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*European Migration Policy:
External Dimensions of the Internal Market*

“The procedures and conditions for issuing visa for legal migrants”.

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ii. Abstract:

After Schengen Convention, and with the abolition of border controls, different policies regarding issuing visa for third-country nationals, is no longer just the matter of one Member State but rather, the whole European Union (EU), would be affected; however, yet, migrants face different policies depending the country that they apply for. According to European Court of Justices' judgement in *Koushkaki*¹ competent authorities in each Member State, have wide discretion to evaluate the applications and are not supposed to be certain whether the applicants impose a threat to the EU or not, in order to reject the applications. The Parliament, however, in its report in 2000, expressed its concern regarding this matter and stated that the European Union should avoid giving an excessive degree of discretion to officials at embassies with the possibility of exercising unacceptable discrimination².

While the European Union was promoting the idea of solidarity to asylum seekers and people in need of protection, the existing policies of Australia, Canada, and USA were attracting the highly skilled workers. Thus, the European Union fell in the global competitions to attract workforce in order to fulfil its demand in areas such as information technology, specialists, doctors, nurses and business managers. Until 2010, the commission's estimation was that, the EU needs to attract approximately twenty million skilled workers over twenty years, to resist the deficit in the engineering and computer sectors in order to become, the most competitive and dynamic knowledge-based economy in the world³.

¹ Case C-84/12, *Koshkaki v Bundesrepublik Deutschland* [2013] ECLI:EU:C:2013:862.

² The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, p. 41-43

³ Shengelia, Tamar. *EU Migration Policy*, Tbilis State University, 2010. page: 35-36

Legal migrants in European territory, however, face insurmountable obstacles that freeze different aspects of their lives and breach the founding principles of the European Union; yet, there are no other options for compensation. The EU has the competence to lay down provisions regarding entry and legal residence in its Member States, equipping them with incentives and supports in order to take measures to promote integration of legal residency for third-country nationals; EU law however, lacks harmonisation for national laws and regulations in this matter.⁴

Stockholm programme goal was, to facilitate the European market to compete with the global market by attracting highly qualified migrant. Accordingly, to safeguard the EU's strong economic performance over the longer period, Immigration play a valuable role. A uniform level of rights and obligations for both legal migrants and European citizens, was among the goals, that Europe must strive to achieve.⁵

Europe 2020 Strategy states that, Europe should be an attractive place for talented students and highly skilled workers to strengthen European economic competitiveness, yet, European migration policy could not ensure a uniform level of obligation and rights for legal migrant comparable to European citizens in many aspects specially as the subject matter of this research concern on the procedure of issuance or extending the visas. As a result, the thesis, analyse the procedure of issuing visa for three groups of legal migrants namely self-employed, workers, short-stay visa_ in European Member States (focusing on Sweden), in the light of EU provisions, particularly the principle of "*good-administration*".

⁴ Raffaelli, Rosa. European Parliament at your service, Fact Sheets on the European Union, Immigration policy. 01/2017 http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.12.3.html

⁵ Stockholm Programme, Action plan, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. page: 7. Brussels 20.4.2010

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iii: Abbreviation:

AFSJ	Area of Freedom, Security and Justice
CCI	Common Consular Instructions
CEAS	Common European Asylum System
Ch.	Chapter
CoR	Committee of Region
DG Home	Directorate -General for Migration and Home Affairs
ECJ	European Court of Justice
ECHR	European Court of Human Rights
EU	European Union
FTD	Facilitated Transit Document
FRTD	Facilitated Railway Transit Document
GAMM	Global Approach to Migration and Mobility
JHA	Justice and Home Affair
SEA	Single European Act
SIS	Schengen Information System
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VIS	Visa Information System

Chapter 1

1. Introduction:

In the twentieth century, the European Union became a desired destination for different migrant groups. However, the European common asylum and migration policy developed significantly following the 1957 Rome Treaty.⁶ First, the asylum and migration policy was developed in 1986 in the Single European Act, under a complete intergovernmental process within the framework of the 1985 Schengen Convention. Second, migration policy, within the third intergovernmental pillar, was introduced with the Maastricht Treaty in 1992.⁷ Thirdly, in the Amsterdam Treaty, signed in 1997 and put into effect in 1999, it progressed and became a common migration policy. Finally, since the entry into force of Lisbon Treaty in 2009, it is a part of ordinary legislative procedure (Art 77 to 79 TFEU). European migrant policy counts among the shared competencies of the EU (Art 4 TFEU) and now consist of border controls, asylum, legal migration, as well as integration of third-country nationals. After the Lisbon Treaty, the EU aimed to guarantee security in Europe while ensuring respect for fundamental freedoms and integrity (Article 67 TFEU).⁸

The European Member States obligations under international conventions to protect human rights have also stimulated a flow of immigrants. However, the actual migration policy in practice is not what the European founding principle, in supporting human dignity, prohibiting discrimination and protecting of family life, had promised. Migration policy is one of those controversial areas that Member States, to a large extent, were reluctant to transfer their competence to the European Union.

⁶ Officially known as the Treaty establishing the European Economic Community (TEEC).

⁷ Formally known as the Treaty on European Union (TEU).

⁸ Balleix, Cornie. From Lampedusa to the Post-Stockholm Programme: Difficult European solidarity in the field of migration. European Policy Brief. Egmont Royal Institute for International Relations. No 24, March 2014, p.2.

On the other hand, legal migrants in European territory face insurmountable obstacles that freeze different aspects of their lives and breach the founding principles of the European Union; yet, there are no other options for compensation. The EU has the competence to lay down provisions regarding entry and legal residence in its Member States, equipping them with incentives and supports in order to take measures to promote integration of legal residency for third-country nationals; EU law however, lacks harmonisation for national laws and regulations in this matter.⁹

Indirect discrimination¹⁰ is a form of prohibited discrimination within both EU law and ECHR.¹¹ EU studies on impact assessment reports, however, affirms: “in practice the level of legal protection to secure these values differs between Member States”¹². As a result, for instance in the area of tourist or family-visit visa (generally known as short-stay visa) for a third-country national, it is somehow impossible to obtain a visa for family member outside the EU. This is despite the fact that the Parliament, in its report on *Impact of Amsterdam Treaty on Justice and Home Affairs*, expressed concern regarding the EU tourist visa policy. According to the Parliament, the use of threat of illegal migration should not lead to the discriminatory application of rules, criteria, and suspicions, that are unrelated to the personal circumstances of the individual applicants and are against the liberties that European societies have fought hard to obtain and maintain. The Parliament, in the same report, advanced its arguments, stating that the European Union should avoid giving an excessive degree of discretion to officials at embassies with the possibility of exercising unacceptable discrimination. Instead, they recommended imposing clear and precise provisions,

⁹ Raffaelli, Rosa. European Parliament at your service, Fact Sheets on the European Union, Immigration policy. 01/2017 http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.12.3.html

¹⁰ Article 2(2)(b) of the Racial Equality Directive states that “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons”.

¹¹ European Convention of Human Rights

¹² Commission of the European Communities, proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. 2008/0140 (CNS)

permitting the individual to know what the requirements for fulfilling the criteria for the issue of a visa were. However, as already mentioned earlier, the level of this legal protection is still ambiguous in different Member States.¹³

The goal of the “*Europe 2020 Strategy*” is to make Europe an attractive place for talented students, highly skilled workers, and entrepreneurs to fill the gaps in European labour on the economic market. Yet, neither in the area of skilled workers nor in the realm of the self-employed are the processes of issuing or even extending visas effective for this aim. Both self-employed and work-visa applicants usually face long waiting times to get their visa extended. This interim period for issuing a visa extension, often lasting nearly one to two years based on the Swedish migration offices (Migrationsverket) website¹⁴, puts the average visa applicant in a position where he will not be able to leave the Member State territory in any event; if he leaves the territory, he will not be able to return to his daily life without the visa, which is undergoing the approval process. Thus, a self-employed applicant planning to invest in a specific country can never rely on the principle of legal certainty that all the visa requirement issues would be completed during a certain amount of time.

While, different Member State have different policies and requirements for granting permanent residence permits, the long waiting time for processing visa extensions is just a tip of an iceberg. If the worker, in any case, in its four years salary calendar, has in one month, earned less amount of salary that he was supposed to earn, Migrationsverket (Swedish Migration office), reject the application, based on that only month of deficit in the four years of employment. On the other side, workers get deported/ rejected for their permanent visa application, even if the mistake, in their visa process is not due to their fault. Accordingly, a worker after four years or even more

¹³ The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, p. 41-43

¹⁴ Migrationsverket <https://www.migrationsverket.se/Privatpersoner/Arbeta-i-Sverige.html>.

(counting the times waiting for obtaining visas), get deported from Sweden, if the employer intentionally or mistakenly has paid the pension insurance less than the standard rate. As a result, based on these regulation in Sweden, workers pay the punishment, for the mistake that they did not made. However, after deportation, the amount for pension insurance and taxes that the workers have paid all these years, would not be paid back to them.

The other category of legal migrants, are the short-stay visa applicants that, there is no legal certainty, recognizing on which grounds, a visa application can be approved or rejected, which, as a matter of facts, the consular authority's decision making, can lead to arbitrary decision making and discriminatory manner, rather than to be based on a valid ground.

1.1. Purpose:

The Commission's proposal for "*The conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities*"¹⁵ states that, a comparative study in June 2000 illustrates, the rules on admission of third-country nationals in EU differs from a Member State to another. Both third-country nationals seeking to be admitted to work in EU and employers dealing with the lack of workers and in need of third-country workers are confronted with a highly complex national administrative rules; there are only a few common rules and principles applicable in all Member States.¹⁶

The purpose of this thesis is to investigate, first and foremost, on the conditions of entry for legal migrants to the EU and to analyse the scope of EU law competences in

¹⁵ Official Journal 192, 12/08/2002 P. 0020–0023.

¹⁶ Proposal for a Council Directive on the Conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM (2001) 386 final. Brussels, 11.7.2001.

enacting a common migration policy provision, as well as to inspect Member State competences in this matter. This is done in order to examine if, the interpretation and implementation of EU law by national courts in national legislations is a flexible competence.

Furthermore, the thesis will examine Member States competence in accordance to the EU general principles. As earlier mentioned, if the level of legal protection differs from one Member State to another, moreover, if protecting human right and human dignity are the founding principles of the EU, how would EU guarantee protecting these rights? This thesis, although, does not intend to answer the question but, rather, to touch upon the facts regarding the administrative procedures in European migration policies, EU general principles and, Charter of Fundamental Rights. The aim is to point to the elephant in the room.

1.2. Limitation:

To establish a full picture of this topic, one would perhaps like to assess every aspect of the EU migration policy and different national provisions concerning the matter, such as free movement of EU citizens and third-country national migrations, ebbs and flows of migration provisions and the obstacles that Member States face to fulfil their obligations. However, due to limited of time and space and the vast variety of different types of migration issues, it would not be possible to undertake this type of contextual analysis in a master thesis.

Therefore, by dividing the substantial concept of third-country national migration into legal and illegal migration, this work will only focuses on the procedure of issuing/extending visa for short-stay visa applicants as well as economic, legal migration to the European Union. As a result, some groups from the category of legal migrants are not addressed in this research, such as studies on student migrants as well as

“privilege migrants”, a category of third-country nationals who are family members of EU citizens residing in another Member State or are involved in a cross-border activity.¹⁷

On the other hand, the subject matter of this thesis is highly related to humanitarian and fundamental rights as well as general principles that have their roots in European Convention on Human Rights. This thesis with all its respect and interest to the Court in Strasbourg, however, would not cover the ECtHR case laws. The reason for this exclusion, is based on the recent and frequent references of the Court of Justice, to the point that the ECHR does not constitute, a legal instrument that has been formally incorporated within the EU law. This can be explained in the light of the Opinion 2/13 that European Union has not acceded to the ECHR¹⁸.

Moreover, the focus in practice will be on Sweden as an example of the extent of national law and courts interpretation of the EU objectives, specifically to investigate the legal barriers that legal immigrants face, to attain their justified rights.

In the proposal for a Council Directive on the condition of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities in 2001, which was withdrawn by Commission in 2005, it is stated: “Regulation of immigration for the purpose of exercising employed or self-employed economic activities is a cornerstone of migration policy and development of a coherent community immigration policy is impossible without addressing ‘the conditions for entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities’. Article 63(3)(a) [of the EC Treaty] is, ac-

¹⁷ Privilege migration is covered under the Commission’s Directive 2004/38/ EC.

¹⁸ Groussot. X, Hettne. J and Petursson G.T.General Principles and the Many Faces of Coherence: *Between Law and Ideology in the European Union*, Paper No 01/2016, April 2016. page: 8, see also: Case opinion 2/13, ECLI:EU:C:2014:2454.

cordingly, the proper legal basis for this proposal.¹⁹” This work, therefore will focus on the importance of the uniform regulation regarding the procedure of issuing and extending visa for these groups of legal migrants.

1.3. Research Question:

This thesis addresses the following research questions:

• based on the wide discretion that Member States have, regarding the evaluation of visa applications and according to the European Court of Justices’ (herein after the Court or ECJ) recent judgement²⁰ regarding the scope of Article 41 of European Charter of Fundamental Rights, this Article, only cover EU institutions and not Member States; as a result, the question pops in mind that, how EU would guarantee protecting this right in case of breach in Member State institutions?

• Is a common migration policy in the area of entry and admission of third-country nationals significant for the EU? If it is, how far does the sample Member State comply with these policies? Are the EU founding-principle values, diminished?

• Are there any effective and applicable measures to oblige Member States? In other words, what are the enforcement tools?

1.4. Methodology:

¹⁹ The proposal for a Council Directive on the Conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed economic activities, COM (2001)

²⁰ Joined Cases C-141/12 Y.S. v Minister voor Immigratie, Integratie en Asiel and C-372/12 Minister voor Immigratie, Integratie en Asiel v M, S., EU:C:2014:2081, paras. 66-69.

This thesis is conducted based on the legal doctrinal approach, which aims to give a systematic presentation of principles, rules, and concepts governing legal migration policy and analyses the relationship between these principles, rules and concepts, aiming to illuminate the ambiguities and fill the gaps in this area within the existing legal system. The legal doctrinal approach follows three interrelated goals or features: description, prescription and justification. It describes the existing law and therefore has a prescriptive voice, although it can also legitimately propose new solutions.²¹ However this method, will be accompanied by a legal historical methodology, to better explore and understand the changes that have been done and reasons behind them.

