what is necessary to achieve the objective pursued. In its judgment the ECJ tried to balance interest of both third-country national applying for family reunification and of Member States saying that derogations granted to Member States are not contrary to human rights and do not preclude individuals from exercising their rights to family reunification and are, therefore, proportional. This time the ECJ referred not only to ECHR and the Charter, but to the UN Convention on the Rights of the Child pointing out importance of protection of human rights and right to family life in particular, and results in a clear emphasis on the need for national authorities to take the interests of children into account when deciding individual cases.[123] Once again decision was rather political than legal, since interests of Member States prevailed above the fundamental rights.

Now I will move on to the review of the ECJ case-law with regard to protection of fundamental rights in relation to third-country nationals. An early judgment delivered by the ECJ with regard to right to family life was *Demirel*[124]. The case concerned a Turkish wife who was refused, by German authorities, permission to join her husband living in Berlin. Mrs Demirel tried to invoke provisions of Article 12 of Turkish Association Agreement and Article 36 of the Protocol against such a decision. However, the ECJ ruled that those provisions are of programmatic nature and are not sufficiently precise and unconditional to have direct effect, therefore, individuals may not rely on them.[125] Likewise the ECJ considered itself not

[121] Ibid., para. 97.
[122] Ibid., para. 98.
[123] Lawson, Rick, *Family Reunification and the Union's Charter of Fundamental Rights, Judgment of 27 June 2006, Case C-540/03, Parliament* v. *Council,* 3 European Constitutional Law Review, 2007, p. 340.
[124] Case 12/86 *Demirel* [1987] ECR 3719.
[125] Ibid., para. 23.

competent to review claim by Mrs Demirel under Article 8 ECHR, on the basis that situation was outside the scope of Community law.[126]

In *Akrich* the ECJ introduced a requirement of prior lawful residence stating that national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.[127] The ECJ commented that such a requirement may not be considered as less favorable treatment, since non-EU national family member already did not have the right to remain in home State before EU national family member exercised his or her free movement rights.[128] The ECJ, however, mentioned that provided the marriage is genuine, Member States are required to respect for family life under Article 8 of the ECHR. As in Carpenter, the ECJ found fundamental rights as a basis for Mrs Carpenter's right to reside disregarding her visa expiration and unlawful stay in the UK. From *Carpenter* and *Akrich* we can see partition of the sources of residence rights: some families derive protection of their family rights directly from EU law, while others, also falling within the scope of EU law, have to rely on protection developed by Article 8 ECHR.[129]

In *Jia*[130] case the ECJ was also referred a question whether third-country national family member has to be lawfully resident prior to exercise of EU law protection. However, the ECJ responded uselessly stating that Member States are not required to set such a requirement of lawful residence under Community law.[131]

In another case *Eind*[132], which concerned Dutch citizen Runaldo Eind and his third-country national daughter Rachel returning to the Netherlands from the UK, the ECJ ruled that an absence of prior residence of third-country national family member in the State of EU national has no bearing on recognition of a right of entry and residence for a child, in her capacity as a member of an EU worker's family, in the Member State of which he is a national.[133] The ECJ also mentioned that prior residence requirement is not stated in any provision of EU law relating to the right of residence in the Union of third-country nationals who are members of the families of EU workers.[134]

Moreover, the ECJ ruled that such a requirement would run counter to the objectives of EU law, which has recognized the importance of ensuring protection for the family life of nationals of Member States in order to

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[126] Ibid., para. 28.
[127] Case C-109/01 *Akrich* [2003] ECR I-9607, para. 50.
[128] Ibid., para. 53.
[129] Costello, Cathryn, *Metock: Free Movement and "Family Life" in the Union*, 46 Common Market Law Review, 2009, p. 593.
[130] Case C-1/05 *Jia* [2007] ECR I-1.
[131] Ibid., para. 33.
[132] Case C-291/05 *Eind* [2007] ECR I-10719.
[133] Ibid., para. 42.
[134] Ibid., para. 43.

eliminate obstacles to the exercise of the fundamental freedoms guaranteed.[135] In *Eind* the ECJ has diminished its approach taken in *Akrich* and insisted that Rachel Eind derives residence rights directly from EU law.

The above decisions were taken by the ECJ prior to the date of adoption and implementation of Directive 2004/38/EC and were chaotic in some way. This resulted on a situation where some Member States applied requirement of prior legal residence, while other considered that the law is in need of urgent codification.[136]

So judgment in *Metock*[137] case was right in place and brought a clarification on prior legal residence requirement. The case at stake concerned 4 third-country spouses of EU citizens in Ireland who were firstly refused asylum and then their applications for residence as third-country national family members of EU migrating citizen were also refused on the basis that they did not fulfill the requirement of prior legal residence. In this case the referring authority in light of implemented Directive 2004/38/EC has specifically asked whether Member States can impose prior legal residence requirement. Significance of the case was proved as it was decided to be of exceptional urgency.

