DENIZENSHIP-A NEW FUNDAMENTAL STATUS IN THE EU?

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Abstract

In 1992 the Maastricht Treaty introduced the concept of 'Citizenship of the Union'. By granting EU citizenship the European Union created a common identity for Member State nationals, but the European citizenship granted Union citizenship rights only for EU nationals. For non-nationals, who arrived from third countries (non-EU states) and stayed in one of the EU Member States the regulation about the Union citizenship did not provide Union rights. This paper seeks to interpret the status of third country nationals in comparison to the EU citizens, especially the position of third-country nationals who are long-term residents. This paper argues that as a consequence of litigation by individuals before EU courts and the provisions of the Charter of the Fundamental Rights, TCNs already enjoy a number of European citizenship-related and citizenship-like freedoms, rights, benefits and general principles, which are subject to protection at the EU level. The conclusion of the article is that granting TCNs citizenship-related rights and their analogous interpretation with the rights enjoyed by Union citizens constitute a real alternative to the full extension of Union citizenship, creating the so called European Denizenship.

Keywords: *Migration, third-country nationals, long term residents, EU citizenship, denizenship, non-discrimination.*

DENIZENSHIP- AB'DE YENİ BİR YENİ BİR TEMEL STATÜ?

Öz

Maastricht Anlaşması 1992 yılında 'Birlik Vatandaşlığı' kavramını getirmiştir. Avrupa Birliği, AB Vatandaşlığı tanıyarak Üye Devlet uyrukları için ortak bir kimlik yaratmış, ancak Avrupa vatandaşlığı yalnızca AB uyrukları için Birlik vatandaşlığı hakları tanımıştır.Üçüncü ülkelerden (AB üyesi

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olmayan) gelip bir AB Üye Devletine yerleşen vatandaş olmayanlar için, Birlik vatandaşlığına ilişkin düzenlemeler Birlik hakları sağlamamaktadır. Bu çalışma, özellikle, uzun süreli oturum hakkı edinmiş olan üçüncü ülke vatandaşlarının statüsünü AB vatandaşlarına kıyasla yorumlamayı amaçlamaktadır. Bu makale, üçüncü ülke vatandaşlarının, bireylerce AB mahkemelerine götürülen davalar ve Temel Haklar Şartı hükümleri neticesinde, AB seviyesinde koruma altında olan, Avrupa vatandaşlığı ilintili ve vatandaşlık benzeri bir kısım özgürlükler, haklar, menfaatler ve genel ilkelerden halihazırda faydalanmakta olduğunu ileri sürmektedir. Makalenin vardığı sonuç, üçüncü ülke vatandaşlarına vatandaşlıkla ilintili haklar tanınması ve bunların Birlik vatandaşlarınca kullanılan haklara kıyasen yorumlanması, tam kapsamlı Birlik vatandaşlığına gerçek bir alternatif olarak, bir nevi Avrupa 'Denizenship'i yaratmış olduğudur.

Anahtar Kelimeler: *Göç, üçüncü ülke vatandaşları, uzun süreli oturum hakkı sahipleri, AB vatandaşlığı, denizenship, ayrımcılık yapmama.*

Introduction

After the World War II, Western European states recruited large numbers of foreign citizens to the labour market, followed by their family members. (Atikcan, 2015:7) As opposed to the expectations, these people have not returned home and stayed in the host states. This led to the occurrence of a new group, who has gained a secure residence status but not full citizenship. (Atikcan, 2015:7)

Hammar calls this new group, "whose members are not regular foreign citizens anymore but also not naturalised citizens of the host state, 'denizens'". (Atikcan, 2015:7). The origin of the terms is the English common law dating from the 13th century "by which a foreigner could gain some of the privileges of an English subject" but "remained excluded from appointment to certain public offices". (Walker, 2008:1).

For the most part, "the idea developed within a context of migration and residence". (Walker, 2008:1) Scholars (Benton, 2014; Walker, 2008) define the term denizenship as the status of a person who is lacking citizenship rights while being a permanent member of a national polity. So the term stands for foreign citizens with a legal and permanent resident status in the host state, but has no citizenship because of several reasons. Denizens enjoy "almost full social, economic and civil citizenship rights whereas they only have limited access to political rights". (Atikcan, 2015:8).