In order to answer the research questions that I presented in the previous part, I will focus on the following aspects. First, in the second chapter, I explore the history of migration to and within the European Union, looking at when and why migration became an issue. For this, I will examine the founding principles of the EU both in general and regarding other nations; the approach of the EU towards third-country immigrants will be heavily scrutinised, as I will discuss those specific principles, as well as the general principles of the EU. Decision making procedures will also be argued in this section.

Then, to assess the elaboration of these principles and norms regarding EU migration policy, I will look to its regulatory enforcement tools, such as the EU treaty as the Constitutional legal basis and the related Regulations, Directives, guidelines, and action plans. Moreover, the EU case laws as another regulatory element of the EU semi-Common law system will also be discussed. Chapter four, is devoted to the related Swedish regulations, the relevant anti-discrimination provision and aliens act.

²¹ Smith, Jan M. What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research, Maastricht University. 2015.(This paper can be downloaded without charge from the Social Science Research Network at <http://www.ssrn.com>)

In the fifth part, I will discuss European asylum policy, which is related to the EU objectives such as abolition of border controls and free-movement of persons. The area of asylum policy, more than any other area of European Union's activity employs human rights obligation of Member states. Asylum policy, demonstrate human right obligations and foreign policy in one frame. As a result, after discussing related principle and laws regarding migration, the thesis devotes a small section to this area.

As I mentioned earlier, the focus will be on three groups of legal migrants: self-employed, workers, and short-stay visa applicants. Related Directives and Regulation and case laws will be discussed in each of the sections that address these groups. While chapter six introduces the legal migration policy in general, chapter seven puts its emphasis in the above-mentioned three groups in practice. Thus, how these laws would be implemented within the Member States can be used to evaluate the strength of EU migration policy. Therefore, it is important to see whether these laws in practices comply with EU rules and principles. Observing these practices in national migrants legislations is, thus, essential and will also be looked through in each part. Finally, Chapter nine will be the conclusion section.

1.5. Sources:

The primary sources in this research are EU treaties, Charter of fundamental rights, related Regulations, Directive and, Case Laws as well as Swedish related provisions regarding the issuing visa for third-country nationals.

The proposals of the Parliament and Council as well as, European Union institutions and Swedish migration office (Migrationsverket) website, has been used as primary sources.

Previous literature and research regarding migrant's policies, social media's discussions and online sources, has been used as secondary sources.

Chapter 2

2. History of European Migration Policy:

In 1990, following the Community legislation on the free movement of workers in 1968, later extended to the self-employed in 1973, the Directives on the right to settle for pensioners, students, and other citizens with independent incomes based on the Single European Act was passed. It was a legal basis for the governments of Member States not only to deny any responsibility for the Commission regarding the matter, but also even minor proposals, to cut down border controls to random checks was rejected by the Council.

While the Single European Act (SEA)²² granted to the Community the power to enact legislation for the Single Market and eliminate the checks of persons, Member States in two declarations on the same subject announced that the power to implement measures in the area of terrorism, crime, drug smuggling, and immigration from third-countries should remain under the competence and the prerogative of the individual Member States and not Community's. However, their reasoning of security measures was not accurate; even before the mid-1980s, border controls were taking place randomly while those border controls could only detect minor crimes, but not organised crimes. However, at that time, the Community had no mandate to consign measures regarding internal security or migration or asylum law; thus, the only alternative regarding dismantling border control was if the Member States adopted their own agreement²³.

²² Official Journal of European Union, No L 169/1. 29/06/87

²³ The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, pp. 6, 7.

In 1985, the Schengen agreement between five European countries, was signed to form an area of free movement within their collective borders; discussions regarding the migration policy was a subject of intense debates. Finally, in 1997, the Amsterdam Treaty changed this agreement to the Schengen Convention and proposed a “Common Visa Policy” and dismantled border controls, save for the times that, due to security problems, border controls may “temporarily” be re-introduced.

EU countries increasingly supported the Schengen Solution; only Denmark, England and Ireland did not sign it. Except Article 2, all of the other 140 Articles of the Convention consist of “compensation measures” such as:

- Strengthening border controls at external borders;
- The “one chance only” rule in asylum law;
- The introduction of common visa and a common visa policy;
- Increased cooperation between police, customs and judicial authorities;
- The introduction of the Schengen Information System (SIS) as a joint information system for wanted persons and objects.²⁴

SIS was first introduced in 1985 in order to enhance the efficiency of border controls. It was renewed in 2013 (SIS-II), which enables sharing of information regarding those people whose entry to the Schengen Area was refused.²⁵

In 1995, the Commission proposed three Directives (the Dublin Convention, the draft external border Convention, and the draft Convention on European Information System) and Regulation determining that third-country nationals must be in posses-

²⁴ The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, pp. 6, 7.

²⁵ Balleix, Cornie. From Lampedusa to the Post-Stockholm Programme: Difficult European solidarity in the field of migration. European Policy Brief. Egmont Royal Institute for International Relations. No 24, March 2014, pp. 2

sion of a visa, when they cross external borders. Among these, only the Dublin Convention and two Visa Regulation have been adopted. However, EU and its Member States took giant steps toward cooperating in the area of migration and asylum law, besides that, in police, judicial and custom cooperation and moreover, in the area of rights and freedoms of the citizens of the European Union, Member State had a lot progress cooperating with each other.

The Amsterdam treaty has tampered the EU free-movement objectives by replacing the free-movement of persons from the context of third pillar²⁶ cooperation in the Maastricht TEU to the “Area of Freedom, Security and Justice” (AFSJ) in Amsterdam TEU.²⁷ The Parliament report in January 2000 states that if the concept of single market is a space without border in the economic side, it should also reserve the liberties of persons inside this space.²⁸ Most EU countries, as well as and also three non-EU countries (Iceland, Norway and Switzerland) belong to the Schengen area; this means that they have abolished border controls among them. Additionally, the polices and judiciary work together in the Schengen Zone, sharing information through a single computer system (SIS or Schengen Information System).

2.1. Visa policy

After the expansion of Schengen Area, non-EU citizens can move within the area without passing through passport control. As a result, there is now a *Visa Code*²⁹ for countries within the Schengen Area, for border control and issuance of short-stay vi-

²⁶ Third pillars refer s to the division which Maastricht treaty defined Union. According to the Maastricht treaty the Union was given certain powers in three classified groups known also as three pillars. The European Community, the common foreign and security policy and cooperation in the field of justice and home affair are the three pillars. See European Parliament at your service, fact sheets on the European Union.

²⁷ The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, page: 8

²⁸ The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, page: 12

²⁹ Council Regulation 810/2009, establishing a Community Code on Visas (Visa Code) OJ L 243, 15.9.2009.

sas. Additionally, there are biometric data added to passports and visas, such as fingerprints, digital photos, and retina scans. However, this is part of a global trend that obliges countries to use these advanced technologies for travel document. The EU immigration departments, started using the new biometric database, *Visa Information System (VIS)*, in 2008.³⁰ VIS was established in 2004 to fight against “visa shopping” and to cooperate with the prevention of threats to the internal security of the Member States by tracing visa applicants.³¹

In pursuance of adopting the Visa Code, and on the basis of Article 51 of Visa Code, the Commission has laid down a *Handbook*³² as operational instructions (guidelines, best practices, and recommendations) for the practical application of the Visa Code. As it is mentioned in the forewords of this Handbook, “it neither creates any legally binding obligation upon Member States nor establishes any new rights and obligations for the persons who might be concerned by it, but aims to ensure a harmonised application of the legal provisions”.³³ However, in cases where the Handbook is based on or referred to in a legal provision, legally binding effects are produced and can be invoked before a national court.

2.1.1. The Handbook

The Handbook was laid down to instruct the performance of Member State’s consular staff or other authorities responsible for examining and determining visa applications, as well as tasks for the authorities responsible for modifying issued visas for transit or intended stays not exceeding three months in any six-months period.

³⁰ Shengelia, Tamar. EU Migration Policy, Tbilis State University, 2010. page:52

³¹ Balleix, Cornie. From Lampedusa to the Post-Stockholm Programme: Difficult European solidarity in the field of migration. European Policy Brief. Egmont Royal Institute for International Relations. No 24, March 2014, pp. 2-3

³² The handbook for the processing of visa applications and the modification of issued visas based on: Commission Decision C(2010) 1620 final. Consolidate version: 9 July 2014.

³³ The handbook for the processing of visa applications and the modification of issued visas based on: Commission Decision C(2010) 1620 final. Consolidate version: 9 July 2014, p. 8.

The Handbook asserts that the process of assessing visa applications should be conducted in a professional manner and fully complies with Article 3 and 14 of the European Convention of Human Rights and Article 4 and 21 of the Charter of Fundamental Rights of the European Union. Consular staff in performing their duties, should fully respect human dignity and must not discriminate against persons on the grounds of sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Moreover, measures taken in regard to issuing visas must be proportionate to the objectives pursued by those measures. Consular staff should obtain a balance between, on one side, the need to be vigilant in detecting persons posing a risk to public and internal security _as well as potential illegal immigrants_ and, on the other side, the need to ensure the smooth handling of visa applications submitted by persons who fulfil the entry conditions³⁴.

2.2. Free movement expansion

One of the four fundamental free movements of the EU, is the free movement of EU citizens and their family members for three months; for time over three months, they should either be working, studying or financially independent and not become a burden if they want to remain in the other EU state. Five years later, however, this would become a permanent right. Although the freedom of movement did not automatically entitle an EU citizen to work in other Member States, after waiting a transitional period of seven years, from 2014, the free movement of workers will be automatically obtained for EU citizens.

This policy has tended toward a more “global approach” in recent years. This means that Member States are putting together common migration policies for the fight against illegal migration and control the demands for qualified workers. The

³⁴The handbook for the processing of visa applications and the modification of issued visas based on: Commission Decision C (2010) 1620 final. Consolidate version: 9 July 2014.

Global Approach to Migration and Mobility (GAMM) has been promoted by Commission as an “overarching framework of EU external migration policy”. Besides this framework, one of the important European Union concerns is to focus on poverty issues to reduce the level of push immigrants as a matter of need.³⁵

2.3. Justice and Home affairs (JHA)

The area of EU policies on migration, asylum, border controls, and crime are gathered under the title of the Justice and Home Affairs (JHA), under the supervision of the European Commission. Although the Commission regularly uses its competence in taking legislative initiatives in the area of migration and home affairs, but when necessary and in order to accomplish the remaining enforcement gaps, the Directorate -General for Migration and Home Affairs (DG Home) also elaborates on adopting legislation, action plans, and soft laws.³⁶

After the Amsterdam Treaty entered into force in 1999, European Leaders established a legal basis on Title IV of the EC Treaty, based on European core values such as freedom, democracy, rule of law, equality and respect for human rights. From 1999 until 2004, for the harmonisation of border controls and for police and judicial cooperation based on mutual trust, a five-years, multi-annual programme was decided, based on the detailed list of policies in the area of common asylum and immigration which was called the *Tampere Programme*; this Tamper Programme focused on the rights of legally residing, third-country nationals.

³⁵ Shengelia, Tamar. EU Migration Policy, Tbilis State University, 2010. p: 33

³⁶ Strategic Plan 2016-2020, DG Migration and Home Affairs. European Commission, Ref. Ares 2016. p: 4

In the programme from 2004 until 2009, new goals with more security concerns were added to these policies and it was renamed to *the Hague Programme*,³⁷ for realising EU visions in the areas of access to justice, international protection, migration and border control, terrorism and organised crime, police and judicial cooperation and mutual recognition. One of the Hague Programme's objective was to "improve the common capability of the EU and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice".³⁸ For this a systematic monitoring system was considered to ensure that the Commissions' legislatives were compatible with the Charter of Fundamental Rights. In March 2007, the Fundamental Right Agency³⁹ started assisting EU institutions and Member States through research projects and data coalition.

When in 2009, the Treaty of Lisbon was ratified. It designated that EU resolutions about migration and integration should be determined based on the qualified majority votes.⁴⁰ As a result, these policies were followed under the *Stockholm Programme* from 2010 until 2015, during the presidency of Sweden of the Council.⁴¹ The first chapter of Stockholm Programme mentioned that it intended to focus on "citizens interests and needs" and other persons for whom EU has a responsibility. Its challenge was "to ensure respect for fundamental rights and freedoms and integrity of the person, while guaranteeing security in Europe". The European Commission addressed

³⁷ Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. p: 2

³⁸ An evaluation of the Hauge Programme and Action Plan, COM(2009) 263 final. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions.

³⁹ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, p. 1.

⁴⁰ Shengelia, Tamar. *EU Migration Policy*, Tbilis State University, 2010. p: 40-41

⁴¹ Plathner, Christine. *A common EU migration policy? EU immigration and asylum policy from the perspective of regime complexity*. (Master thesis) Lund University, spring 2013. p: 9

the development of to a “more vigorous integration policy” to grant legally residing third-country nationals the “right and obligations comparable to EU citizens”.⁴²

The *Europe 2020 Strategy* is another five-year, multi-annual programme that is currently in force. The plan intends to respond to the economic crisis of Europe with a new migration policy while also granting humanitarian visa to people in need of protection.

Thus, these programmes besides European and international human rights instruments enable the basis for the analysis of EU secondary legislations, as well as national implementers measures.⁴³ These programmes and their provisions, related to the subject of this thesis, are explained briefly in the subsections that follow.

2.3.1. Tampere Programme

The Tampere Programme stressed that migrants should “enjoy the same rights and responsibilities as EU nationals” and, accordingly, “action to integrate immigrants into our societies must be seen as the essential corollary of the admission policy”⁴⁴.

Respect for human dignity is the cornerstone value of European Union which constitute the first article of charter of Fundamental right. It is strongly affirmed in beginning of the Stockholm programme that the charter of human right is at the centre of the migration policy.

⁴² Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. p: 4-8

⁴³ Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. p. 4-8

⁴⁴ Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. p. 4-8

“Respect for the human person and human dignity, freedom, equality, and solidarity are our everlasting values at a time of unrelenting societal and technological change. These values must therefore be at the heart of our endeavours” moreover under the title of fundamental rights it stresses that “the area of freedom, security and justice must above all, be a single area in which fundamental rights and freedoms are protected.”⁴⁵

2.3.2. Hague Programme

In November 2004, the Hague programme was set by twenty-five member states of EU, to strengthen freedom, security and justice in Europe. The Hague programme not only aimed to improve fundamental rights, procedural safeguards, and access to justice but also its main focus was to fight against terrorism, while migrants issues are distinguished.

More importantly, the Hague programme intended to improve Tampere programme’s achievement by evaluating the way that Member States transpose and implement EU directives and regulations into national legislations. The Hague programme states that by 2005, the Commission should have a policy plan on legal migration including admission procedures, this view is within the context of Lisbon strategy, a ten-year effort to improve EU’s economic competitiveness, however, the Hague programme did not intend to lead to an EU wide immigration system, or even increasing the opportunities for legal migrants⁴⁶.