The applicants argued that the rights of third-country national family members are derived directly from family relationship and that Directive 2004/38/EC governs exhaustively the conditions of residence in a Member State for a Union citizen who is a national of another Member State and his family members, so that Member States are not entitled to impose additional conditions.[138] The ECJ responded that right to family life has been protected by the case-law already before the implementation of Directive 20034/38/EC.[139] Moreover, the ECJ basically overrules its judgment in *Akrich* stating that it has to be reconsidered since rights of movement and residence of third-country national family members of EU citizens can not depend on a prior lawful residence in another Member State.[140]

Based on the ECJ case-law described above it is possible to conclude that approach has changed throughout the years. If in *Akrich* it stated that prior legal resident is a necessary requirement to fulfill in order for third-country national family member to move from one State to another where an EU citizen is migrating. In *Jia* case the ECJ did not provide us with any reasonable answer with regard to prior legal residence requirement, which

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[135] Ibid., para. 44, see also Case C-60/00 *Carpenter* [2002] ECR I-6279, para. 38 and Case C-459/99 *MRAX* [2002] ECR I-6591, para. 53.
[136] Supra note 129, p. 595.
[137] Case C-127/08 *Metock and Others* [2008] ECR I-6241.
[138] Ibid., paras. 40-41.
[139] Case C-60/00 *Carpenter* [2002] ECR I-6279, para. 38; Case C-459/99 *MRAX* [2002] ECR I-6591, para. 53; Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911, para. 26; Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, para. 41; Case C-441/02 *Commission* v. *Germany* [2006] ECR I-3449, para. 109 and Case C-291/05 *Eind* [2007] ECR I -10719, para. 44.
[140] Supra note 137, para. 58.

showed that this issue is of high importance in the European legal order. Judgment in *Eind* case provided that prior legal residence requirement goes counter the entire principle of protection of family life stipulated both by ECHR and the Charter as well as by number of directives. And as a consequence, such requirement also limits exercise by EU citizens' freedom of movement which is derived directly from the Treaties. And finally, in *Metock* the ECJ manifestly reconsiders approach taken in *Akrich* and states that prior legal residence requirement is unlawful.

All of the recent Directives which regulate status of third-country nationals in the EU include provision on protection of fundamental rights. However, issue of integration of third-country nationals in the Union is of political nature at the moment. Therefore, the ECJ has to balance interests of Member States against fundamental rights granted to third-country nationals. So far, I can say, that approach taken by the ECJ is changing to a more integrationist one…

There is a reference for preliminary ruling placed by Tribunal du travail (Belgium) asking the ECJ to elaborate on a case where situation concerned a child who is a national of the Member State and never exercised free movement rights within the Union and the child's relative who is third-country national upon whom the child is dependent and who has sufficient resources and sickness insurance, but is not in possession of work permit. Tribunal du travail (Belgium) referred 3 questions for preliminary ruling. One of the questions was whether in specific circumstances of the case a child's relative can be granted secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides. This particular situation seems alike to the one in *Chen*, however, the significant difference is that the child had never exercised its right of movement. Therefore, the ECJ faces the case where situation is purely internal, but involves fundamental rights protection of which the ECJ have always ensured and now will be inspired by binding legal effect of the Charter. If the ECJ considers the case and decides it in favor of third-country national relative, this will mean that such relative can derive rights directly from the Treaties, which is entirely new step for inclusion of third-country nationals.

4.2.2.1 The EU Charter of Fundamental Rights

The Charter combined in a single text the civil, political, economic, social and cultural rights hitherto laid down in a variety of international, European or national sources.[141] The stated purpose of the Charter is to strengthen protection of fundamental rights in the EU, not by changing the rights as such, but by making them more visible. The Charter gives a codified catalogue of the existing rights and raises their visibility, contributing at the same time to their invocability by the subjects of the EU legal order. It,

[141] Nice European Council, Presidency Conclusions of 7- 9 December 2000, p. 1.

furthermore, gives the judicial enforcement of fundamental rights in the EU a legally more stable foundation and it, thus, remedies to a certain extent the lack of clarity in the protection of EU human rights.[142] With adoption of the Treaty of Lisbon Charter was given a legally binding status – the same legal value as the Treaties. The Charter as a legal text represents an important change in the EU's human rights framework.

Article 6 of the TEU stipulates that the Union shall recognize the rights, freedoms and principles set out in the Charter, however, this in no way extends the competences of the Union. The Charter itself expressly states that it is addressed to EU institutions with due regard to subsidiarity as well as Member States when they implement the Union law, meaning that it does not establish any new power or task for the Union.