In the European Union for non-nationals, who arrived from third countries (non-EU states) and stayed in one of the EU Member States the regulation

about the union citizenship did not provide Union rights. Union citizenship and Member State nationality are inextricably linked to each other, as the former cannot be acquired without obtaining the latter. The Union citizenship discriminates the third-country nationals (TCN) and excluding third-country national residents from Union citizenship rights and creating new dividing lines between 'us' (Europeans) and 'them' (non-Europeans). (Wiesbrock, 2012:64).

So although the EU comes closer to achieving the common identity, which has so long been aimed for; the rights of the TCNs can be said to be ignored and possibly discriminated against in comparison to the EU nationals. So the integration of TCNs would be one of the most important goals of the European integration processes.

Legal Background of the Regulation of Third-Country National Status

Programmes in the field of 'Area of Freedom, Security and Justice'

Because the greatest obstacles to integration arise from differencies among Member States' naturalization regimes and immigration rules, the EU decided to harmonise the status of the TCNs.

The policy of immigration transferred to shared competence between the EU and its Member States. The development of an EU integration policy for third-country nationals started with the entry into force of the Maastricht Treaty, (TEEU 1992) which provided for the possibility of co-ordination in immigration and asylum matters by identifying areas of 'common interest'. With the Amsterdam Treaty 1997 the EU started to develop a common immigration and integration policy as a key component of the 'Area of Freedom, Security and Justice' (AFSJ).

The basis for policy development in the sphere of integration was elaborated by the 1999 Tampere European Council. The conclusions of the Tampere Council - in the context of setting out the political guidelines for the EC immigration - pointed towards an inclusive policy based on equal treatment and a secure legal status, particularly in the case of long-term residents. The Council requested the creation of a „uniform set of rules through which fair treatment of all TCNs residing legally in the EU Member States should be ensured." (Presidency Conclusions, 1999: para.18).

This fair and equal treatment paradigm of integration envisaged that a vigorous integration policy should aim at granting legally resident TCNs rights and obligations comparable to those of the EU citizens (Gyeney, 2011).

Following these rather tentative first steps, integration received renewed attention in The Hague Programme which, stated that greater co-ordination of national integration policies and EU initiatives were needed and that a

framework based on common basic principles. (Brouwer and de Vries, 2015:135-136).

So although some progress has been made towards common entry requirements, harmonization of the national laws regulating the status of TCNs remained second class status.

The TCN status largely remains determined by the law and regulations of the Member States of residence. As a result of this, "TCNs in one Member State lived under a very different national legal regime -and hence have different prospects for obtaining nationality and thence European citizenship". (Becker, 2004:138) These "early instruments of asylum and migration law in the EU, adopted between 1990 and 1999, were generally aimed at controlling and preventing migration and thus strengthened this 'divide' between EU citizens and non-EU citizens". (Brouwer and de Vries, 2015:135)

The "differential treatment concerning the TCNs is not limited to the differences between them and the Union citizens, but also there are serious differences in their treatment among themselves." (Atikcan, 2015:22) Also, there is no coherent set of rights for TCNs in EU law. (Atikcan, 2015:22)

So the EU decided to regulate the TCN status commonly under the Union law, embodying a strong commitment to improve the situation of TCNs in the EU. The European Council aimed at granting legally resident third-country nationals' rights and obligations comparable to those of the EU citizens. (Gyeney, 2011:22).

The Rights of the Third Country Nationals in the EU

EU developed a patchwork of TCN provisions provided different rights regarding residency, free movement, family reunifications, students and researchers in form of EU Directives.

Community acquis on legal migration includes the Directive 2003/86/EC on the right to family reunification (Council Directive 2003/86/EC), Directive 2003/109/EC on the status of long term residents (Council Directive 2003/109/EC), Directive 2004/114/EC on the conditions of admission of students, pupils, unremunerated trainees and volunteers (Council Directive 2004/114/EC), Directive 2005/71/EC on a specific procedure for admitting third country national researchers (Council Directive 2005/71/EC), Directive 2009/50/EC on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment. (Council Directive 2009/50/EC).