⁴⁵ Wiesbrock, Anja. Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe, Danvers, USA. 2010. p. 4-8

⁴⁶ Van Selm, Joanne, Migration Policy institute. The Hauge Programme Reflects New European Realities. <http://www.migrationpolicy.org/article/hague-program-reflects-new-european-realities>. January 2005.

2.3.3. Stockholm Programme

The Stockholm programme, in part 6, asserts that labour immigration could contribute to increase the competitiveness and the economic validity of the European Union; however, the programme suggests that in order to reduce the demographic challenge that Europe could face in the future, as a result of increased demand for labour, a flexible immigration policy is needed that could help European development in the long term.

In section 5(2) regarding visa policy, the European Council, in order to create the possibility for moving to a new stage, invited the Commission to investigate the possibility of a common European issuing mechanism for short-term visas. Moreover, they were invited to examine to what extent an assessment of individual risk could be associated with the presumption of risk based on the applicant's nationality.

In its last chapter (7), which is regarding the foreign policy and external dimension of area of freedom, security and justice, the Stockholm Programme once again emphasises on human rights as an important EU values that should be protected and pursued outside of the EU. "Internal and external aspect of Human Rights are inter-linked, for instance as regards the principle of non-refoulement or the use of death penalty by the partners that the EU cooperates with".⁴⁷

The Stockholm Programme's presumption towards the labour and legal migrants was more corroborative. It could fulfil the EU's demographic challenge and the need of labour market while, moreover, it could also help facilitate the European market to compete with the global market by attracting highly qualified migrants: "Robust defence of migrants' fundamental rights out of respect for our values of human dignity

⁴⁷ Stockholm Programme 2010:4 Action plan, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Brussels 20.4.2010

and solidarity will enable them to contribute fully to the European economy and society". In order to tackle Union's demographic challenge and to safeguard the EU's strong economic performance over the longer period, Immigration play a valuable role. A uniform level of rights and obligations for both legal migrants and European citizens, was among the goals, that according to the Stockholm programme, Europe must strive to achieve. Accordingly, in order to maximise the benefits of legal migration for the benefit of all stakeholders and to strengthen the EU's competitiveness a consolidated version of rights in an immigration code, and common rules to effectively manage family reunification are essential to be presented. Stockholm programme stressed on the migrants integration into the society in which they live by underlying their own responsibility whilst safeguarding their rights, will be further pursued.⁴⁸

2.3.4. European Strategic Plan 2016-2020⁴⁹

Europe 2020 is a strategy to help Europe recover from the recent abnormal economic crisis, which is exceptional in this generation, and prepare it for the next decade. Long-term challenges in globalisation, resources, and population put Europe in a moment of transformation. Thus, the Commission identified three contexts for growth: smart, sustainable, and inclusive. In order to achieve these targets, Commission has proposed five interrelated headlines for the EU to achieve by 2020⁵⁰.

By establishing the European Strategy, which replaced the Stockholm Programme, DG HOME, contributed to following general objectives of the Commission:

⁴⁸ Stockholm Programme, Action plan, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. page: 7. Brussels 20.4.2010

⁴⁹ Europe 2020, A European strategy for smart, sustainable and inclusive growth. Communication from the Commission. Brussels 2010

⁵⁰ Europe 2020, A European strategy for smart, sustainable and inclusive growth. EU Fact Sheets. Delegation of the European Union to the United States. August 2010. see also: <http://www.eurunion.org/eufacts> .

- Towards a new policy on migration;
- An area of justice and fundamental rights based on mutual trust;
- A Union of democratic changes; and
- A deeper and fairer internal market with a strengthened industrial base.

Hence, a reliable migration policy should contain both humanitarian and economic imperatives. With the beginning of the migration and refugee crisis in 2015, some countries, due to the length of their external borders or their specific geographic situation were under a huge burden to manage. This is the area that the significant value of taking measures at EU level and mobilising the EU budget plays a role; the principle of solidarity and fair sharing of responsibilities between the Member States are thus at the heart of the common policies on asylum policies.

The migration strategic framework for 2015_2020 sets out policy priorities and immediate response to the migration flows in short-term as well as long-term perspectives toward a new policy on migration. As a result, the framework outlines;

1. Reducing incentives for irregular migration;

- Pondering effective return policies; and
- Effective border management.

1. For a new policy on legal migration to address skill shortage in the EU and enhancing effective integration of the migrants and under this subject, DG HOME will contribute to:

- Well-managed legal migration and visa policy (students and researchers and highly qualified workers).

However, the volume of admissions of third-country nationals remains the exclusive competence of Member States, although EU has a specific role in it. The idea of the new legal migration policy is through European programmes, such as Horizon 2020 and Erasmus+, to attract talented individual to EU by giving these groups job-seeking opportunities. The next phase of this policy is to make an attractive EU-wide scheme for highly qualified third-country nationals which the EU Blue Card Directive⁵¹ already provided such a possibility. In 2015, however, DG HOME launched a public consultation on both labour migration and on the Blue Card Directive in order to review the Directive and make it more effective in attracting talent to Europe.

Besides the above-mentioned plans, DG HOME will start a process of reviewing the existing legal migration instruments, and also consider the possibilities for facilitating the entry of migrant entrepreneurs and service providers. The European Dialogue on Skills and Migration, has also been founded to comprise inputs from business, the trade unions and other social partners to maximise the advantage of migration for the European economy and the migrants themselves.⁵²

It was a joint response to grant humanitarian visas to the people seeking protection and economic needs. Although, on the part of asylum and refugees the right offered to the people benefiting from this strategy is more precarious than those that already existed under conventional protections. The task force had a study plan on the possibility of processing asylum applications outside of the EU. Selection of people would be based on the vicinity to the conflict zones, starting with as close as possible.⁵³

⁵¹ Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17–29.

⁵² Strategic Plan 2016-2020, DG Migration and Home Affairs, European Commission. Ref. Ares(2016) 2231546-12/05/2016. page: 10-19

⁵³ Europe 2020, A European strategy for smart, sustainable and inclusive growth. EU Fact Sheets. Delegation of the European Union to the United States. August 2010. see also: <http://www.eurunion.org/eufacts> .

2.4. Decision making procedure and EU institution

After the Lisbon Treaty, the Council of Ministers and the European Parliament together determine all decisions regarding migration and asylum in EU. The qualified majority in the Council can decide upon a judgement while, on top of that, the European Court of Justice (herein after the Court or ECJ) is entitled to rule on the annulment of legislation or on the failures of EU institution in their actions or on infringement cases where Member States have not fulfilled their obligations.

Due to the complexity of the area of migration and the task of harmonisation in this part, the policy-making developers have more limitations, centered on the networks of experts, while also connecting to formal law making as well as informal social resources, such as interests. As a result, the Commission is the sole initiator in EU legislation in the area of common migration policy; this is supposed to take into consideration the interest of whole EU. The Commission gets its technical expertise from the committees, including interest groups.⁵⁴

The Stockholm Programme, adopted by European Council in 2009, emphasises the need to find practical solutions to increase the coherence between migration and other policy areas such as foreign, development and trade, health, employment and education at European level. Particularly, the European Council invites the Commission to discover the methods to link the development of migration policy to the development of the post-Lisbon strategy.

Thus, the European Council admits that in order to be able to promote the positive development effects of migration within the scope of Union's activities in external dimension, and to adjust international migration closer to the achievement of the Mil-

⁵⁴Plathner, Christine. A common EU migration policy? EU immigration and asylum policy from the perspective of regime complexity. (Master thesis) Lund University, spring 2013. page: 35

lennium Development goals, there is a need for further policy coherence at European level. Consequently, the European Parliament invited the Commission and Council to implement the policy plan on legal migration.⁵⁵

Chapter 3

3. EU Laws

3.1. Principles and Norms:

For almost forty years, the protection of human rights has been secured by the European Union on the basis of general principles of the Community by the Court of Justice. However, following the adoption of Lisbon Treaty, general principles were constitutionalised in the Charter of Fundamental Rights. There are several rights guaranteed in the Charter from the constitutional traditions to international obligations common to Member States and rights recognised under European Union treaties.⁵⁶

3.2. General Principles

The EU General principles are the “unwritten law” of the Community, which courts rely on in their judgements. General principles are mostly derived from the Community treaties, legal system of Member States, and international treaties. Accordingly, based on Article 6 (2) TEU, the Community has to respect fundamental rights guaranteed by ECHR and the constitutional tradition common to the Member State; these fundamental rights constitutes general principle of Community Law. Ar-

⁵⁵ Stockholm Programme 2010:5 An Open Secure Europe Serving and Protecting Citizens, Notice from European Union Institutions, Bodies, Offices and Agencies, European Council. 04.5.2010

⁵⁶ Ippolito Francesca (2015) Migrations and Asylum Case before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to test. European Journal of Migration and Law. Faculty of Political Science, University of Cagliari. page: 2

Article 13 EC (Article 19 TFEU) sets the rules to combat discrimination as an explicit principle for EU policy making.⁵⁷ Unlike Member States legal system, EU lacks a general administrative law, this makes general principles particularly important in this concept⁵⁸.

Consequently, Article 19 TFEU, the Council in a remarkably accelerated manner adopted three Directives on racial equality,⁵⁹ a framework Directive on equality on employment,⁶⁰ and a new Directive on gender equal treatment.⁶¹ The race Directive and the framework Directive developed significant steps toward an autonomous principle of equal treatment in the Community legal order. These Directives apply to “all natural persons” on EU territory.

It is worth mentioning that, in any case contrary to EU citizens, third-country nationals are not protected from discrimination on grounds of nationality based on the scope of either the race Directive or Article 19 TFEU. Article 3(2) of the race Directive explicitly ruled out the inclusion of “different treatment based on nationality” from the scope of Directive. It excludes any discrimination arising from the legal status of the third-country national.⁶²

3.2.1. The principle of legitimate expectation:

⁵⁷ Wiesbrock, Anja. Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe, Danvers, USA. 2010. page: 169-171

⁵⁸ Groussot, X, Hettne, J and Petursson G.T. General Principles and the Many Faces of Coherence: *Between Law and Ideology in the European Union*, Paper No 01/2016, April 2016. page: 10

⁵⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁶⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁶¹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access and supply to goods and services.

⁶² Wiesbrock, Anja. Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe, Danvers, USA. 2010. page: 175-177

One of the corollaries to the principle of legal certainty is the principle of legitimate expectation. Accordingly, to the Case Law in *Mavrides*, the principle of legitimate expectation arises when an individual “who is in a situation in which it appears that the administration’s conduct has led him to entertain reasonable expectations”.⁶³ However, in order to invoke this principle, three conditions should be met. There must be an action undertaken by an authority in the form of adopting administrative measures that has justifiably created legitimate expectation on the part of an individual.⁶⁴ For third-country nationals, as Anja Wiesbrock in her book *Legal Migration* mentions “the expectations arise primarily in the context of insufficiently precise provisions of national immigration, integration and citizenship law”.⁶⁵ Actual and potential immigrants who make significant emotional and financial investments should be guaranteed in order to enter or reside in a certain Member State if they are able to clearly identify the condition for admissions. As a result, in order to be able to comply with the criteria and requirements, third country nationals must possess legitimate expectations to be admitted or granted a secure residence permit or to obtain the citizenship of a Member State.⁶⁶

3.2.2. The principle of proportionality

One of major EU administrative law principles is the principle of proportionality; its scope and the nature of the “proportionality test” has been largely developed by ECJ. Accordingly, the proportionality test consists of three elements of “suitability” (the measure should be suitable for achieving the desired objective); “necessity” (a less restrictive means should be used if it is equally effective); “proportionality” (the measure should not be disproportionate to the objective). Generally, the third element

⁶³ Case 289/81 *Mavrides v European Parliament* [1983]ECLI:EU:C:1983:142.

⁶⁴ Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. pp. 190-191

⁶⁵ *Ibid*, pp. 191-193

⁶⁶ Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. page:190-193

of proportionality test ‘*stricto sensu*’ which implies that the measure is disproportionate or excessive is mostly applied by the Court when the fundamental rights are concerned. In Cases such as *Omega*⁶⁷ and *Schmidberger*⁶⁸, the Court has used the third element to enhance the balance of the different fundamental interests involved. It is thus only applicable if it falls under the scope of Community law.

Notwithstanding that Directives 2003/86/EC, 2003/109/EC, 2005/71/EC and Directives on highly skilled migrants⁶⁹ and a single permit⁷⁰ give a significant margin of discretion to Member States in the implementation process, the rights under the provision of these Directives are within the scope of Community law. As a result, national admission requirements, measures, and possibilities to terminate residence permits of third-country nationals must comply with the principle of proportionality.⁷¹

3.3. Charter of Fundamental Rights of the European Union

All the provisions adopted in the EU, whether national or on the Union level, should comply with the Charter of Fundamental Rights of European Union, the EU principle of laws and the international human rights documents. However, the Charter is legally binding only when implementing Union law, as it is mentioned in Article 51 of the Charter. The Courts in *Annibaldi*⁷² stated as, when there is no specific link between the national provision and the EU law, the Court has no jurisdiction to

⁶⁷ Case C-36/02 *Omega* [2004]ECLI:EU:C:2004:614.

⁶⁸ Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333.

⁶⁹ Council Directive 2009/50/EC, on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

⁷⁰ Directive 2011/98/EU, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

⁷¹ Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. pp. 193-197

⁷² Case C-309/96 *Annibaldi* [1997]ECLI:EU:C:1997:631.

interpret national standards. Thus, the ECJ in *Wachauf*⁷³ also confirmed that, Member States are bound by EU general principles when “implementing Community rules”. The *ERT* doctrine⁷⁴ also provides that the general principles are binding to Member States when they pass measures that derogate from Union law.

Though, the scope of Union law has been expanded to situations where there is a link or connection between the national legislation and the EU law or where there is any negative or positive EU law, obligation for the Member State.⁷⁵ AG Bot in *N*⁷⁶ and the also the Court in that case, were on the idea that the right to good administration enshrined in Article 41 should apply to bodies and institutions of the Member States when they act within the scope of EU law not because its a general principle but also because it is a fundamental right. This interpretation was confirmed in the later case *M*.⁷⁷ The same approach of the scope of Article 41 is in line with the interpretation of Article 51 given by the Court in *Åkerberg*.⁷⁸⁷⁹

However, lately there has been a change in Courts direction regarding the relationship of the Charter and General Principles. In *YS and others*⁸⁰ and also in *Khaled Boudjilida*⁸¹ the Court and also AG Sharpston in *YS*, held that the right to good administration in the Charter is only addressed to the institutions and bodies of EU. However, AG Wathelet in *Khaled Boudjilida*, did not share the same opinion. Ac-

⁷³ Case 5/88, *Wachauf v. Federal Republic of Germany* [1989] ECLI:EU:C:1989:321.