Another important issue which is worth mentioning is the application of the Charter in respect to third-country nationals. Since the Charter has now become legally binding and has the same effects as the Treaties, in my opinion it will raise the value and importance of fundamental rights within the Union. From now on all the European authorities as well as Member States are under direct obligation to obey the Charter to the same extent as the Treaties while performing their functions and implementation of EU law. Of course, the ECJ has many times referred to the Charter in its rulings stating that fundamental rights constitute an integral part of the general principles and, therefore, shall be protected when acting within EU legal order. In general, it is possible to say that in recent years fundamental rights came to be more and more important in the ECJ case-law both in relation to EU citizens[143] and third-country nationals.[144] Therefore, now due regard has to be given to the ECJ when interpreting binding legal effect of the Charter. I have always believed that everything is happening for a reason and giving to the Charter a binding effect is not an exception. If it changes nothing, why did it become binding then? The ECJ has already delivered judgement on binding effect of the Charter in *Kücükdeveci*[145]. The ECJ states that "it should also be noted that Article 6(1) TEU provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties."[146] With *Kücükdeveci* the Charter appears clearly as a superior norm of EU law and the most important source of inspiration when it comes to general principles of EU law and fundamental rights especially. Consequences of *Kücükdeveci* are grand, since it extends of the scope of EU law by expanding the reach of the general principles and it will raise lots of discussions among scholars.

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[142] Lenaerts, Koen and De Smijter, Eddy, *A Bill of Rights for the European Union?,* 38 Common Market Law Review, 2001, p. 274.
[143] See, for instance, Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.
[144] See for instance, Case C-60/00 *Carpenter* [2002] ECR I-6279 and Case C-200/02 *Chen* [2004] ECR I-9925.
[145] Case C-555/07 *Kücükdeveci* [2010] n.y.r.
[146] Ibid., para. 22.

4.2.3 Equality

The general principle of equality finds its expression in Article 18 TFEU (ex Article 12 TEC) stating that within the scope of application of the Treaties discrimination on the ground of nationality shall be prohibited. Article 18 TFEU (ex Article 12 TEC) has been interpreted by the ECJ as it applies exclusively to EU nationals.[147] However, the wording of the Article does not clearly state that it applies to EU citizens only, but merely "within the scope of application of the Treaties". So one can draw conclusion, if third-country national potentially falls within the scope of application of the Treaties, he or she may rely on Article 18 TFEU (ex Article 12 TEC).[148] As de Witte states Article 18 TFEU (ex Article 12 TEC) can also be read as prohibiting discrimination against third-country nationals.[149] It is, however, understandable that application of Article 18 TFEU (ex Article 12 TEC) to third-country nationals is limited by the ECJ's narrow interpretation of Article 45 TFEU (ex Article 39 TEC). As it was already mentioned in the Section 2.2.3 of this thesis, third-country nationals can not benefit from freedom of movement of workers.

Undoubtedly, if EU legislator decides to concede rights to third-country nationals, the concerned situations fall under the scope of application of the Treaties, since aspects regulated by EU law exist,[150] meaning that EU law will apply to third-country nationals when EU authorities decide to regulate their legal status. However, it will be very difficult to extend the scope of Article 18 TFEU (ex Article 12 TEC) as long as fundamental distinction between EU citizens and third-country nationals exists in relation to Article 45 TFEU (ex Article 39 TEC).

As for now, the general principle of equality is mentioned in a number of directives and international agreements that regulate legal status of third-country nationals. Equal treatment rules for third-country nationals differ significantly depending under which directive or international agreement they fall.

Directive 2003/109/EC

For instance, under Article 11(1) of Directive 2003/109/EC third-country nationals who are long-term residents entitled to equal treatment with EU nationals in number of areas.[151] It follows that even third-country citizens who have been legally resident on the territory of Member States for longer

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[147] Epiney, Astrid, *The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship*, 13 European Law Journal, 2007, p. 611.
[148] Case 186/87 *Cowan* [1989] ECR 195, para. 10 and Case C-122/96 *Saldanha* [1997] ECR I-5325, para. 25.
[149] De Witte, Bruno, *The Past and Future of the European Court of Justice in the Protection of Human Rights*, in Alston, Philip (ed.), *The EU and Human Rights*, Oxford: Oxford University Press, 1999, pp. 859-860.
[150] Supra note 147, p. 614.
[151] Areas where third-country nationals are entitled to equal treatment with EU nationals are listed in section 3.2 of this Thesis.

than 5 years and obtained long-term residence permit can exercise only limited equal treatment rights. Such an approach taken in the Directive is not surprising, since Member States (especially Germany) has persistently pushed to restrict the scope of the Directive and live a wide margin of discretion to the States.[152]