Two Directives have been of especial importance when regulating the conditions for the entry, residence and family reunion of TCNs in the

EU: the Directive concerning the status of third-country nationals who are long-term residents (2003/109/EC) and that on the right to family reunification (2003/86/EC).

The Directive on the right to family reunification establishes common standards and criteria for TCNs residing lawfully in a Member State to be reunited with their family members. As the Directive on Family Reunification itself puts it: "Family reunification is a necessary way of making family life possible. It helps to facilate the integration of third country nationals in the Member State." (Directive on Family Reunification, Preamble, Para. 4.).

The Directive 2003/109 on TCNs who are long-term residents recognises an EC status of long-term resident for those who have resided for a period of five years in the territory of a Member State in a regular status.

This Directive establishes the rights and conditions for granting and withdrawing long-term resident status of third-country nationals who meet a number of conditions. (Tutilescu, 2015:199) Persons with this status are entitled to equal treatment as nationals in a range of areas such as employment, education, social security, tax advantages and freedom of association. The most important regulation: granted a conditional right to free movement within the EU. (Tutilescu, 2015:202).

The Long Term Residence Status

Directive 2003/109 EC is the most significant development in the membership politics of the EU in recent years. The Directive structured in four chapters: general provisions (definitions and scope); the long-term resident status in a member state (requirements, application procedure, rights, loss of status); conditions of residence in a second member state once the long-term resident status has been obtained; and final provisions.

A long-term resident is defined as a "third-country national, who has long-term resident status and has met the conditions on the acquisition in question, conditions on the duration, and order and public security". (Walker, 2008:1).

"Besides the necessary criteria to be met for obtaining long-term resident status in the territory of a Member State, the Directive provides travel conditions in another Member State and rules that must be fulfilled to obtain long-term resident status in that State." (Tutilescu, 2015:199)

Third-country nationals who acquires long-term resident status "recognized as equal treatment with nationals on many rights that they have". (Tutilescu, 2015:202) It enables equal treatment as regards "social security, social assistance, social protection and tax benefits recognized national citizens. […]

Access to goods and services and the provision of public goods and services and access to procedures for obtaining housing are guaranteed to long term residents as well as national citizens. Freedom of association, affiliation and participation in an organization of workers or employers or any professional organization and rewards are guaranteed long-term residents too." (Tutilescu, 2015:202).

The greatest achievements of the Directive are:

1. Third-country nationals who have legally resided in a Member State for five years are entitled to a special secure residence status, which can only be withdrawn on certain limited grounds.

2. Persons with this status are entitled to equal treatment as nationals in a range of areas such as employment, education, social security, tax advantages and freedom of association.

3. Third-country nationals are granted a conditional right to free movement within the EU.

4. A long-term resident shall acquire the right to reside in the territory of a MS other than the one which granted him the long-term residence status, for a period exceeding three months. Directive 2003/109/EC cannot be asked to fulfil integration requirements in the second Member State when moving and residing there.

Nevertheless the necessity to transpose the Directive into national law leads to divergencies in the extent of rights enjoyed by TCNs residing in different Member States. For example the Member States, in contrast with the Union citizens, may require additional conditions for third-country nationals to comply with integration measures (and possessing sufficient resources and sickness insurance), in accordance with national law. Every Member State maintains entire freedom to decide on the rights of TCNs until their stay reaches the agreed length of time. This discretionality of States in the application and implementation of the Directive in any case leads to differencies between the real legal position of the TCNs.

The Directive in addition confirms the differential treatment of third country nationals in the EU legal framework too. The Directive and the rights in it applicable only to long term resident, and other groups of third country nationals in the future too remains outside of the scope of the EU law. According to Carrera and Wiesbrock, the EU law can be applied to TCNs only in the following situations:

"1. First, the most obvious case is that of the TCN family members of Union citizens who have exercised their freedom to move to a second EU Member State.