⁷⁴ Case C-260/86 *ERT* [1991]ECLI:EU:C:1991:254.

⁷⁵ Ippolito Francesca (2015) *Migrations and Asylum Case before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to test*. European Journal of Migration and Law. Faculty of Political Science, University of Cagliari. page: 2-3

⁷⁶ Case C-604/12 *H. N. v Minister for Justice, Equality and Law Reform and Others*, EU:C:2014:302

⁷⁷ Case C-277/11 *M*, ECLI:EU:C:2012:744, para 84.

⁷⁸ Case C-617/10 *Åkerberg*, EU:C:2013:105

⁷⁹ Groussot. X, Hettne. J and Petursson G.T. *General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union*, Paper No 01/2016, April 2016. page: 12-13

⁸⁰ *Joined Cases C-141/12 Y.S. v Minister voor Immigratie, Integratie en Asiel and C-372/12 Minister voor Immigratie, Integratie en Asiel v M, S.*, EU:C:2014:2081, paras. 66-69

⁸¹ *C-249/13 Khaled Boudjilida v Préfet des Pyrénées-Atlantiques*, EU:C:2014:2032

ording to AG Wathelet its neither in consistent nor in accordance with the Courts previous case *N*, to inference from the wording of *Article* 41 of the Charter, the presumption that Charter introduces an exception to the rule laid down in Article 51 and enables Member States not to apply it when they are implementing Union law.⁸²

The failure of the Court of Justice, in clarifying the scope and interpretation of Article 51(1) of the Charter, has severe consequences for the efficiency and predictability of human rights protection in domestic jurisdictions⁸³. As the Court itself in Opinion 2/13 held that, fundamental rights are ‘at the heart of that legal structure’. Moreover, the ECJ in that Opinion claims that it has authority over the law of ECHR.⁸⁴

The Charter contains several rights related to third-country nationals, such as the right to respect family life, home, and communication (Art. 7). Article 15(3) recognises the right to the same working condition as the Union citizens for all legal workers in a Member States. Article 18 and 19 explicitly define the right to asylum and prohibition of deportation of the third-country national, who are under a serious risk of being subjected to death penalty or torture or inhuman degrading treatments. Except for a few provisions in the Charter, such as the freedom to work, the right of establishment and provision of services, which exclusively apply to the EU citizens, other provisions are addressed to everyone.

There is, however, a separate chapter (Art. 20_26) in the Charter on equality which contains two horizontal non-discrimination provisions that state “every one is equal before the law” (Art. 20) and prohibits “any ground of discrimination” includ-

⁸² Opinion in Case C-249/13 Khaled Boudjlida v Préfet des Pyrénées-Atlantiques, EU:C:2014:2032, paras 46 and 47

⁸³ Fontanelli, Filippo. The Implementation of European Union Law by Member State Under Article 51(1) of the Charter of Fundamental Rights. *Columbia Journal of European Law*. Vol 20.2. (2014)page: 196

⁸⁴ Opinion 2/13 of the Court (Full Court) EU:C:2014:2454, para 167. See also: Groussot. X, Hettne. J and Petursson G.T.General Principles and the Many Faces of Coherence: *Between Law and Ideology in the European Union*, Paper No 01/2016, April 2016. page: 17

ing examples of grounds of discrimination based on race, colour, ethnic or social origin, generic features, language, religion or belief and membership of national minority all of which can be relevant for third-country nationals (Article 21[1]).

Thus, the right of third-country nationals to non-discrimination claims on the grounds of nationality based on the Charter is limited. Nationality discrimination is defined separately under Article 21(2), which indicates that it does not fall under the general prohibition of discrimination under the Article 21(1). As a result, based on Article 21(2) any discrimination on the grounds of nationality “within the scope of the application of treaty and without prejudice to its specific provisions” is prohibited. Consequently, discrimination based on nationality toward third-country nationals by national legislation, state authorities, or private actors, might escape from the general scope of Article 21(1).⁸⁵

Article 52(1) lays down that any derogation from the rights and freedoms recognised by the Charter must comply with the principle of legality, proportionality, and necessity. Hence, difference in treatment could be recognised to be disproportionate if it goes beyond what is justified or necessary in status between citizens and non-citizens.⁸⁶

3.4. Related General Principles Mentioned in the Directives:

A. Direct discrimination: Article 2 of both Directive 2000/43/EC⁸⁷ and Directive 2000/78/EC⁸⁸ indicates that discrimination on grounds of racial or ethnic

⁸⁵ Wiesbrock, Anja. Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe, Danvers, USA. 2010. page: 163-167

⁸⁶ Wiesbrock, Anja. Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe, Danvers, USA. 2010. page: 167-168

⁸⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Official Journal L 180 , 19/07/2000.

origin is prohibited. Direct discrimination under Article 2(2) arises when a person in a comparable situation is treated less favourably than another on grounds of race or ethnic origin or any ground mentioned in Article 1 of the Directive. Although this kind of discrimination is rare in civil and administrative cases, direct discrimination does not depend on the perpetrators intention; the only thing that needs to be shown by the victim is that differential treatment on the prohibited ground has occurred. As a result peoples try to avoid the charges of discrimination by applying other means that do not appear to be discriminatory but have the effect of favouring certain group to exclusion of others.

B. Indirect discrimination: Under the same Article of the Directives,⁸⁹ indirect discrimination occurs when an apparently neutral provision, criterion, or practice put a person of a racial or ethical origin at a particular disadvantage compared to other persons.

C. Objective justification: Generally, there is no justification for direct discrimination except in limited occasion, such as Article 2(5) of the framework Directive that states discrimination related to employment is permitted if the different treatment or measure is necessary for the public security and maintenance of public order and prevention of crimes and rights of others. Article 4 of both the framework and race Directive stated that the differential treatment on any of the prohibited grounds would not be considered as discrimination if the differentiation were based on the “genuine and determining occupational requirements” which has a legitimate and proportionate objective. However, in order to comply with the Directive like any exception to the any principle, this exception to the discrimination principle needs to be read restrictively.

⁸⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Official Journal L 303 , 02/12/2000.

⁸⁹ Article 2(2) of both Directive 2000/43/EC and Directive 2000/78/EC

Indirect discriminations can only be justified if they pursue a legitimate objective and the means to achieve those objectives are necessary and proportionate. This means that any justification based on stereotypes related to ethnic or religious affiliation are excluded from this scope.

The Court of Justice in the *Bilka Case*⁹⁰ announced indications to the criteria that national courts are to consider when deciding whether a discriminatory act is objectively justified or not. Accordingly, the discriminatory measure must: (1) correspond to a real need; (2) be appropriate to achieve the objective pursued; and (3) be necessary to that end.⁹¹

3.5. International Obligations?

3.5.1. GAMM (Global Approach to Migration and Mobility)

In the area of refugees and asylum, respecting human dignity and showing solidarity is the mutual concern in both Stockholm Programme and GAMM: “Connected to basic principle of human rights and the Convention related to the Status of Refugees is the importance of asylum seekers being offered a decent treatment regardless of in what Member State they turn in their application of asylum”. (Stockholm Programme 2010:32) The same concept had also been mentioned in GAMM.(GAMM 2011:16)⁹².

⁹⁰ Case 170/84, *Bilka- Kaufhaus GmbH v Weber von Hartz* [1986] ECLI:EU:C:1986:204. Para 30-37

⁹¹ Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. page: 177-181

⁹² Stockholm Programme 2010:4 Action plan, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Brussels 20.4.2010

Although in GAMM, a communication is written by the European Commission to the European Parliament, the Council, the European Economic and Social committee and the Committee of the Regions, which according to DG Home Affairs webpage: “Is to be regarded as the overarching framework for the EU external migration policy, complementary to the EU foreign policy and development cooperation” the document has repeated many parts of the Stockholm programme but the differentiation is when describing “the others”.

Accordingly, there is a distinction between mobility and migration. Mobility consists of short-term visitors, tourists, students, researchers, business people or visiting family members while migration is not specifically defined. Thus according to GAMM the three categories are EU citizens, short-term visitors and migrants. While mobility seems as something positive, perhaps due to individual’s short-stays that brings benefits for the tourist sector and do not risk the taking of a job in the EU citizens migration is more complicated. Mobility is covered under VISA policy and migration is interlinked with that.⁹³

“European policy in the organisation and facilitation of legal migration and mobility within the GAMM is based on the premise of offering employers wider opportunities to find the best individuals for vacancies on the global labour market.” (2011:12) The dominating norm behind labour migration is to satisfy employers wishing for special types of labour, either because the competence can be scarce on the EU market or because it is non-existent. In the text, it also becomes clear that the labour migrants the EU needs are “highly skilled workers”. (GAMM 2011:12) The access to the EU for these skilled workers must therefore be facilitated. As a logical consequence to this comes the ambition for the EU to strengthen the “capacity to anticipate labour market and skills need”. (GAMM 2011:13)

⁹³ Plathner, Christine. A common EU migration policy? EU immigration and asylum policy from the perspective of regime complexity. (Master thesis) Lund University, spring 2013. page: 26-27

3.5.2. Third-country nationals:

The provisions of third-country nationals aims to accomplish the objectives of the establishment of an area of freedom, security, and justice do not aim to abolish intra-union border controls.

The European Community entered into an agreement with World Trade Organisation (WTO) to liberalise trade in services which also includes a framework of natural persons to take part in service provisions. Therefore, measures regarding their entry and residency should facilitate this process. As a result, the Community's migration policy regarding entry and residence should aim to give full effect to the community's commitment to GATS (General Agreements on Trade in Services) and their policy to boost their commitment under the declared policy. Hence, in the context of GATS, the provision of services includes the establishment of permanent presence, while the Community equivalent article regarding services is Article 49 EC which does not. Therefore, it should be understood in a larger concept to include other establishment provisions, as well as Article 43 EC.⁹⁴

Chapter 4

4. **Swedish Law⁹⁵**: The following provisions are related Articles regarding issuing visa to economic migration and short-term visa applicants. [Entry and extension visa conditions].

4.1. Economic Migration & Short-term visa (Entry and extensions visa conditions)

⁹⁴ The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, page: 51

⁹⁵ The First number according to Swedish law represent the chapter and the second number after the colon represent section numbers.

4.1.1. Discrimination Act (Diskrimineringslagen) 2008:567

1:4(2) indirect discrimination is to be disadvantaged by the application of a provision, criterion or procedure that appears to be neutral but which may put people of certain sex, certain gender identity or expression, certain ethnicity, certain religion or other beliefs Certain disability, certain sexual orientation or age, unless the provision, criterion or procedure has a legitimate purpose and the means used are appropriate and necessary to achieve the purpose.⁹⁶ This Article has been implemented in the same way of the wording of the EU Directives regarding equal treatment.

4.1.2. Aliens Act (Utlänningslag) 2005:716⁹⁷

2:3 According to this Article third-country national, who travels in or stays in Sweden shall have a Schengen visa or national visa. Lag (2014: 198).

3:1 This Article refers to the Visa Code regarding the condition of granting visa.

5:5 Article five regarding resident permit states that permanent residence permit may be granted to a foreigner who has had for a total of four years in the past seven years.

1. Residence permit for work or EU Blue Card issued by Sweden, or
2. Residence permit for studies related to education at the postgraduate level.

Residence permits may be granted to a foreigner who has his or her supply ordered otherwise than by employment. If the foreigner is to pursue a business activity, he or she must be able to carry the activity in question. Lag (2014: 777).

⁹⁶ Diskriminerings ombudsmannen: Discrimination Act, <http://www.do.se/other-languages/english-engelska/discrimination-act/>.

⁹⁷ Utlänningslag, Sverige Riksdag, https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716

5:10 A temporary residence permit may be granted to a foreign national who wishes to stay in this country for work, studies, a visit or to conduct business activities. lag (2008: 884).

6:2 Work permits may be granted to a foreigner, who is offered an employment, if:

1. The employment allows him or her to support, and

2. The salary, insurance cover and other terms of employment are not worse than the terms of Swedish collective agreements or practices in the profession or industry.

Work permits according to the first paragraph may only be granted if the recruitment procedure is compatible with Sweden's commitments within the European Union.

Work permits may also be granted to a foreigner participating in an international exchange or if it follows from an international agreement or agreement with another country. Lag (2008: 884).

These provisions however, do not provide safeguarding measures guaranteeing the rights given to applicants. According to Swedish Migration office website (*Migrationsverket*), as regards today, work permit residence permit extensions which has been applied online, will take between twelve to fifteen months, and for those who applied by paper it will takes between twenty-six to thirty months. Moreover, according to the website, these waiting time numbers are not promising. As a result, after sending the applications, if the waiting time process changes to a longer period, there is no guarantee the previous shorter time would apply to the applicants.

6:2a A work permit pursuant to section 2, first paragraph, may not be given for more than two years. Nor should it be more than the time of employment.

The total period for work permits pursuant to section 2, first paragraph, may not exceed four years. However, if there are special reasons, the total permit period may exceed until six years.

A work permit pursuant to section 2, first paragraph, shall be linked to a particular employer and refer to a certain kind of work. After a total period of two years, the permit shall be linked only to a particular kind of work. Lag (2014: 777).

6:9 Anyone with a EU Blue Card shall report to the Migration Board about:

1. The employment termination, or
2. The agreed salary no longer reaches the pay threshold underlying the EU Blue Card. Lag (2013: 606).

6a:1 An alien who is offered a highly qualified employment in Sweden with an employment period of at least one year shall be granted a residence and work permit for highly qualified employment (EU Blue Card), subject to section 2 or 3, if:

1. The salary is at least one and a half times the average gross salary in Sweden (wage threshold),
2. The salary, insurance cover and other employment terms are not worse than the terms of Swedish collective agreements or practice in the profession or industry,
3. The foreigner can show that he or she has or has applied for a comprehensive health insurance that applies for three months from the entry into Sweden, and
4. The recruitment procedure is consistent with Sweden's commitments within the European Union.

6:12 An EU Blue Card shall not be revoked, pursuant to the paragraph 9, if the foreign national demonstrate that the failure to fulfil the obligation to notify Migrationsverket of the employment termination or that agreed salary no longer reaches the pay threshold underlying the EU Blue Card, pursuant to Section 9, is due to reasons that he or she could not handle it.