According to Directive 2003/109/EC long-term residents are entitled to the same equal treatment rules as EU nationals with regard to working conditions. However, this is the only absolute treatment rule stipulated. For every other area mentioned in the Directive Member States are entitled to impose certain restriction with regard to equal treatment, which makes the enjoyment of already limited rights even more limited. For instance, Member State may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State with regard to the following areas: (1) education and vocational training, (2) social assistance, (3) tax benefits, (4) freedom of association and union membership, (5) access to goods and services. This provision was inserted at a very late stage of the negotiations upon proposal from the Greek Presidency.[153] It significantly weakens the position of long-term residents concerning freedom of movement, since they can only enjoy the above benefits in the State that issued residence permit and other Member States are allowed to deny these benefits.[154]

Furthermore, Member States may require proof of appropriate language proficiency for access to education and training. This condition simply follows the legitimate educational purpose, however, shall be used strictly proportionally, otherwise equal treatment with respect to education may be eroded.[155] Moreover, Member States, when accessing application for granting of long-term residence permit may require third-country nationals to submit results of language proficiency as part of integration conditions under Article 5(2) that applicants have to fulfil. Hence, it is not quite clear whether a Member State, which required third-country nationals to submit evidence of language proficiency in the course of application for long-term residence permit is still allowed to demand the same document with regard to enrolment in education process after long-term residence status is already granted.

Article 11(3)(b) further stipulates that access to education may be subjected to fulfilment of specific educational prerequisites. As "specific educational prerequisites" are not defined in the Directive, it is a wide and ambiguous term that gives Member States a wide margin of discretion, which allows them to set forth numerous requirements for long-term residents before they can exercise their rights to education.

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[152] Supra note 54, p. 181.
[153] Ibid., p. 191.
[154] Ibid., p. 193.
[155] Ibid.

Furthermore, Article 11(1)(d) stipulates that long-term residents enjoy equal treatment with regard to social security, social assistance and social protection as defined by national law. Member States again have retained power to speculate, since they have the right to make equal treatment in social sphere conditional or limited by including particular provisions in national legislation.

In addition, Article 11(4) allows Member States to limit equal treatment in respect of social assistance and social protection to core benefits. However, recital 13 of the Directive provides a threshold of this derogation, namely Member States have to cover at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care. It seems that social security is excluded from the scope of Article 11(4) and long-term residents can enjoy their rights on equal footing with EU nationals. However, it is not true. We have to turn back to Article 11(1)(d) of the Directive which allows Member States to define level of social security for long-term residents in respective national legislation. Once again, it is up to Member States to decide, which rights shall be granted to third-country nationals concerning social security. Such a situation makes enjoyment of equal treatment in social sphere by third-country nationals quite illusionary. Nothing precluded the legislator just to include the list of benefits granted to long-term residents in social sphere of life and avoid exploitative derogations on behalf of Member States.[156]

Such approach taken in the Directive does not go in line with the case-law of ECtHR, which in its judgement of *Gaygusuz*[157] and *Poirrez*[158] cases restricts States, parties to the ECHR to distinguish between nationals and non-nationals with regard to social care. Most likely the value and impact of Strasbourg Court decisions on European Union legal order will increase in light of binding effect of the Charter.

Directive 2004/38/EC

EU legislation has always been far-reaching with regard to third-country nationals who are family members of EU citizens and, therefore, granted them certain degree of protection. This could already be seen in Regulation 1612/68, which granted certain rights to family members of the Union workers.[159] The ECJ also followed this path in its case-law stating that third-country nationals who are family members of EU citizens in certain circumstances can derive rights directly from the Treaties.[160] For instance, in *Carpenter* case the ECJ ruled that deportation of Ms. Carpenter, citizen of Philippines, is against fundamental rights, since this would disable her to take care of the child and consequently, in a negative way influence freedom

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[156] Ibid., p. 198.
[157] Application 17371/90, Judgment of 16 September 1996, (1997) 23 EHRR 364.
[158] Application 40892/98, Judgment of 1 September 2003.
[159] For instance, Recital 5 of the Preamble to Regulation 1612/68.
[160] Case C-60/00 *Carpenter* [2002] ECR I-6279, paras. 36-38 and Case C-200/02 *Chen* [2004] ECR I-9925, para. 47.

to provide services for Mr. Carpenter, who is an EU citizen. The ECJ has recognized the importance of ensuring the protection of the family life of nationals of Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaties.[161] Compared with the judgment in *Carpenter*, *Chen* makes one step even further by stating that it is necessary for the mother to reside together with the child so the child could enjoy the right of residence.[162]

Directive 2004/38/EC extends equal treatment rights significantly. Article 24 of the Directive stipulates that all third-country nationals with family ties to Union citizens who have the right of residence or permanent residence in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State. As we can see, Directive 2004/38/EC grants quite extensive equal treatment rights to third-country nationals who are family members of EU citizens. Nevertheless, these rights are derivative and take their origin in family relationships between EU and third-country nationals. Therefore, equal treatment is conditional on existence of family ties with EU national.