2. …[I]n the scope of international agreements between the EU and third countries. The EU has concluded Association Agreements or Euro-Mediterranean Agreements with countries such as Turkey, Morocco, Tunisia and Algeria, which grant freedom from discrimination on the basis of nationality to nationals from these countries in comparison with EU nationals in fields such as employment, freedom of establishment, service provision and social security. "

3. In the scope of EU immigration law, under the secondary legislation of the EU, e.g. Directive 2003/86/EC on the right to family reunification. (Carrera and Wiesbrock, 2010:342).

It is clear that the adoption of the Long-Term Residents Directive in itself represents an improvement on the legal position of third-country nationals residing in the EU. The Directive strengthens the position of third country nationals in EU law, the creation of a secure status which brings third country nationals closer to the privileged position enjoyed by citizens of Member States, particularly as regards the right to free movement. (Murphy, 2008:171). But the question is, whether this legal status and the rights with this are enough to destroy the differencies and discrimination between the Union citizens and third-country nationals?

New Fundamental Status?

The long-terms third-country residents' category with neither Member State nationality nor European citizenship clearly falls within the denizenship definition, because "the term denizen symbolises limited membership to a polity and access to the rights and services that membership provides, as opposed to the full membership represented by citizenship". (Atikcan, 2015: 8).

The national politics of citizenship in relation to immigrants deeply rooted in sovereignty of States, and are nationality-based. In all European States "there is a common differentiation between the temporary residents who are called aliens and the permanently residents, whose permanent stay gradually makes them members of their state of residence". (Atikcan, 2015: 10). On the national level, a non-citizen holding a permanent residence status would be considered a national denizen. National denizenship could lead to national citizenship and, thus, to European citizenship.

After the legislation of the EU in form of Directives on the EU level, a TCN, meaning a non-EU citizen, holding a European immigration status, such as the long term residence status of the EU, would be considered an EU denizen,

enjoying citizenship-like rights gained through the status. So the Directive created a common EU residence status.

The European long-term residence is a status that gives access "not only to secure residence rights, but also to equal treatment on many aspects of socio-economic rights, and stronger family reunification rights." (Huddleston and Vink, 2015:8) But the right that would make them denizens of the Union, not only of the Member State, is free movement. (Atikcan, 2015: 30). Extending the rights of free movement and residence to TCNs put the status to the Union level, and granting Union citizenship right not only in relation to one of the Member States, but in the European Union by the Union law. European denizenship entails mobility rights within the Union, but does not extend to political participation and diplomatic protection abroad. (Kostakopoulou, 2002:200).

In this sense, long-term residence status may be viewed as a significant step towards full inclusion through naturalisation or, in its strongest manifestation as an alternative for naturalisation. So the long term residence status of the EU could be a temporary status on the way to full citizenship, but could see as a permanent sub-citizenship status; or as a status which is moving beyond the citizenship/non-citizenship dichotomy in understanding political membership. Other scholars (Bauböck, 1997) (Jean Monnet Working Papers, 2007) (Joppke, 2009) (Kostakopolou, 2008) rather talk about the category as a transnational membership or an enactment of quasi-citizenship as new European citizenship of TCNs. (Beutke, 2015:6).

Although the Directive created a common EU long term residence status and promote uniform rights which are as close as possible to those enjoyed by EU citizens, TCNs remained in a restricted position.

Relationship between Union Citizenship and TCN Status

This new situation and the European long-term residence status has been reinforced by the The Charter of the Fundamental Rights and the case-law of the European Court of Justice too.

The Charter of the Fundamental Rights also contributed to the legal status of TCNs. "Article 45(2) states that freedom of movement and residence rights 'may be granted', in accordance with the EC Treaty, to TCNs legally resident in the territory of the Member States." (Atikcan, 2015: 25). This provision in the Charter „Every person has the right" or „Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State" means that the number of rights enshrined in Art. 20 TFEU are already enjoyed by subjects of the Union without any requirement of having a Member State nationality, such as the right to petition to the European Parliament and

the European Ombudsman could be extended. For instance, third country nationals legally resident in the EU could be given the opportunity to participate in local elections and in the elections of the European Parliament.