7:4 In assessing whether a residence permit should be withdrawn under Section 1 or 3 from an alien who has entered the country, account shall be taken of the ties that the alien has to Swedish society and of any other arguments against withdrawing the permit. In making such an assessment particular attention shall be paid to:

- 1) the alien's personal circumstances,
- 4) how long the alien has been in Sweden.

7:7e A temporary residence permit for work for a foreigner who has been granted a work permit in accordance with Chapter 6. Section 2, first paragraph, shall be revoked

1. The conditions for the work permit according to Chapter 6. Section 2, first paragraph, for any reason other than the termination of employment, is no longer met, or
2. The foreigner shall not commence work within four months from the date of validity of the permit.

If the foreigner's employment has ceased after the foreigner has been informed that an investigation has been initiated pursuant to the first paragraph, but before a decision to revoke is taken, the provisions concerning revocation in section 3, first paragraph, shall apply. The period shall then be four months instead of three. Lag (2014: 776).

4.1.3. Amending Aliens Act⁹⁸ (2006:97) SFS 2014:38

4:21b A case of residence permit for work shall be decided by the latest within Four months from the date of submission of the application. If there are special reasons or if the application needs to be completed, the time may be extended. The applicant shall Notified of the extension.

⁹⁸ ändring i utlänningsförordningen (2006:97) SFS 2014:38

4.1.4. Amending Aliens Act⁹⁹ (2006:97) SFS 2006:262.

8 ch. Handling of cases relating to permanent resident (for third-country nationals who resided 5 continuous years in Sweden and in the last 2 years had EU blue card)

10a§: A case of permanent residence in Sweden according to Chapter 5a. of the Aliens Act (2005: 716) shall be decided not later than six months after the application was filed, unless there are special reasons. The person granted a permanent residence in Sweden shall be informed of the meaning of this position. Regulation (2006: 262).

4.1.5. Amending Aliens Act (2006:97) SFS 2013:601¹⁰⁰

5a ch. EU Blue Card (turnaround)

1 §: A case of EU Blue Card pursuant to Chapter 6a. 1§ of the Aliens Act (2005: 716) shall be settled within 90 days of submission of the application. If the application needs to be completed, the time may be extended. The applicant shall be notified about the extension. Lag (2013:601).

4.2. Remarks regarding the regulations:

The abovementioned provisions, define a set of obligations and rights as well as clarify, the consequence of not fulfilling the obligations from the applicant's side, whereas, these laws do not guarantee any safeguard measures, in case where the applicant' rights of legal certainty, good administration or indirect discrimination is breached.

⁹⁹ ändring i utlänningsförordningen (2006:97) SFS 2006:262.

¹⁰⁰ ändring i utlänningsförordningen(2006:97) SFS 2013:601.

Chapter 7.7 of Aliens Act 2005:716, regarding the condition of granting or rejecting the permanent residence permit, for those staying in Sweden based on work visa with temporary residence permits, has been approved in 2014¹⁰¹, however, the law is applied retroactively by Swedish authorities. Consequently, those who obtained work visa, before 2014 and have been working all these years in Sweden, their permanent residence permit application gets rejected, based on the fact, that they could not fulfill the criteria which was set out in later years, specifically in 2014.

Recently¹⁰², it has been proposed that¹⁰³ the government should take adequate measures to improve the labor immigration law and make easier rules. Accordingly, the government did not act to combat, either the abuse of the labor immigration system, or the long periods of processing work permits¹⁰⁴. The following is quoted from the proposed amendment:

"The government suggests that revocation of the work permit does not need to happen if the employer itself has corrected the shortcoming (i.e. the mistake). The employer can correct shortcomings by for example correcting incorrectly registered information about absence, sign a necessary insurance or retroactively pay the salary the work permit holder should have had."

¹⁰¹ 7 kap. 7 e § utlänningslagen (2005:716)

¹⁰² June 14, 2017

¹⁰³ Lagrådsremiss, Möjlighet att avstå från återkallelse av uppehållstillstånd för arbete när arbetsgivaren självmant avhjälp brister i arbetsvillkoren, Regeringen överlämnar denna remiss till Lagrådet. Stockholm den 24 maj 2017. <http://www.regeringen.se/49ba50/contentassets/62aa05c578674f27a06f47377208e2a7/mojlighet-att-avsta-fran-aterkallelse-av-uppehallstillstand-for-arbete-nar-arbetsgivaren-sjalvmant-avhjalpt-brister-i-arbetsvillkoren.pdf>

¹⁰⁴ Sverige Riksdag, http://www.riksdagen.se/sv/dokument-lagar/arende/betankande/riksrevisionens-rapport-om-arbetskraftsinvandring_H401SfU22. Accessed 2017-06-29.

"Migrationsverket need to pay attention, if an employer regularly uses the possibility to fix shortcomings in a later stage instead of fulfilling the conditions at the time of the employment. In that case, the work permit should be revoked".¹⁰⁵

The proposed amendment, however, even in case of coming into force as a law, can be called a “too little, too late” resolution. First, it will stop deportation of worker, if the employer notices its own mistake and correct it, before Migrationsverket discover them in the application. However, the proposed amendment, does not stop the process of deportation of those, who are subject to the current law. Second, it’s an unsatisfying redress; since, letting the problems to be fixed before the Migrationsverket discover them, demonstrate that, it is recognized that some mistakes are non-intentional, even if, they are not discovered by the employer or employee before Migrationsverket finds it. Moreover, it demonstrates that, the consequences for serious employers and workers are not proportional to the mistake have been made. Thus, if punishment of the worker, for the mistake of the employer, is not acceptable, it should not happen at all, whether the worker was lucky to find out about the mistake or not.

However, the government is on the idea that, allowing the worker to correct the mistake, after Migrationsverket has found out about them, will open up for exploiting the system. They, therefore, will put together a committee, to investigate, how to shape new proposals that avoid punishing employer and employees, for an unintentional mistake, meanwhile, preventing the possibilities of exploiting the system.

On the other side, for the processing of assessment of the visa applications, there is no such a system, to keep record of the fair process of the waiting times lists, and to trace the track of the applications in the queue. It is possible that in some cases,

¹⁰⁵Lagrådsremiss, Möjlighet att avstå från återkallelse av uppehållstillstånd för arbete när arbetsgivaren självmant avhjälp brister i arbetsvillkoren, Regeringen överlämnar denna remiss till Lagrådet. Stockholm den 24 maj 2017. <http://www.regeringen.se/49ba50/contentassets/62aa05c578674f27a06f47377208e2a7/mojlighet-att-avsta-fran-aterkallelse-av-uppehallstillstand-for-arbete-nar-arbetsgivaren-sjalmant-avhjalpt-brister-i-arbetsvillkoren.pdf>.

where applicants hire migration lawyers, depending on the credibility and reputation of the lawyer, their application, might be handled in a significantly short time after lodging the application. This happens in a situation that, some other applications, do not get the chance to be opened by migration consular after months of waiting time. This system of processing applications, can jeopardize the principle of good administration as well as the indirect discrimination.

Chapter 5

5. The EU Asylum System

The Convention relating to the Status of Refugees and its Protocol have established a common set of rules connected to the refugees in need of international protection, which is called the Common European Asylum System (CEAS). On June 12, 2013, the European Parliament also made an agreement to put a common asylum system in place by 2015. As a result, the current asylum system includes the Asylum Procedure Directive (2005/85/EC), which sets the norm for the application procedure, the Reception Condition Directive (2003/9/EC), which sets the minimum standards for the reception of the applicants such as accommodation, food, medical care and access to education for minors, and also Qualification Directive (2011/95/EU) for a uniform status of refugees. All of these directives constitute the minimum standard to make it more possible for Member States to achieve these requirements in their national law; “The **doctrine of direct effect** makes it possible for individual asylum seekers to take states to the domestic courts if standards set out in the directives are not followed” (Kaunert 2009: 155_156). As a result, these directives improved the migrant’s right to a large extent especially when it comes to the right to education for

minors. The right to access to the labour market, however, depends on the Member State policy.¹⁰⁶

5.1. Return policy

EU governments were discussing a law that could forbid illegal migrants from re-entering the EU territory from 2005. As a result, the Commission's "return Directive"¹⁰⁷ plays an important role regarding this desire.¹⁰⁸

5.2. Purpose of inclusion of asylum policy in EC Treaty within the context of Member States international commitments and the framework of the EU's Constitution:

The European Union is characterised by a balance of power between the Union and Member States. These powers are transferred by Member States to the Community in order to accomplish certain goals of the Community. Therefore, the scope of these transferred powers depends to a large extent on the reasons and objectives at which these powers were transferred to in the first place.

Asylum policy was related to Union objectives, such as abolition of border controls and free movement of persons. Therefore, the treaty has tied minimum standard temporary protection for an asylum applicant with the abolition of intra-states border controls. Some measures regarding asylum policy are exclusively attached to the establishment of the area of freedom, security and justice, such as:

- Minimum standards on the reception of asylum seekers;

¹⁰⁶ Plathner, Christine. A common EU migration policy? EU immigration and asylum policy from the perspective of regime complexity. (Master thesis) Lund University, spring 2013. p. 39

¹⁰⁷ Council Directive 2008/115/EC OF of 16 December 2008 ,on common standards and procedures in Member States for returning illegally staying third-country nationals. L 348/98.

¹⁰⁸ Shengelia, Tamar. EU Migration Policy, Tbilis State University, 2010. p. 37

- Minimum standards with respect to qualification as a refugee;
- Minimum standards on procedures for granting or withdrawing refugee status;
- Promoting a balance of effort between Member States in receiving and bearing the consequences of refugees and displaced persons.

Other measures in the field of asylum are specifically tied to the objectives of free movement of persons and elimination of intra-state border controls, such as:

- Criteria and mechanisms for determining the Member State responsible for considering an asylum application; and
- Minimum standards for giving temporary protection to displaced persons and persons otherwise in need of international protection.¹⁰⁹

Relating to the abolition of intra-union border controls for people, the rules of asylum policy also needed harmonisation at union level regarding the movement of asylum seekers and refugees in a “borderless” territory in order to, for example, recognise the Member State responsible for processing of their applications. However this transferred competence to the Union level should be comprised of the highest standard of human rights obligations of the Member States so that the applications do not result in Member States being in breach of their international obligations.¹¹⁰

¹⁰⁹The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, page:18-19

¹¹⁰The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, page: 21

However, it is not sufficiently accurate to consider the purpose of asylum policy only from the Community constitution's perspective, taking into account the fact that asylum policy more than any other area of Union activity, employs the human rights obligations of the Member States. It should, therefore, also be considered from the Member State's external-obligation perspective towards the rest of the world. Thus Member States are not only parties to international convention, which solely regulates the issue of refugees (the Geneva Convention), but also are engaged under the ECHR (Article 3).

Accordingly, in the context of asylum, the idea of security relates to security from prosecution. This concept of security can also be found in International human rights law such as Article 14 of the Universal Declaration of Human Rights under the right to seek asylum. Yet the objectives of the Community must include protection for the freedom to seek asylum by reaching the borders of a safe country. Thus, asylum policy in the amended EC Treaty is expressly defined as a necessary means to achieve internal market objectives.¹¹¹

Based on Article 1A of the Geneva Convention, "asylum" refers to a person who is outside of his or her country of origin or habitual residence owing to a well-founded fear of persecution on the basis of race, religion, nationality, membership of a social group or political opinion and is unable or owing to such fear, unwilling to return there. A wider definition of asylum policy covers the area related to the treatment to the asylum seekers. The European definition not only covers persons under the Geneva Conventions but also those who are under a serious "risk" that they would suffer torture, inhuman or degrading treatment or punishment if returned to their country of origin or their habitual residence therefore returning them to such a places would contradict Article 3 of the European Convention on Human Rights 1950

¹¹¹The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, page: 21

(ECHR). This definition also can also be found in international document such as Article 3 UN Convention Against Torture 1984.

According to a report in 2000, there was an increasing “race to the bottom” in different EU Member States regarding the reception of asylum seeker that led to an extension to the treatment of persons given less than Geneva Convention refugee status. The basis for this kind of different protection, such as subsidiary protection is in Article 3 ECHR, which covers a wider group in need for protection when compared to the Geneva Convention. While the Geneva Convention should be interpreted by national courts the ECHR instead has the advantage of being a supra-national court, the European Court of Human Rights, which is in charge for interpretation of the rights contained in the convention¹¹². As a result of all the aforementioned issues, the inclusion of asylum was included in the EU’s constitution and EU common migration policy.

Chapter 6

6. The concept of legal migration and attracting highly skilled workers

While the European Union was promoting the idea of solidarity to asylum seekers and people in need of protection, the existing policies of Australia, Canada, and USA were attracting highly skilled workers. The European Union fell in the global competitions to attract workforce in order to fulfil its demand in areas such as information technology, specialists, doctors, nurses and business managers. Until 2010, the commission’s estimation was that the EU needs to attract approximately twenty million skilled workers over twenty years to resist the deficit in the engineering and computer

¹¹²The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, page: 14-16

sectors in order to become the most competitive and dynamic knowledge-based economy in the world.

When the EU “Blue Card” was suggested as a common working visa for highly skilled workers in Europe, they were supposed to have a salary of at least 1,5 times the average gross annual salary in the concerned Member State, guaranteed for at least for a year; they should be able to acquire the two-year resident status of the Member State where the job was offered, which would make it possible for the worker to apply for the extension of the visa and continue working in any EU member country. Although it is up to Member States to decide how many workers they want to attract, but the Commission decides the criteria of acquiring the “Blue Card” and ensures health care, tax and pension rights.¹¹³

Following the establishment of an area of freedom, security and justice in the Lisbon Treaty, measures were supposed to be adopted in the areas of asylum, immigration and rights’ protection for third-country nationals. According to the treaty, the Council is responsible for adopting measures on migration policy relating to conditions of entry and residence, standards for procedures regarding the issuing long-term visas and residence permits, and measures defining the rights and conditions for legal third-country residing in one Member State to live in other Member States.

Thus, the Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment was adopted. In it’s preamble (7) it was mentioned that “in order to achieve the goals of the Directive it is necessary to facilitate the admission of highly qualified workers and their families by establishing a fast-track admission procedure and by granting them equal social and economic rights as nationals of the host Member State in a number of areas”. However, the principle of Community preference was on the Member State’s

¹¹³Shengelia, Tamar. EU Migration Policy, Tbilis State University, 2010. page: 35-36

agenda. Besides that, the Member States had the right to determine the volume of admission of third-country nationals entering their territory for the purpose of highly qualified employment. Furthermore, the preamble affirms that the Directive should not confer the more rights on the Blue Card holder than the pre-existing, social security Community law in the area where the third-country nationals are practicing the cross-border element.