For instance, Article 12 stipulates that death of EU citizen shall not lead to loss of the right of residence of family members who are not nationals of a Member State in case they have been residing in the host Member State as family members for at least one year before the death of EU citizen. Moreover, before acquiring the right of permanent residence, third-country national EU family members have: (1) to be either workers or self-employed; (2) or 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; (3) or to be members of the family, already constituted in the host Member State, of a person satisfying these requirements. Upon completion of the above criteria, such family members shall retain their right of residence exclusively on a personal basis.

Moreover, under Article 13 third-country nationals who are family members of EU citizens retain their right of residence in the event of divorce, annulment of marriage or termination of registered partnership in case: (1) the marriage has lasted at least 3 years before divorce; (2) the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; (3) divorce or separation was in consequence of special circumstances (for instance, domestic violence); (4) third-country national family member of EU citizen under agreement with EU citizen or by order of the court has a right to see the child if access to the child has to be in the host State.

As we can see, third-country nationals who are family members of EU citizens indeed enjoy equal treatment rights on equal footing with EU

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[161] Case C-60/00 *Carpente*r [2002] ECR I-6279, para. 38.
[162] Case C-200/02 *Chen* [2004] ECR I-9925, para. 47.

nationals, however those rights are entirely dependant on family ties with EU citizen.

International Agreements with Third Countries

Equal treatment rules granted to third-country nationals and stipulated in international agreements vary greatly depending on the country EU and Member States have concluded agreement with. Due to a significant number of international agreements concluded between EU and third countries I will analyze only several of them which will provide general overview equal treatment rights under respective agreements.

The EEA Agreement grants EFTA countries nationals wide range of equal treatment rights in different spheres of life that are almost identical to those enjoyed by EU citizens. For instance with regard to employment, remuneration and other conditions of work and employment nationals of the contracting parties shall be treated without any discrimination on the ground of nationality.[163] In order to make it easier for persons to take up and pursue activities as workers and self-employed persons, the parties agreed to perform the mutual recognition of diplomas, certificates and other evidence of formal qualifications.[164] Article 31 of the agreement treats nationals of the contracting parties equally concerning rights of establishment.

the EC-Switzerland Agreement also grants quite extensive equal treatment right to the nationals of the contracting parties, however, there are some significant limitations present. Firstly, there are some restrictions with regard to employment in public sector, namely: a national of a contracting party pursuing an activity as an employed person may be refused the right to take up employment in the public service which involves an exercise of public power and is intended to protect the general interests of a state or other public bodies.[165] Article 9 of the EC-Switzerland Agreement in comparison to Article 7(2) of Regulation 1612/68 among equal treatment provisions does not list social advantages.

The EC-Turkey Association Agreement is a completely different story. As was already mentioned in Section 3.4 of this Thesis the Agreement does not grant a wide range of rights to Turkish nationals. As for equal treatment Member States shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labor forces treatment involving no discrimination on the basis of nationality between them and EU workers.[166] Turkish workers referred and members of their families shall also be entitled, on the same footing as EU workers, to assistance from the employment services in their search for employment, however, this right is conditional upon duration of employment in each

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[163] Supra note 73, Article 28.
[164] Ibid., Article 30.
[165] Supra note 77.
[166] Protocol 1/80 of the Association Council to the EC-Turkey Association Agreement, Article 10.

particular Member State. Article 7 states that the members of the family of a Turkish worker duly registered as belonging to the labor force of a Member State, who have been authorized to join him: (1) shall be entitled-subject to the priority to be given to workers of Member States of the Union – to respond to any offer of employment after they have been legally resident for at least three years in that Member State; (2) shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years. The above provisions clearly show that priority with regard to employment is given to EU citizens and Turkish nationals can enjoy only few limited equal treatment rights and even those limited rights are still conditional on length of stay within the Member State concerned.

The general conclusion to be made with regard to equal treatment right granted to third-country nationals in directives is that rights exercised are far from being equivalent to those enjoyed by EU nationals on the basis of Treaties. Basically, the Directives do not contain any general equal treatment rule, except Directive 2004/38/EC,[167] but merely limited rights in specific spheres of life (employment, social assistance, social security, education, etc.) and even those are conditional. The path followed by Member States is that they try to retain as many powers to derogate from the provisions of the Directives as possible, which leads to pure discrimination on grounds of nationality and exclusion of legally resident on the territory of EU third-country nationals from the integration process which is so loudly proclaimed by EU authorities. Especially, under Directive 2003/109/EC, when third-country nationals exercise certain free movement rights, therefore, it is not quite clear why, when acting within the scope of EU law, they are unable to rely on the general principle of equality and non-discrimination provision under Article 18 TFEU (ex Article 12 TEC) in particular.

Interesting dynamics can be observed in connection with international agreements concluded by EU with third-countries. Nationals of welfare countries (EFTA Member States and Switzerland) are granted quite extensive equal treatment rights which are almost identical to those enjoyed by EU nationals. However, if we have a look at the EC-Turkey Association Agreement, equal treatment rules are limited to specific spheres of life and discriminatory.