The Charter and the Treaties prohibits discrimination on the ground of nationality, so it must be applicable not only to EU citizens but also to TCNs.

Such an interpretation would "allow TCNs to rely on this provision where they are treated differently on account of their nationality in any area falling within the scope of the EU treaties." (Wiesbrock, 2012:81). But the allowing third-country nationals to rely on a right to non-discrimination at the Union level would open the door to a large number of claims, not only concerning the distinction made between different categories of third-country nationals in national immigration law implementing Union legislation, but also regarding the distinction made between Union citizens and third-country nationals. (Wiesbrock, 2012:81). Were third-country nationals to be covered by the principle of non-discrimination on grounds of nationality, which is one of the core rights of Union citizenship, this would diminish the dividing line between third-country nationals and Union citizens significantly, as well as undermining the validity of making such a distinction. (Wiesbrock, 2012:81).

The European Court of Justice also show willingness to interpret to concept of Union citizens to third-country nationals too. In several cases the CJEU interpreted the rights of the TCNs analogously to those of the Union citizens.

In *Chakroun* case, (Rhimou Chakroun *v.* Minister van Buitenlandse Zaken, 2010) the Court for the first time established a direct link between the rights of Union citizens and their family members on the one hand and the rights of TCNs on the other. Drawing an analogy between the case law applicable to TCNs and EU citizens, in *Chakroun* the Court established "a unified norm for protection of family life of TCNs in the EU, ruling out any distinction made at the national level according to the place and/or period of time that the marriage was concluded." (Wiesbrock, 2012:81).

The principle of equal treatment also appears in the ruling of the CJEU. In the *Metock* case (Metock and Others, 2008) the Court ruled on the entry and residence rights of TCN spouses of EU citizens relying on the fundamental principle of the free movement of persons. The claim for a residence permit under the Citizens Directive 2004/38/EC was denied on the basis that the applicants had not previously been lawfully resident in another Member State. This provision had been initiated on the basis of the previous *Akrich* ruling of the CJEU. (Secretary of State for Home Department *v*. Hacene Akrich, 2003). In his case the CJEU overruled the decision of *Akrich*, and stated that the benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State. (Metock and Others, 2008).

Although the Directive 2003/109 on long-term resident TCNs "includes a right to equal treatment, but Article 11 (4) grants the Member States a discretionary power to limit such equal treatment." (Brouwer and de Vries, 2015:137). "This discretionary power was limited by the CJEU in the judgment *Kamberaj* (Kamberaj *v.* Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano and others, 2012) where it emphasized that a derogation from the right of equal treatment in this field should be interpreted strictly, in order to safeguard the rights of TCNs to 'social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources' as protected in Article 34 of the EU Charter on Fundamental Rights." (Brouwer and de Vries, 2015:137).

In its recent case law the Court seems to have developed an alternative to the full extension of Union citizenship to TCNs. Contrary to earlier case law, it has started to interpret the rights and concepts applicable to TCNs in analogy with the case law governing the situation of Union citizens.

The Court's opinion is that the acquisition of a residence right under one of the Directives covering third-country nationals bring the situation within the scope of EU law. As a result, the Directives' provisions should be interpreted in the light of the Court's case law on Union citizens. (Wiesbrock, 2012:91).

The case law developed in interpreting Union citizens' rights thus serves as guidance in interpreting provisions governing the situation of TCNs. (Wiesbrock, 2012:67). With these steps the Court could in the same time clarify the rights of the TCN's and with the help of the non-discrimination principle develope and make more comparable the treatment of the EU citizens and TCN's.

Conclusions

The status of TCNs is consequently "automatically excluded from EU citizenship rights without any option of naturalisation at the Union level." (Atikcan, 2015: 19). The Union citizenship is still an "all-or-nothing category". (Atikcan, 2015: 19). The option to extend the EU citizenship to TCNs who are permanently resident in the Member State would cause Union citizenship to be "seriously devalued in the eyes of citizens of the Member States by reducing it to a generalized denizenship, disconnected from the notion of consensual membership in a political community." (Bauböck, 1994). On the other hand for most immigrants is important to keep the linkages to their country of origin in this way. Often, they also want to keep the opportunity to return to their country of origin.