This is why when the Commission proposed a Council Directive¹¹⁴ on the third-country nationals' paid employment and self-employed economic activities, the Committee of the Region (CoR) gave its recommendation that the Commission regarding "the phenomenon of migration should not be analysed purely on the labour market needs, but also need a political response from civil society for breakdown the international system of protection of human rights based on the United Nations 1984 Universal Declaration of Human Rights".¹¹⁵ Furthermore, the CoR, due to the shortage of unskilled workers in the EU, should encourage the Commission to go further in its proposal, by establishing a harmonised procedure for obtaining a visa entitling them to seek work of these kind.

6.1. Circular migration: Managing migration in the European way

According to the GAMM, circular migration enables Europe to benefit from the labour migration when it is needed and then this migrant, with the new knowledge that he has learned, can go back to his country when there is no longer a need for his

¹¹⁴ Commission of European Communities, 2001/0154 (CNS), Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, Brussels, 11.7.2001 COM(2001) 386 final

¹¹⁵ Opinion of the Committee of the Regions, having regard to the Proposal for a Council Directive on the conditions of entry and residence of third- country nationals for the purpose of paid employment and self-employed economic activities [COM(2001) 386 final — 2001/0154(CNS)] and the Proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months [COM(2001) 388 final — 2001/ 0155 (CNS)], point 2(2).

labour performance in Europe¹¹⁶. This idea of circular/flexible migration was also mentioned in the Stockholm Programme by the European Council. As mentioned above, the European Council in the Stockholm Programme invites the Commission and Council to implement policy plan on Legal Migration. Consequently, the Directive 2014/36/EU¹¹⁷ on the condition of entry and stay of third-country nationals for the purpose of employment as seasonal workers was adopted by the Commission and Council.

The Directive applies for the stays not exceeding 90 days and regards the third-country nationals residing outside the territory of the Member State who retain their principle place of residence in a third country. It also covers legal and temporary third-country nationals in the territory of a Member State and who apply to be admitted for the purpose of employment as a seasonal worker. However in exceptional cases, the Member State can decide to allow seasonal workers who are already present in the Member State, to extend their stay more than once, provided that the maximum period does not exceed more than nine months in any twelve-month period. However, the Member State could reject an application in cases where the criteria were not fulfilled, the employer has been sanctioned under Article 17, or the business has been wound up, or if Member State considered that the vacancy could be filled by national or Union citizens.

The idea, which is, designed based on European market's demand and also apparently prevents the challenge of brain drain in the origin country, neglects the most important part in this formula: The worker himself is a human being and not a tool. As one of commentators accurately mentioned, this idea ignores that, both in reality and in practice, people tend to root themselves where they go by changing lifestyles,

¹¹⁶ GAMM 2011:19

¹¹⁷ Directive 2014/36/EU of the European Parliament and of the Council, on the condition of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] L 94/375.

learning the host-country languages, buying houses, finding friends, or even finding partners for life; therefore, forcing them to return to their country of origin is not in accordance with human dignity which is one of the core values that the EU wants to uphold.¹¹⁸

6.2. Migrants integration

European Commission has founded a “Migrants Integration Policy Index”, which is a survey that ranks EU countries according to the effectiveness of their integration laws. This includes laws on family reunification, residence rights, access to the labour market, access to nationality and, discrimination and political participation rights. Accordingly, Sweden is the second from the top in the list, which shows that the integration laws have been effective¹¹⁹.

6.3. Unified Migration policy

The European Commission had initiated a communication for collaborating unified migration policy to discuss what has been done and what should be done in the area. Accordingly, new commitment should be based on the needs of migrants whether currently or in future period. It should define a plan where the result would be the general opinion about what kind of immigration the EU needs with the accompanied legal measures in order to ensure the normal integration, while also balancing between state policy and policy at the EU level as well as making a logical connection between the various sector policies.¹²⁰

6.4. Condition of entry and residence of third-country nationals:

¹¹⁸Plathner, Christine. A common EU migration policy? EU immigration and asylum policy from the perspective of regime complexity. (Master thesis) Lund University, spring 2013. page: 30

¹¹⁹Shengelia, Tamar. EU Migration Policy, Tbilis State University, 2010. page: 39

¹²⁰Shengelia, Tamar. EU Migration Policy, Tbilis State University, 2010. page: 54

According to the European Commission, “[a] European area of freedom, security and justice must be an area where all people, even third country nationals, benefit from the effective respect of fundamental rights enshrined in the charter of Fundamental Rights of the European Union.” It further continues that the Treaty of Lisbon “gives the Union the new objectives of combating social exclusion and discrimination, and reaffirms the objectives of promoting equality between women and men.”¹²¹

6.5. Single Permit Directive¹²²

The framework Directive establishes sets of rights for single permit holders and includes a provision on application procedures and the permissions. However, the admission conditions are covered in four other Directives on highly qualified workers, seasonal workers, remunerated trainees and intra-corporate transferees. The scope of this Directive has been limited only to single permit third-country nationals workers although the possibility for Member States to adopt a provision for granting equal treatment to other legally resident third-country nationals who do not hold a single permit exists. The single permit is defined under Article 2(b) and (c) for those who were granted access to the labour market. Thus, based on article 3(1), certain categories of third country nationals such as self-employed and seasonal workers are exempted from the scope of this Directive. Article 4 provides a one-stop shop system procedure, simplified for the admission of third-country nationals intending to reside in an EU Member State.

6.6. The Handbook

¹²¹ Action Plan Implementing the Stockholm Programme, COM (2010) 171 final, Delivering an area of freedom, security and justice for European Citizens. Page 2& 3.

¹²² Directive 2011/98/EU, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

•Part I point 3.7 of the Handbook defines a “*uniform format*” for visa stickers which was established by Council Regulation (EC) 1683/95 laying down a uniform format for visas. Accordingly, uniform visas, visas with limited territorial validity, and airport transit visas issued by Member States are printed as a uniform format for visa stickers.

•Part I point 3.8 enumerates the three categories of allowance to enter/ or stay in the territory of the Member State that are not covered by the Visa Code but in some cases have the right to circulate within the territory of the Member States according to the conditions laid down. Accordingly:

▸ National long-stay visas: Procedures and conditions for issuing national long-stay visas (for intended stays of more than three months) are covered by national legislation, although holders of a national long-stay visa have the right to circulate within the territory of the Member State in accordance with Regulation (EC) No (EU)265/2010 of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 (the Schengen border Code) in regards to the movement of persons with a long-stay visa.

▸ Resident permits: These are also covered by national legislations however according to the principle of equivalence between short-stay visa and residence permits, this category in case of holding valid travel document can also circulate within the territory of Member State.

▸ Facilitated Transit Document (FTD) and Facilitated Railway Transit Document (FRTD)¹²³: According to the Article FTD and FRTD have the same

¹²³ On 1.7.2003, a specific travel regime for transit between the Kaliningrad region and mainland Russia entered into force. It introduced two types of documents – a Facilitated Transit Document (FTD) and a Facilitated Railway Transit Document (FRTD) - needed for crossing the territory of the Member States in order to enable and facilitate the travel of third-country nationals who travel between two parts of their own country which are not geographically contiguous. At

value as a visa and must be issued in a uniform format by consular authorities in accordance with the Council regulation (EC) No 693/2003 and Council Regulation (EC) No 694/2003. These two types of transit allowance can not be issued at the border.

- According to part II Point 1.1.1 of the Handbook regarding the operational instructions of the visa application, a resident permit issued for third-country nationals is equivalent to a uniform visa. The handbook also contains information regarding dealing how to deal with an applicant travelling to several Member States and the time of lodging an application.

- Part II point 3.2.2 hence states that a visa application in principle should be lodged at least 15 calendar days before the intended visit and cannot be lodged earlier than three months before the start of intended visit. Visa applicants are required to obtain an appointment and based on Article 9(2) of Visa Code, the deadline for obtaining an appointment shall as a rule, not exceed two weeks. The capacity of Member State's consulate should be adopted in a way that this deadline is complied with even during peak seasons.

- Part II point 6. of the Handbook discusses the supporting document, which can help the relevant authority to assess whether an applicant fulfils the entry conditions or impose a possible risk of illegal immigration or security risk. The legal basis for the supporting document is provided in Visa Code Article 14 and Annex II. Based on this chapter, the Member State's consulates in any location shall assess the need to complete and harmonise the list of supporting documents in order to determine the local circumstances. The Visa Committee should approve this harmo-

present only Lithuania applies this regime. The FTD serves for multiple direct transits by any kind of transport by land through the territory of Lithuania. It is issued by Lithuanian authorities and is valid for a maximum period of up to three years. Each transit based on an FTD cannot exceed 24 hours. (The Handbook)

nised list in accordance with the procedure described in the Handbook, part II, point 4.4. The supporting document should be adopted in order to define:

- The purpose of intended journey;
- Local circumstances; and
- The length and destination of the intended journey.

•Part II Point 6.2 defines that supporting document should provide evidence of following:

- Proof of accommodation or sufficient means to cover the cost of accommodation;
- Possession of sufficient means by applicants both for duration of intended stay and for the return to its country; and
- Information which enables the assessment of the applicants intention to leave the territory before the expiry of the visa.

Annex 14 sets out a non-exhaustive list of supporting documents that the consulate can ask for the applicants to provide. These supporting documents should be assessed in relation to individual applicants and, as a result, one document can render the other redundant.

•Point II point 6.2.1 lists a number of documents for the assessment of the applicant's intention to leave the territory of Member State before the expiry of the visa such as poof of financial means in the country of residence, poof of integration to the country of residence such as family ties or professional status. Point 7.3. states, however, that the level of authenticity and reliability of documents and statements depends on the local conditions and as a result may vary from one country to another and from one type of document to another.

• In part II point 7.12, regarding the assessment of the risk of illegal immigration and the applicant's intention to leave the territory of the Member State, defines that during the assessment of the profile, the consulate should define 'profiles' of applicants that present specific risk, according to local circumstances which also takes into account the general situation in the country of residence. Accordingly, profiles can be based on the applicant's socio-economic situation, although each individual applicant should be assessed on his own merits. It further explains that an unemployed applicant may benefit from a very stable financial situation and well paid employed might consider illegal stay for personal reasons. As a result, all elements should be taken into account to ensure an objective assessment. Although, this point in its last part, affixes further information that can be also relative such as:

- Previous illegal stays in the Member State;
- Previous abuse of social welfare in the Member State; and
- Credibility of the inviting person when the invitation letter is presented.¹²⁴

Chapter 7

7. Analysis

7.1. Procedural practice of issuing visa for legal migrants

7.1.1. Self-employed third country nationals

¹²⁴ The handbook for the processing of visa applications and the modification of issued visas based on: Commission Decision C(2010) 1620 final. Consolidate version: 9 July 2014

In 2001, ten years after the Tampere Programme, the Commission proposed a Directive about the condition of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities (Com (2001) 386 of December 2001).¹²⁵ The Directive was however, withdrawn by the Commission in 2006. Currently, there is no such a specific Directive that can guarantee the right of third-country nationals as self-employed workers, which causes a gap of rights for this group of economic migrants.

Council Regulation (EC) No1030/2002¹²⁶, in its recital declares that, whereas Amsterdam Treaty, confers on the commission a shared right of the initiatives to be taken regarding the relevant measures for harmonising immigration policy. Paragraph 38(c)(ii) of the Action Plan of the Council and Commission, on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice¹²⁷, provides, for the preparation of rules concerning procedures for the issue by Member States of long-visas and residence permits. The same regulation in Article 6 states that, measures necessary for implementing this Regulation shall be adopted in accordance with Article 7 (2) of the same regulation.¹²⁸

Yet, after the unsuccessful proposal by the Commission's Directive, there has been no such a harmonised regulation regarding the administrative procedure of residents permits issued by Member States for third-country nationals as self-employed persons. However, in Sweden's amended version of the Alien Act (ändring i utlänningsförordningen) (2006:97) Chapter 5, section 5 and 10, the notion of being self-

¹²⁵ COM (2001) 386: Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

¹²⁶ Council Regulation (EC) No1030/2002 laying down a uniform format for residence permits for third-country nationals

¹²⁷ OJ C 19, 23.1.1999, p. 1.

¹²⁸ Article 7(2): Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply.

employed or conducting business, came together in the same article about workers. Although, when the legislators address the waiting time turnaround for work permits in chapter 4 section 21b, there is no reference to self-employed persons.

As a result, since the EU has not yet adopted necessary measures for third country nationals as self-employed, the question remains: if national institutions lack national regulatory measures supporting the right of ‘good administration’ in this matter, and if, national institutions, are not bound by Article 41 of Charter of Fundamental Rights regarding the ‘good administration’, then how this fundamental right would be protected?

While the waiting time of the immigrants (self-employed/ worker) visa turnover in practice is not limited to the appointed law, there is not such a system for example in Sweden that can enable the immigrants to travel around and be able to come back during this practically unlimited waiting time.

7.1.2. Workers of third-country nationality

Council Regulation (EC) No1030/2002 sets down the rule that Member States and the Commission should consider a uniform format for third-country nationals’ resident permit in order to prevent counterfeiting and falsification, that enables Member States to enter further information, utilize new biometric features that are in line with technological developments.

A general framework Directive (2011/98/EU) on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State was proposed by the Commission and ratified on the last working days of 2011. This Directive established a common set of rights for third-country workers who are legally residing in a Member State based on the Regulation (EC)

No1030/2002. The objectives of this Directive are twofold: First, it intended to simplify and harmonise the various rules applicable to third-country nationals regarding the residence in a Member State for the purpose of work by introducing a single permit issued in a single procedure. Second, the Directive aimed to fill the gap of rights between third-country nationals and Citizens by granting sets of rights that included equal treatment compared to nationals in that country.

In general, the Directive lays out the right to work, reside and move freely in the issuing EU country, plus the same conditions as the nationals of that country regarding the working conditions, health and safety, access to goods and services, education and training. However, under specific criteria, EU countries, could restrict equal treatment on certain issues such as social security benefits or access to education or training.

Article 3(2)(k) excludes the self-employed third-country national migrants from the scope of this Directive. Article 4(3) states that the single application procedure is without procedure for a visa that may be required for the initial entry.

Article 5(2) states that the competent authority shall adopt a decision on the complete application as soon as possible and, in any event, within four months of the date on which the application was lodged. However, it follows that the time limit in this paragraph may be extended in exceptional circumstances due to the complexity of the examination of application, although national law shall determine the consequences in cases with no decision during the time limit provided for in this paragraph.