[167] The Directive states that family members of EU citizens who are not nationals of the Member States enjoy equal treatment rights on equal footing with nationals of the host Member State concerned, however, such right is derivative and conditional upon family ties with EU citizen.

5 Conclusion: Third-Country Nationals – Second-Class Citizens?

As we can see throughout the last decade lots of developments with regard to regulation of the status of third-country nationals took place in the Union. Such developments concerned both secondary legislation (three directives that regulate status of third-country nationals were adopted) and approaches taken by the ECJ in cases involving third-country nationals (the ECJ started to take a more inclusive approach by interpreting some provisions of EU law in favour of third-country nationals). No wonder, since the number of third-country nationals legally resident in the EU increases every day.

Examination of the Directives: 2003/109/EC, 2003/86/EC and 2004/38/EC has indicated that third-country nationals are actually granted certain rights, which are in some way identical to those enjoyed by EU citizens. However, these rights are far from being equal to those exercised by EU citizens.

In my final remarks, I will make conclusion with regard to application of general principles to different categories of third-country nationals who are in possession of different legal statuses in the EU. Such categories are to be defined as the following: (1) third-country nationals who are long-term residents, (2) third-country nationals who are family members of EU citizens, (3) third-country nationals who derive their right from family reunification with other third-country nationals, (4) third-country nationals who are granted rights based on international agreements.

Third-country nationals who are long-term residents

It is possible to conclude that long-term residents is the least controversial group of third-country nationals who have already lived and worked in a Member State for five years, are integrated to certain extent. Therefore, it might be logical to assume that they shall be granted rights as close as possible to those enjoyed by EU citizens. However, this does not appear to be quite true.

Unfortunately, Directive 2003/109/EC did not achieve the aim proclaimed in Tampere Conclusions, since third-country residents who are long-term residents eventually were granted rights far from being equal to those exercised by EU citizens. With regard to Directive 2003/109/EC one can say that it is very progressive from the first sight, since it grants significant rights to third-country nationals who are in possession of long-term resident permit. However, careful examination showed that the rights exercised by third-country nationals who are long-term residents in relation to the rights of EU citizens are very limited. Under Article 11 Member States may

exercise their powers to derogate from equal treatment provisions of the Directive and apply certain restrictions under national law, which makes enjoyment of the rights by third-country nationals more difficult and less effective. Of course, a lot depends on how Member States will use their rights to derogate, how restrictive measures under national law will be and how the ECJ will interpret the Directive's provisions. Nevertheless, it is possible to say now that general standard of equal treatment stipulated is very low.[168]

By failing to grant third-country nationals who are long-term residents the basis necessary for their full integration into the Union, the Council gives us a signal that Member States still consider third-country nationals, even after they have resided and worked legally in a Member State for more than five years and fulfilled the numerous conditions laid down in Directive, to be second class citizens.[169] We can for sure state that the Council by adopting Directive 2003/109/EC did not follow the way proposed in Tampere Conclusions and did not grant to long-term residents "the rights which are as close as possible" to those enjoyed by EU citizens. Therefore, I personally consider that granting Member States right to derogate from the provisions of the Directive and place restrictions under national law was a highly political decision, which allowed States to retain their powers in control over residence rights of third-country nationals.

Third-country nationals who derive their rights from family ties with EU citizens

In my opinion, the most extensive bundle of rights is granted under Directive 2004/38/EC. Article 24 of the Directive grants third-country nationals who are family members of EU citizens and have the right of residence or permanent residence right to enjoy equal treatment with the nationals of that Member State within the scope of the Treaties.[170] Nevertheless, these rights partially depend on the status of third-country nationals as family members of EU citizen and are in some way derivative from the rights granted to EU citizen once he or she exercises free movement to pursue employment in another Member States.[171]

Family relationships with a migrating EU citizen are very important, however, because those relationships give rise to more favourable rights than those exercised by third-country nationals under Directive 2003/109. For instance, Directive 2003/109 does not give a third-country national not having the status of long-term resident in a Member State the right to travel to another Member State in search of employment. If a family member of third-country national is migrating EU citizen, primary EU law gives her or him that right. Such far-reaching rights provided to third-country nationals who are family members of EU citizens are understandable. Right to family

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[168] Supra note 54, p. 200.
[169] Ibid., p. 201.
[170] Directive 2004/38/EC, Article 24 (1).
[171] See Section 4.2.3 of this Thesis.

life is stipulated in Article 8 (2) of the ECHR and was highly respected by ECtHR. On its part, the ECJ has in numerous occasions referred both to ECHR and case-law of Strasbourg court stressing on its significance when the question before it touches upon human rights.[172]