But the creation of Union denizenship would supplement, rather than replace the Union citizenship. (Atikcan, 2015: 29). Just like national

denizenship "it would be a partial membership through enjoyment of only certain citizenship rights." (Atikcan, 2015: 29). Besides free movement right "as it forms the essence of such a status, Union denizens can also be granted local voting rights." (Atikcan, 2015: 31).

Today in the EU, the third-country nationals enjoy EU rights through a variety of secondary law instruments that have been adopted. These include, most importantly, the Directive on long-term resident third-country nationals (Directive 2003/109), which provides for a secure residence right and free movement for economic and other purposes across the EU for (most) third-country nationals who have completed five years lawful residence in a Member State. The Directive strengthens the positions of third country nationals in EU law, and brings third country nationals closer to the privileged position of the EU citizens.

Undisputedly the recent legislations concerning the long-term residence and social security rights of TCNs are developments "establishing the basis of Union denizenship". (Atikcan, 2015: 30). "This approach to equal rights for foreigners as an 'alternative' to naturalisation is similar to the so-called 'denizenship' model, where states grant equal economic, social, and certain – but not full– political rights to foreigners, but without facilitated naturalisation." (Huddleston and Vink, 2015:4) "Foreigners can easily become long-term residents and even voters at local levels, where access to national citizenship is restricted." (Huddleston and Vink, 2015:5)

Many scholars stated (Beutke, 2015:78) that the national limitations and added requirements restricted the initial goals of the long term residency status significantly. According to many authors, this made the long term residense status unattractive and would explain the low take-up or failure of the new Directive.

Nevertheless long-term residence EU status, contextualised in the European Union as a form of European denizenship, constitutes an alternative or substitute to citizenship. (Beutke, 2015:78). The EU long-term status is more favourable in those Member States where a stricter naturalisation regulations hinder naturalisation and lead to lower naturalisation rates. But as a result of the EU developements the naturalisation is not the most important goal of the integration process.

In addition to the analogous interpretation of Union rights, lead the extension of citizenship-related rights to TCNs, rather than the full extension of citizenship. The number of rights enshrined in Article 20 (TFEU) that are already enjoyed by subjects of the Union, without any requirement of having a Member State nationality. Almost all of the rights contained in the Charter apply not only to EU citizens, but also to third-country nationals. It can be said

that third-country nationals in the EU are entitled to enact citizenship in the EU now via the exercise of Charter rights. The Charter has moved towards the equalisation of rights for everyone in the EU. The expansion of European citizenship-related and citizenship-like freedoms to TCNs makes the possibility to be a Member State national less relevant in relation to the rights and opportunities of the TCNs too.

CJEU case law also evidences that the rights of non-nationals are often being interpreted in light of European Citizenship, EU general principles of law and the principle of non-discrimination on the basis of nationality. (Carrera and Wiesbrock, 2010:339).

So this new hybrid status of the EU Denizenship is "a potential 'subsidiary form' of EU citizenship, which could bridge the rights gap between EU and non-EU citizens at the EU level." (Huddleston and Vink, 2015:8)

"The expansion of European citizenship-related and citizenship-like freedoms to TCNs is an indication of the loss of discretionary power by the nation-state." (Carrera and Wiesbrock, 2010:359) The discretion and autonomy of national administrations over European citizenship-related matters have been transformed as a result of EU integration and now fall within the scope of EU law. (Carrera and Wiesbrock, 2010:359).

The European denizenship should not be seen as a comprehensive solution to the inequitable position of long-term resident third-country nationals, on the contrary, it creates new differencies between the third-country nationals. Nevertheless the Directives of the EU are important and welcome steps towards full membership and integration to the European Union and may have led to greater harmonisation of national long-term residence policies. (Kostakopoulou, 2002:187). The creation of Union denizenship would supplement, rather than replace Union citizenship and could reinforce the common European identity.

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