According to Article 8(1) of the Directive, negative decisions must be reasoned on the basis of criteria provided for by the Union or national law. Moreover, it follows from Article 8 (2) that the decision should be subject to legal challenge in the Member State, in accordance with the national law. However, it appears from the

third clause of the same article that the right to legal review does not apply in cases where the application has been considered inadmissible or has not been processed on the ground of the volume of the admissions of third-country nationals coming for employment and on that basis, need not to be processed.

Council Directive 2009/50/EC on EU Blue Card holders in Article 11, regarding the procedural safeguards, states that the competent authority shall adopt a decision on complete applications as soon as possible and at the latest within 90 days of the application being lodged. Any consequences of a decision not having been taken within the specified time provided for this Article shall be determined by the national law of the relevant Member State.

In Amending the Immigration Ordinance (*ändring i utlänningsförordningen*) (2006:97, SFS 2013:601) Chapter 5a section 1, in Swedish law regarding the Blue Card holder's, the Ordinance states that the case of the EU Blue Card shall be settled within 90 days, at latest, after the application has been lodged. Moreover, in Amending the Immigration Ordinance (*ändring i utlänningsförordningen*)(2006:97, SFS 2014:38) Chapter 4 section 21b, regarding regular workers, it is determined that the application work permit shall be decided within four months, at the latest, after the application has been lodged.

However, in practice, on the website of the Migration office in Sweden (*Migrationsverket*) the processing time for issuing a work visa is constantly changing based on their workloads and usually the waiting time are not less than six months. Additionally, that as the migration office itself on its website mentions, the stated time is not based on promising that the cases would be handled within that time.

In reality, as has been discussed and debated on news¹²⁹ social media¹³⁰ by those who are dealing with these administrative procedures, the extension of work residence permits for people who are already working and residing in Sweden usually, lasts more than twelve months.

As it was explained in Chapter 3, to invoke the *principle of legitimate expectations*, three conditions should be met. There must be an action undertaken by an authority in the form of adopting administrative measures that has justifiably created legitimate expectation on the part of an individual.¹³¹ As a result, not only have the **rights to good-administration** for these people been jeopardised, but it would also raise the question of the **principle of legal expectation**. Based on law and regulations, the people who apply for work permission in Sweden or in Europe in general should not expect that the time for acquiring permanent resident permits would last more than four years. Besides that, the administrative system, would put this group of applicants, waiting to receive their resident permits, in a discriminatory position compared to other group of workers. While the previously referred to third-country nationals during the waiting time are working and paying taxes during the waiting time, like other groups of workers, their positions of being unable to travel or even visit their own country suspends them for an uncertain period of time.

Moreover, extending the work resident permit can be withdrawn or revoked after four years. This is based on article 7 ch. 7e § of Aliens Act (*Utlänningslag*) 2005:716, when the conditions for even one month has not been fulfilled or if the employer had mistakenly paid less amount of the insurance fee _even if inconsiderable amount_ than the amount he was supposed to pay based on the law in 2014.

¹²⁹ Lifvendahl, Låt dem bara fortsätta jobba. Svesnka Dagbladet, <https://www.svd.se/lat-dem-bara-fortsatta-jobba>.

¹³⁰ There has been a Facebook page “Work Permit Holders Association” regarding the status of work permit applicants. https://www.facebook.com/WPHASweden/?hc_ref=NEWSFEED. Also, another Facebook page named Just arrived had also various discussions regarding the problem. https://www.facebook.com/pg/JustArrivedSE/posts/?ref=page_internal.

¹³¹ Wiesbrock, Anja. Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe, Danvers, USA. 2010. pp. 190-191

It has been explained in Chapter 4 regarding the Swedish law that, the regulation, has been applied retroactively by Swedish authorities. Consequently, those who obtained work visa in before 2014 (e.g 2010) and have been working all these years in Sweden, their application for permanent residence permit, were assessed based on the law that was implement in 2014. Thus, the Swedish authority rejected applications, in cases that they did not fulfill the criteria which was set out later in 2014 and apply the new law retroactively which is in breach of the **principle of legal certainty**.

In chapter 4, it was explained that the Swedish government proposed a new amendment regarding the same Article¹³² that, adequate measures should be taken to improve the labor immigration law and make easier rules. Accordingly, the government did not act to combat, either the abuse of the labor immigration system, or the long periods of processing work permits¹³³. The proposal however, even in case of coming into force, can be called a “too little, too late” proposal. First, it will stop deportation of workers, in cases when, the employer notices its own mistake and correct it, before Migrationsverket discover them in the application. However, it does not stop the process of deportation of those, who are subject to the current law while the law is applying to them retroactively.

Second, it’s an unsatisfying redress; since, letting the problems to be fixed before the Migrationsverket discover them, demonstrate that, it is recognize that some mistakes are non-intentional, even if, they are not discovered by the employer or employee before Migrationsverket finds it. Moreover, it demonstrates that, the consequences for

¹³² Lagrådsremiss, Möjlighet att avstå från återkallelse av uppehållstillstånd för arbete när arbetsgivaren självmant avhjälp brister i arbetsvillkoren, Regeringen överlämnar denna remiss till Lagrådet. Stockholm den 24 maj 2017. <http://www.regeringen.se/49ba50/contentassets/62aa05c578674f27a06f47377208e2a7/mojlighet-att-avsta-fran-aterkallelse-av-uppehallstillstand-for-arbete-nar-arbetsgivaren-sjalvmant-avhjalpt-brister-i-arbetsvillkoren.pdf>

¹³³ Sverige Riksdag, http://www.riksdagen.se/sv/dokument-lagar/arende/betankande/riksrevisionens-rapport-om-arbetskraftsinvandring_H401SfU22. Accessed 2017-06-29.

workers are not proportional to the mistake that have been made. Thus, if punishing the worker, for the mistake of the employer, is not acceptable, it should not happen at all, whether the worker was lucky to find out about the mistake or not.

Third, the proposed amendment does nothing for the mistakes that, even in case of recognition, cannot be fixed. Thus, in cases where applicants, were unaware of mandatory vacation law,¹³⁴ and did not spend the mandatory vacation time out of work; their applications get rejected. However, neither Swedish Migrationsverket, or the employer has the obligation to inform the workers, regarding their obligation of taking mandatory vacation. Migrationsverket, does not provide the third-country national workers with the information regarding their rights and obligation in Sweden when the visa is issued. Despite that, neither in chapter 7 regarding the withdrawal, nor in chapter 8 regarding the rejection and expulsion of a third-country national of Swedish Aliens Act (2005:716)¹³⁵ there has not been a provision regarding the expulsion based on not taking vacation. As a result, the minimum employee leave, that aimed to support the rights of worker in the first place, defeats its objects and becomes a barrier for attaining their right.

Although, the last paragraph of 6ch. 12 § of the Amendment of Aliens Act (2005:716, SFS 2013: 606) regarding the lack of short incomes in the agreed pay threshold or employment termination, states : An EU Blue Card shall not be revoked, pursuant to the paragraph 9, if the foreign national demonstrate that the failure to fulfil the obligation to notify Migrationsverket of the employment termination or that agreed salary no longer reaches the pay threshold underlying the EU Blue Card, pursuant to Section 9, is due to reasons that he or she could not handle it.¹³⁶ However, such a provision not only does not apply for regular worker but also is hard to demonstrate

¹³⁴ Semesterlagen förarbeten (prop. 1976/77:90)

¹³⁵ Utlänningslag (2005:716).

¹³⁶ Lag om ändring i utlänningslagen (2005:716) SFS 2013:606.

As a result, for instance, if a third-country national travels to his or her home country and, due to some problem, could not be able to be back at work and fulfil the specified salary requirement, he or she would be jeopardising his or her permanent residency right. This legal measure does not comply with the principle of proportionality, which implies that a measure should not be disproportionate to the objective pursued and less restrictive measures should be taken if it is equally effective. Whereas, considering the average salary of each year, which would achieve the same objective.

On the other side, even imposing fines or considering extending the period of acquiring permanent residency in cases when the negligence matters would be even more proportionate than trading four years of working, with the lack of required salary for one month. Considering the point that, people tend to root themselves in the host country after living for a long period of time, expelling them for a mistake that sometimes is out of their control affects their dignity.

7.1.3. Short-Stay Visa (Tourist Visa)

Swedish aliens act, in its amended version (Lag om ändring i utlänningslagen (2005:716) SFS 2011:705) states that the condition for granting Schengen visa is included in Visa Code.

The basic conditions regarding the issuance of a Schengen visa was initially set out by Schengen Convention in 1990. It was supplemented by decisions of Schengen Executive Committee, namely by the establishment of CCI (Common Consular Instructions). Following the entry into force of the Amsterdam Treaty, a new visa list

regulation¹³⁷, with a fully harmonised blacklist as well as whitelist¹³⁸ countries was adopted by Council in 2001. The previous regulations regarding the Schengen visa and 1999 EC Regulations were repealed plus the power was conferred to the Council to Amend CCI.¹³⁹ In June 2009, the Visa Code Regulation was adopted and nearly all of the previous measures concerning the conditions of issuance of Schengen visas were annulled.¹⁴⁰

The Visa Code Regulation 810/2009 establishes the procedure and conditions for issuing visas. Title III of the Visa Code obliges Member States to cooperate with each other in order to prevent the situation in which the application cannot be processed because the Member State responsible does not have any consulate or representation from another Member State in the third State concerned.¹⁴¹

The Regulation, both in the preamble and in Article 39, states that “the reception arrangement for applicants should be with due respect for human dignity” besides that, Member States should ensure that the measures taken are proportionate to the objective pursued and have a high standard with good administrative practices. This regulation respects fundamental rights particularly by observing the Convention for the protection of Human Rights and by the Charter of Fundamental Rights of the European Union.

Article 9(1) determines that visa applications cannot be lodged more than three months earlier than the intended date of travel, except in regard to multiple entry visa holders who can lodge the application six month before the travel date. The same ar-

¹³⁷ Council Regulation (EC) No 539/2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

¹³⁸ Blacklist countries: whose nationals need to obtain visa for entering Schengen territory, while whitelist: whose nationals are exempt from obtaining visa for entering Schengen territory.

¹³⁹ Steve Peers, EU Justice and Home Affairs, Third Edition, Oxford University Press, New York. page: 250-258 (2011)

¹⁴⁰ Steve Peers, EU Justice and Home Affairs, Third Edition, Oxford University Press, New York. page: 262 (2011)

¹⁴¹ Steve Peers, EU Justice and Home Affairs, Third Edition, Oxford University Press, New York. page: 264 (2011)

ticle in part (2) illuminates that where the applicants are required to obtain an appointment, as a rule, the appointment shall take place within two weeks after lodging the application.

Article 14 sets the condition for granting Schengen visa:

(c) documents indicating that the applicant possesses sufficient means of subsistence both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or that he is in a position to acquire such means lawfully, in accordance with Article 5(1)(c) and (3) of the Schengen Borders Code;

(d) information enabling an assessment of the applicant's intention to leave the territory of the Member States before the expiry of the visa applied for.

Article 16 set up a standard price for the application fee that applicants are obliged to pay: a standard fee of €60 not only when the visa is issued but to provide a harmonised rule on the use of travel agents in the visa process and also for liberalising the rule on the representation of one Member State by another.¹⁴²

Article 39(3) states that consular staff, while performing their task, shall refrain from discrimination on the grounds of sex, racial or ethnic origin, religion, belief, disability, age or sexual orientation.

Regarding the refusal reasons for issuing a visa Article 32(1)(b) states that if there are “reasonable doubts” to the veracity of the documents or to the reliability of applicant's statements or his intention, to leave the territory of the Member States before

¹⁴²Steve Peers, EU Justice and Home Affairs, Third Edition, Oxford University Press, New York. page: 259 (2011)

the expiry of the visa applied for the related authority can reject the application based on these facts. Part (2) of the same Article states that the refusal decision and the reasons on which that decision was based shall be notified to the applicants by means of standard form set out in the annex referred to that Article.

The same Regulation for issuing short-term visa states that Commission should two years after the provisions of this regulation have been applicable evaluate the result that have been achieved against the objective and of the implementation of the provision of this Regulation.

As it is mentioned in the Handbook Part II, 7.12, *“Profiles could be based on the stability of the applicant's socio-economic situation, but each **individual application shall be assessed on its own merits** irrespective of possible "profiles" having been drawn up”*.

Accordingly, the sanction of a Country cannot per se, leads to rejection of an application but, the whole situation together, should be assessed; and the reason for that should be determined by the consulate authority. Moreover, not all the doubts can lead to rejection of a visa application, rather, the **doubt should be reasonable**. According to the principle of proportionality, measures taken for the concern of illegal migration, should be proportionate to the objective pursued, which means that the consulate, cannot reject an application based on a doubt that has not any ground to be reasonable.

7.1.3.1. Case law

One of the most important case laws, that is the founding ground for Member State decision making in rejecting the application, is the *Koushkaki* Case Law¹⁴³. Mr Koushkaki, an Iranian national, in 2010 applied for a visa for the purpose of a visit to Germany. The German authority, rejected the application on grounds that, Mr Koushkaki, could not prove that, he had sufficient means of subsistence, whether for the duration of stays envisaged or to return to his country of origin.

Following the appeal brought by Mr Koushkaki against the first decision, the German embassy in Tehran, rejected the visa application once more but replaced the decision on the ground that following the examination of all the relevant circumstances, there were significant doubts as to the applicant's intention to return to his country of origin before the expiry of the visa applied for. Moreover, it was held that, Mr Koushkaki lacked economic ties to his country of origin. As a result, although Mr Koushkaki, met the entry conditions set out in Article 5(1)(a), (c) and (d) of Schengen Border Code, to which Article 21(1) of the Visa Code refer, but the only remaining issue was, whether, Mr Koushkaki, constituted a threat to public policy within the meaning of Article 5(1)(e) of the Schengen Borders Code due, to a possible risk of illegal immigration.

One of the questions that the Verwaltungsgericht Berlin referred to the Court of Justice for preliminary ruling was whether the Visa Code established a mandatory right to the issue of a Schengen Visa if the entry conditions, in particular those of Article 21(1) of the Visa Code, were satisfied and there were no grounds for refusing the visa pursuant to Article 32(1) of the Visa Code, and whether those authorities had some discretion in the examination of the application for a uniform visa.

¹⁴³ Case C-84/12, *Koshkaki v Bundesrepublik Deutschland* [2013] ECLI:EU:C:2013:862.

In the Judgement of the Court of Justice for preliminary ruling in this case, which was held in 2013, regarding the procedures and conditions for issuing uniform visas for the purpose of visit, the court stated that:

“It is not clear from the wordings of Article 32(1) alone, as grounds of refusal, whether they are exhaustive list or whether on the contrary, the competent authorities of the Member States have the power to refuse to issue a uniform visa by relying on a ground not provided for in the Visa Code. However, the interpretation that the Visa Code does no more than governing the procedures for the issue of visas and oblige Member States to refuse to issue visas in certain specific situations, without harmonising the conditions for the issue of visas, is incompatible with the objective of the Visa Code.