Even though the Directive provides quite extensive rights with regard to equality, those rights are conditional and tied to family relationship with EU citizen, meaning that third-country national does not derive his or her rights independently, but only on the basis of family ties. And the entire objective of Directive 2004/38/EC is to abolish limitations related to family relationships in order EU citizen can exercise his or her freedom of movement and residence within EU. This means that third-country nationals who are family members of EU citizens are entirely dependant on them and may retain their independent right of residence and pursue employment in case of divorce, separation or death of EU citizen provided certain conditions are met.[173]

Third-country nationals who derive their right from family reunification with other third-country nationals

Directive 2003/86/EC grants very limited rights to those third-country nationals who want to reside together with their third-country national family members. It does indeed stress on that family reunification is a necessary condition of making family life possible. It also helps to create socio-cultural stability facilitating the integration of third-country nationals in a Member State, which also serves to promote economic and social cohesion, a fundamental Union objective stated in the Treaties.[174]

Everything is pretty clear, third-country nationals legally resident in Member States once joined by their family members most likely will establish themselves in a Member State with their family and be part of the society and labour force of that Member State, which ideally is beneficial both, for the Union and individuals.

However, certain derogations allowed to the Member States and incorporated in the Directive are so obviously disproportionate and restrict right to family life protected by the ECHR. For instance, how family reunification can be promoted by allowing Member States to verify whether a child who is above 12 years old and arrived independently from the rest of the family meets the condition of integration before to authorize family reunification? In addition, Member States may require applications for family reunification in respect of minor children to be submitted before the age of 15, as provided for by their existing legislation on the date of the implementation of the Directive. And finally, Member States may apply a requirement of 2 year prior lawful residence to a sponsor before being

[172] Inter alia Case C-344/08 *Rusbach* [2009] n.y.r., para. 31 and Case C-388/07 *Age Concern England* [2009] n.y.r., para. 54.
[173] See Articles 12 and 13 of Directive 2004/38/EC.
[174] Article 3 TEU (ex Article 2 TEU).

eligible to family reunification and 3 year waiting period for individuals wishing to join their family members before they actually can be granted residence permit.

Issues related to third-country nationals and their status has always been very controversial and political. And it is understandable, since Member States really want to make sure who they admit to their territory. Therefore, derogations granted to States in Directive 2003/86/EC are the results of their insistence and political pressure. It is hard to say whether those derogations are really proportionate and in accordance with fundamental rights, nevertheless, the ECJ has decided that they are.

Third-country nationals who fall within the scope of Directive 2003/86/EC also may not apply the general principles in its entirety, but merely can rely on rights which are specifically granted to them by directive.

Third-country nationals who derive their rights from international agreements

In this thesis I have done a general overview of the EEA Agreement, the EC-Switzerland Agreement and the EC-Turkey Association Agreement. Each of the agreements provides different rights to third-country nationals. Such a difference in my opinion depends on the counterparty of the EU in each particular agreement. Dynamics shows that agreements concluded with so called “states desired in the EU” and welfare states are more generous than the others. Therefore, the very nature of each agreement consists of political and economical aspects. For instance, if the EU really wants to have a close cooperation with EFTA member-countries it provides their citizens with very extensive bundle of rights which are almost identical to those enjoyed by EU nationals.

The EC-Switzerland Agreement also provides Swiss nationals with quite extensive rights which are, however, not as wide as for citizens EFTA member-countries. Switzerland positioned itself as a neutral state for many decades, but recently has become a member of Schengen Agreement, to which many EU member states are parties. Therefore, it will be valid to predict a closer cooperation between the EU and Switzerland in the nearest future.

However, close examination of the EC-Turkey Association Agreement showed that Turkish citizens in comparison to nationals to EFTA member states and Switzerland are granted very limited rights in specific spheres of life. The main aim of the 1963 Association Agreement was to improve living conditions in Turkey and the European Economic Community then through economic cooperation and trade. To say in a bold way Turkish workers were not granted any free movement rights comparable to those enjoyed by EU citizens. However, negotiators on behalf of Turkey managed to include standstill clause in Additional Protocol 1/80 to the Association Agreement meaning that Member States may not impose

additional conditions that will make enjoyment of rights granted to Turkish nationals more difficult or impossible. This I consider as a huge win on behalf of Turkey, since it managed to include a provision that allows guaranteeing those rights already granted under the EC-Turkey Association Agreement and avoid derogations and manipulations on behalf of EU Member States (the ECJ ruling in *Sahin* case is a good example of this).

Based on the findings of this thesis I may conclude that general principles of EU law can be fully relied upon only in case individuals directly derive their rights from the Treaties. However, number of those individuals is limited to EU citizens. Meaning that all other groups of individuals may exercise similar rights which are very close to those enjoyed by EU citizens, but this does not mean that those rights are the same. Consequently, general principles of EU in its full application can be relied upon exclusively by EU citizens. All others may rely only on specific rights granted to them by EU secondary legislation and international agreements with third-countries. Those rights may be quite extensive (for instance for EFTA member states nationals) or less extensive (Turkish nationals under the EC-Turkey Association Agreement), but they are not equal to those of EU citizens.

With regard to international agreements concluded with third countries it follows that it is up to the EU and Member States how extensive rights to be granted to the nationals of the third country this agreement was concluded with. Most likely, those rights will not be equivalent to the ones exercised by EU citizens, otherwise the mere concept of European citizenship will be undermined. Nevertheless, as was described above some of agreements provide quite wide range of rights to third-country nationals which may be regarded as “near-equal” to EU citizens’. Basically nothing precludes the EU and Member States to state in international agreement that third-country nationals are granted the same rights as EU citizens and, therefore, can apply general principles of EU law in full. However, it is doubtful to happen.

It follows that application of general principles in its entirety is exclusively reserved for EU nationals and all others are granted only limited rights. Judgment in *Awoyemi* was delivered more than 10 years ago and since that time lots of developments with regard to the status of third-country nationals in the EU took place, which can be proved by adoption of number of directives and more inclusive approach taken by the ECJ in its recent judgments[175].

From my point of view, in light of Tampere Presidential Conclusions, it is now time to make a step forward by departing from conservative approach taken by the ECJ in *Awoyemi* and grant certain categories of third-country nationals right to rely on general principles of EU law as they are in the position of so called “near equality” with EU citizens. Basically one has to answer the question whether third-country nationals who fall within the

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[175] See for instance, Case C-60/00 *Carpenter* [2002] ECR I-6279 and Case C-200/02 *Chen* [2004] ECR I-9925.

scope of secondary EU legislation can rely only on specific provisions of this legislation or whether legal effect of secondary legislation changes their status to such extent that they can rely on the general principle of equality and all accompanying general principles, rights and case-law of the ECJ while exercising free movement rights.[176]

Third-country nationals with family ties to EU citizens exercising free movement do enjoy such right of equal treatment under Article 18 TFEU (ex Article 12 TEC) provided certain conditions are met. But what about third-country nationals who are long-term residence and fall under Directive 2003/109/EC? If we look on the provision of Article 11 of Directive, it provides specific equal treatment clause, which is much narrower than under Article 18 TFEU (ex Article 12 TEC), which does not go together with Recital 4 stating that long-term residents shall enjoy uniform rights as close as possible to the ones enjoyed by EU nationals. It is of course possible to argue that due to specific nature of free movement rights restrictive approach would be justified.[177] However, the exclusion of third-country nationals legally residing in Member States from the benefits of free movement is not justifiable from an economic viewpoint:[178]

In any labour market, statutorily imposed restrictions on economically active persons introduce rigidities and inefficiencies; that is to say, the market-clearing mechanism cannot work as well as it would in the absence of such restrictions. Inefficiencies incur lower output and lower employment. As the establishment of the Single Market is, in essence, an attempt to render the Member States' economies more efficient and competitive, the maintenance of 12 national policies that have the effect of confining a considerable part of the EC's labour force from two-and-a-half to three million persons—to 12 segregated territories, conflicts with the very goals of the Single European Market.[179]

Therefore, based on observations above and following integrationist approach taken in Tampere Conclusions, I think that it is proper to grant third-country nationals who are long-term residents in the Union right to rely on general principles of EU law before the ECJ and national courts of the Member States as they act like European courts.

The very nature of general principles indicates that they are to be applied in every situation that falls within the scope of EU law, otherwise, the mere meaning of term "general" is undermined. I don't see any problem, if legislator gives certain rights under the Treaties to third-country nationals, for them to rely on general principles of EU law and case-law of the ECJ. At

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[176] Supra note 9, pp. 773-774.
[177] Ibid., p. 774.
[178] Sánchez, Sara Iglesias, *Free Movement of Third-Country Nationals in the European Union? Main Features, Deficiencies and Challenges of The new Mobility Rights in the Area of Freedom, Security and Justice,* 15(6) European Law Journal, 2009, p. 792.
[179] Böhning, W. Roger and Werquin, Jean, *Some Economic, Social and Human Rights Considerations Concerning the Future Status of Third-Country Nationals in the Single European Market*, World Employment Program Research Working Paper, MIG WP 46 E, (International Labor Organization, 1990), p. 9.

the moment we have to constitute that in spite of significant developments in the EU secondary legislation with regard to third-country nationals, they still remain “second-class” citizens who have only limited rights in the Union. Unfortunately, even with adoption of the Treaty of Lisbon and binding effect of the Charter third-country nationals’ position has not changed, since they still may not rely on fundamental rights in EU, as those are part of general principles and are, therefore, reserved exclusively to EU nationals.

Third-country nationals constitute a significant part of Union population, therefore, it is important to ensure that they entirely belong here, consider a Member State of residence their home and do not feel themselves discriminated or second class citizens in order to create “an ever closer union”.

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