Likewise, in order to achieve those objectives and harmonised application of the common visa policy, and in order to prevent different treatment of visa application which is also mentioned in recital 18, the competent authorities cannot refuse to issue a uniform visa unless one of the grounds for refusal listed in Article 32(1) and Article 35(6) of the Visa Code applies to the applicant”.

However, the competent authorities have a wide discretion, as to the assessment of the relevant facts, in order to determine, whether the grounds set out in those provisions preclude the issue of the visa applied for. Assessment of the individual situation of a visa applicant, to determine, whether there is a ground for refusal of his application, entails a complex evaluations based, inter alia, on the personality of that applicant, his integration in the country where he resides, the sociopolitical and economic situation of that country, as well as, the potential threat, imposed by the entry of that applicant to the public policy, internal security, public health or the international relations of any of other Member States.

The Court both in para 65 and 67, affirms that “*So far as concerns the latter ground for refusal of a visa, Article 32(1)(b) of the Visa Code provides, inter alia, that a visa is to be refused where there is **reasonable doubt** as to the applicant’s intention to leave the territory of the Member States before the expiry of the visa applied for.*”

66. Among those grounds for refusal, it is important to distinguish the ground based on the threat which the applicant may present to the public policy, internal security or public health of one of the Member States, as provided for in Article 32(1)(a)(vi) of that code, from that relating to a possible lack of intention on the part of the applicant to leave the territory of the Member States before the expiry of the visa applied for, as provided for in Article 32(1)(b).

The Court goes further by stating in para 68 that “*There is no requirement that the competent authorities must, be certain as regards whether or not the applicant intends to leave the territory of the Member States before the expiry of the visa applied for. It is, however, their task to determine whether there is a reasonable doubt as regards that intention*”.

This wide discretion, however, can target the principle of indirect-discrimination prohibition, since the assessment of the risk of illegal migration, imposed by applicants, estimates based on personal views rather than a harmonised list of facts. National authorities, as a result, can have two different opinions, when assessing two similar cases. The assessment, gets more sensitive, when obtaining a Schengen visa becomes more possible when the invitee is of European origin rather than a third-country national origin. Rejecting applicants with the arbitrary decision-making, without conduction on the valid facts, leads to the **discriminatory** way of evaluating applicants.

Moreover, the wide discretion can neither reflect the will of the lawmakers nor does it conform to the principle of good administration and proportionality. Part II, point 7.2 of the Handbook it is defined that, when assessing the risk of illegal migration, Member State authorities shall take into account the credibility of the inviting person or previous illegal stays. However, there is no individual assessment of the cases and, the credibility of the inviting person, usually does not play a roll. This happens in a condition that, applicants who apply for a Schengen visa, based on Article 16 of the Visa Code, are obliged to pay the standard fee of 60€, for their application to be assessed; thus, there is no guarantee for their right of good administration to be protected.

In practice is, as it was mentioned in the handbook, the level of authenticity of documents can vary, in different countries. As a result, although the documents are means of proof of intention to leave the territory of the Member States, but in many cases, are neither capable to eliminate the risk of illegal immigration nor are suitable to recognise such a risk; since employment as well as having or lacking a family ties, in country the of residence, does not necessarily defines the bound to the referred country. In countries where, there is not strong administrative system, obtaining fake employment contract or marriage of convenience, to show the integration to the country of origin, are means to circumvent the requirements.

On the other side, however, this negative effect causes that, consulate authorities apply a very restrictive view and are mostly reluctant to issue visa for family members, even in cases that the applicants, does not intend to stay in the host Member State, after the expiry of Visa. Consequently, inadequate legislation and improper implementation in national legislation, cause to make a very big damage to others, to obtain a little benefit.

In spite of the Parliament recommendation in their reports on the “*Impact of Amsterdam Treaty*”, for permitting individual to know what are the requirement for fulfilling the criteria for obtaining the visa¹⁴⁴, yet, neither European legislation nor the national regulation, define the tools that short-stay visa applicants, can prove their intention to leave the territory, after the expiry of the visa; which harms the legal certainty. Moreover, none of these regulations guarantee the rights of those, that actually does not intend to stay as illegal immigrants. Accordingly, with this system, we scarify the good to get rid of the bad.

If possessing sufficient means by applicants, for the applicants travel expenditure or having sufficient economic, could be a positive indication to support the applicant’s intention to leave the territory of Member State before the expiry of visa, then asking for a financial guarantee from either the invitee or from the applicants can be more efficient or even more promising for the intention to leave the Member States.

Chapter 8

8. Conclusion

As we have seen in the introduction, the parliament in its report in 2000, expressed its concern regarding the use of arbitrary decision making in the area of issuing visa. Accordingly, the use of threat of illegal migration should not lead to the discriminatory application of rules and criteria, which are against the liberties that European societies have fought hard to obtain and maintain. The Parliament recommended in order to refrain from exercising unacceptable discrimination, the EU can impose clear and precise provisions, **permitting the individual to know what the require-**

¹⁴⁴ The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, p. 41-43

ments for fulfilling the criteria for the issue of a visa were. However, as already mentioned earlier, the level of this legal protection is still ambiguous in different Member States.¹⁴⁵

Then we have seen that, European multi-annual programmes in the area of asylum and migration policy such as the *Stockholm Programme* stressed the points that, **measures** taken in regard to issuing visas **must be proportionate to the objectives** pursued by those measures. Thus, there should be a balance between, on one side, the need to be vigilant in detecting persons posing a risk to public and internal security as well as potential illegal immigrants and, on the other side, the need to ensure the smooth handling of visa applications submitted by persons who fulfil the entry conditions. According to the *Stockholm Programme*, one of the goals that the EU must strive for to maximise the benefit of legal migration and strengthen the EU's competitiveness is "*a uniform level of rights and obligations for legal immigrants comparable with that of European citizens.*"¹⁴⁶

In *Europe 2020 Strategy*, we have seen that the strategy plan is to make an attractive EU for talented individuals, entrepreneurs and highly qualified third-country nationals, which the EU Blue Card Directive¹⁴⁷ already provided such a possibility. Yet, despite the Parliament reports or all the policy plans set out by Commissions programmes, in order to make a uniform level of rights for legal migrants comparable to EU citizens, however, we have seen that in any case contrary to EU citizens, third-country nationals are not protected from discrimination on grounds of nationality based on the scope of either the race Directive or Article 19 TFEU. As a result, based Article 21(2) of the Charter any discrimination on the grounds of nationality only

¹⁴⁵The impact of Amsterdam Treaty on the justice and home affair issues: report for the Directorate General for research, European Parliament, Statewatch/ SEMDOC, January 2000, p. 41-43

¹⁴⁶*Stockholm Programme*, Action plan, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. page: 7. Brussels 20.4.2010

¹⁴⁷Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17-29.

“within the scope of the application of treaty and without prejudice to its specific provisions” is prohibited. Consequently, discrimination based on nationality toward third-country nationals by national legislation, state authorities, or private actors might escape from the general scope of Article 21(1).¹⁴⁸

Although we have seen that, based on both Directives regarding equal treatment,¹⁴⁹ indirect discrimination occurs, when an apparently neutral provision, criterion, or practice put a person of a racial or ethnic origin at a particular disadvantage compared to other persons. Accordingly, indirect discriminations can only be justified if they pursue a legitimate objective which are necessary and proportionate. This means that justification based on stereotypes related to ethnic or religious affiliation are excluded from being justified.

In the area of work and self-employed visa application, we have seen in both chapter four and seven, that the long waiting-time of processing of applications often takes an uncertain period of time more than one year. As a result, a worker or a self-employed applicant, planning to invest their time or investment in a specific country, can never rely on the principle of legal certainty that all the visa requirement issues would be completed during a certain amount of time.

We have explained that, in order to invoke the *principle of legitimate expectations*, three conditions should be met. There must be an action undertaken by an authority in the form of adopting administrative measures that has justifiably created legitimate expectation on the part of an individual.¹⁵⁰ With regards to the Court’s

¹⁴⁸ Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. page: 163-167

¹⁴⁹ Article 2(2) of both Directive 2000/43/EC and Directive 2000/78/EC

¹⁵⁰ Wiesbrock, Anja. *Legal Migration to the European Union, Immigration and Asylum Law and Policies in Europe*, Danvers, USA. 2010. pp. 190-191

judgement in *Khaled Boudjlida*¹⁵¹, that Article 41 of the Charter regarding good administration only applies to EU institutions and not Member states, however, it does not mean that a Member State can ignore this principle and do not apply it, thus, the ECJ assumption was that a Member State will protect this principle in a better way. On the other side, the right of legitimate expectation, for third-country nationals, is breached primarily by the imprecise provisions and lack of legal safeguards provided by the EU in case of breaching their rights.

In chapter 7, we discussed that the work visa applications get rejected in cases where there are minor mistakes in the applications, which in most of the cases, the mistakes are from the part of employers, for paying less amount of insurance than it was ratified in 2014, and we have seen that the Swedish authority applies this law retroactively which breaches the **principle of legal certainty**. Also in cases where the applicants were unaware of mandatory vacation and therefore did not take a vacation, the application get a rejection verdict. However, Migrationsverket could beside the visa card, at least attach a paper, that contained their rights and obligations in Sweden based on obtaining the visa. So that, protecting the right of the worker with minimum leave from the work, does not become a tool endangering their other basic rights. To expect an immigrant to be aware of all the laws, not only related about migration but any other laws with their minor changes is not pragmatic, especially, when it is not even written in the website of Migrationsverket itself. Besides that, many migrants save their vacation time to be able to travel to their homeland, if Migrationsverket itself had complied with the law and had extended the visa, within the period that it was legally bound to, migrants could also travel to their homelands and use their vacation period on time.

Besides that, rejecting the application usually happens when the applicants are applying for their permanent residence permits, even if, the mistake happened in the

¹⁵¹ C-249/13 *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, EU:C:2014:2032

first two years acquiring the visa. This means that, the Migrationsverket approved their condition for the first time, with extending their visas for the other two years, therefore rejecting their application for permanent residence permit means that, Migrationsverket does not even approve its own decision. This would not mean anything except exploiting the worker of third-country nationality for a period of 4 to 7 years. However, neither the taxes, nor the pension insurance that the workers paid for all these years, in case of rejection would be paid back to the worker, thus, these financial compensations are not even considerable, comparing their ruined lives by the rejecting verdict. It should be considered that people tend to root themselves, in the places that they live, forcing them to leave, after all the dedication devoted to the host Member State, is not adherent to human dignity as the first European fundamental right.

We have seen in Swedish regulation the process of visa turnaround, in any case should not exceed more than four months for temporary residence permit and not more than six months for permanent residence permit after the application was filed, whereas, based on Migrationsverket website, the turnaround time can take up to thirty months. With the help of technological development, in order to prevent the possibility of being discriminated or to protect their right to good administration and legitimate expectation, it is not far reaching to originate a system that enables applicants to keep record of the fair process of waiting times lists and to trace the track of cases in the queue.

In part 7.1.1. we discussed, while the immigrants (self-employed/ worker) waiting time for the visa turnover in practice is not limited to the appointed law, there is not such a system for example in Sweden that can enable the immigrants to travel abroad and be able to comeback during this practically unlimited waiting time. Though, the rationale behind this is unclear. If a person is allowed to stay in Member State waiting for his visa to be renewed, why the referred person cannot leave the country and

be able to comeback. A system that could enable the immigrants to travel abroad or to their homeland, could to some extent minor the scope of this uncertain waiting time problem.

In the area of short-stay visa, the judgement of the Court in *Koushkaki*¹⁵² without further clarification, however, not only fails to be consistent with the EU provisions regarding the professional and respectful assessment of visa applications which should comply with Article 4 and 21 of the Charter of Fundamental right¹⁵³, mentioned in the Handbook and Visa Code, as well as European multi-annual migrations programme, but also, it provides the possibility that visa applicants to be subjected to indirect discrimination.

The Court in *Koushkaki*¹⁵⁴, regarding the assessment of short-term visa applications, grants a wide discretion to a Member State consulate authority that may escape from the scope of Article 21(1) of the Charter. With support of this wide discretion, the responsible authority can reject an applicant if there is any reasonable doubt regarding his application. Moreover, the consulate authority does not need to be certain about the possible risk that the applicants may impose. Although, this wide discretion should not mean that, the general principle of EU laws such as good administration, proportionality and equal treatment can be ignored, but, neither the case law, nor any EU provision clarifies what situations applicants are supposed to acquire in order to dispel this doubt.

Consequently, short-visa applicants get rejected usually based on the arbitrary reasoning of the Consulate authorities in different Member States. It is very probable to get a rejected decision for an application from one Member State, even after that

¹⁵²Case C-84/12, *Koushkaki v Bundesrepublik Deutschland* [2013] ECLI:EU:C:2013:862.

¹⁵³The handbook for the processing of visa applications and the modification of issued visas based on: Commission Decision C(2010) 1620 final. Consolidate version: 9 July 2014. (Preamble)

¹⁵⁴Case C-84/12, *Koshkaki v Bundesrepublik Deutschland* [2013] ECLI:EU:C:2013:862.

applicants have previously obtained the visa from another Member State or visa-versa. It is worth mentioning that, based on Schengen visa statistic for consulate, in 2015, about 959,650 applications have been refused by consulate authorities in Europe which means that, Europe earned nearly 58 million euros in refused visa fees¹⁵⁵.

In order to refrain from this massive distrust to the family members of a third-country national, regarding the possibility of illegal stay within the territory of EU, the possible solution might be to consider a system, which based on that, short-stay visa applicants who entered the territory of EU, with invitation, cannot apply for asylum to stay in the territory unless under exceptional circumstances. These exceptional circumstances can consist of sudden war or political changes or geographical disaster that have happened after the entrance of the short-stay visa applicants to the territory of the Member State and was not predictable. These circumstances can of course be defined by the same regulation.

At the end, in my opinion, European Union need to use its competence to harmonize the area of migration policy, to achieve its goal; to make the EU an attractive place, in order to attract talented students and workers to fulfil its demands. This, would not be possible except by protecting their rights. More importantly, European Union, should safeguard the basic human rights that it long fought to obtain and promised to guarantee.

¹⁵⁵ Schengen visa statistic for consulate, 2015, Schengen visa info. <https://www.schengenvisainfo.com/visa-statistics-2015/>. Accessed: 23-05-2017

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