Chapter 4 – Preventing Discrimination

The inclusion of foreigners according to the principle of non-discrimination is a central goal of European integration. Ever since the Treaties of Rome were concluded in the 1950s, the European Communities have called upon the founding States to ensure equal treatment of migrants – be they migrant workers, entrepreneurs, service providers, or consumers. This principle of 'constitutional tolerance', as Joseph Weiler famously theorized it,[434] was later elevated to the status of a fundamental right (Art. 21(2) EU-CFR). However, the personal scope of this constitutional guarantee has always been limited to nationals of other Member States, even though this is not evident from the wording of the relevant Treaty provisions (cf. Art. 18 TFEU).[435] Hence, equality of status within the EU is a right of Union citizens, rather than a Human Right. Nonetheless, we argue in this chapter that equality of status, both of and among migrants, has a Human Rights dimension that is underexplored and widely underestimated as a source of legal obligations the EU is bound to respect when developing its migration policy.

Equality and non-discrimination of migrants is a complex issue that could be discussed at various levels of inquiry.[436] Everyday experiences of migrants are often characterized by discrimination, both in their interaction with members of the host societies and with public officials. Migrants are frequently labeled and treated as 'the Other', irrespective of their immigration status or nationality. In recent years, this shared experience

434 Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*', in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (2003) 7.

435 CJEU, Case C-122/96, *Saldanha and MTS* (EU:C:1997:458); Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze* (EU:C:2009:344); on the genesis of the ambiguous wording, see S.A.W. Goedings, *Labor Migration in an Integrating Europe* (2005), at 309–343.

436 See, e.g., B. Fridriksdottir, *What Happened to Equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration* (2017); MacCormack-George, 'Equal Treatment of Third-Country Nationals in the European Union: Why Not?', 21 *European Journal of Migration and Law (EJML)* (2019) 53.

of migrants is being voiced more loudly in public debate, catalyzed by incidents of racist police action against black citizens in the USA.

The claim of migrants not to be subject to racist and xenophobic discrimination has a strong legal basis in Human Rights law. However, the present chapter has a different focus – namely, discrimination embedded in the laws of migration governance. The EU's policy regarding discrimination based on 'racial or ethnic origin' is conceptually outside the field of migration law. Art. 19 TFEU and the relevant EU anti-discrimination legislation aim at providing protection that is not specific to migrants, whereas migration law proper is largely exempt from the scope of the EU's anti-discrimination policy.[437] The present chapter connects these separate fields and addresses non-equal treatment within the realm of immigration and asylum law. It discusses the issue of whether EU migration law is a cause of inequality in itself and, if so, what the Human Rights standards constraining EU policies are.

4.1 Structural challenges and current trends

Questioning inequality in migration law seems almost a contradiction in terms. The difference in treatment of citizens and non-citizens of a State – that is, 'discrimination' based on nationality – is at the very heart of migration law.[438] The relevant legal regimes emerged in the nineteenth century in the wake of the modern nation state, both in domestic law[439] and in international law.[440] Non-nationals are the subjects of a special set of rules that excludes them from hard-won citizens' rights and accords the former an inferior legal position in the host state. This largely holds true today, irrespective of the fact that the gradual expansion of the rule of law into the field of migration and the emergence of denizenship policies since the 1970s have reduced the degree of legal inequality between

437 Cf. Art. 3(2) of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

438 Thym, 'Ungleichheit als Markenzeichen des Migrationsrechts', 74 *Zeitschrift für öffentliches Recht (ZöR)* (2019) 905.

439 D. Gosewinkel, *Einbürgern und Ausschließen: Die Nationalisierung der Staatsangehörigkeit vom Deutschen Bund bis zur Bundesrepublik Deutschland* (2001).

440 R.B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984).

citizens and non-citizens.[441] On that basis, a second layer of rules was gradually developed by state legislatures. Modern migration law provides for difference in treatment *among* non-citizens – that is, 'discrimination' based on immigration status. Depending on the respective purpose of admission, migration law coins various immigration statuses, with distinctive combinations of residence rights, access to employment, and access to the welfare system.[442] Historically, this new field of 'immigration law' (*Aufenthaltsrecht*, in German) emerged in the early twentieth century with the rise of the interventionist welfare state.[443] In essence, immigration law is about defining a plurality of immigration statuses, thus deliberately creating inequality among classes of migrants and causing a stratification of their rights.[444]

When the EU entered the stage in the theater of migration law, it almost naturally followed this line, adopting legislation that defines legal statuses of various classes of third-country nationals. Depending on the regulatory approach, the impact on the existing plurality of immigration statuses at the level of the Member States varies. On the one hand, a certain trend toward horizontal (transnational) convergence of immigration statuses is inherent in the Europeanization of migration policy. The emergence of the EU as a new actor in immigration law heralds a pan-European harmonizing effect. On the other hand, the activity of yet another legislature in the field adds to its complexity when newly created immigration statuses complement existing ones at the national level, rather than harmonizing or replacing them.[445] In this case, the EU actually contributes to new

441 Thym, 'Vom "Fremdenrecht" über die "Denizenship" zur "Bürgerschaft"', *57 Der Staat* (2018) 77.

442 Bast, 'Zur Territorialität des Migrationsrechts', in F. von Harbou and J. Markow (eds), *Philosophie des Migrationsrechts* (2020) 17.

443 Lucassen, 'The Great War and the Origins of Migration Control in Western Europe and the United States', in A. Böcker et al. (eds), *Regulation of Migration* (1998) 45.

444 L. Morris, *Managing Migration: Civic Stratification and Migrants' Rights* (2002), at 19 et seq. and 103 et seq.

445 Examples include the denizen status under to Long-Term Residents Directive (Directive 2003/109/EC), which sits next to permanent residence statuses according to national law; subsidiary protection status according to Qualification Directive (Directive 2011/95/EU) sits next to complementary national protection statuses.

vertical (multi-level) divergence and, hence, increases inequality among migrants.[446]

Given these structural conditions, the impact of the EU legislature on the equality of migrant status is strongly policy-dependent. In this respect, we observe the following trends, which in sum reveal a growing number of status distinctions created by the EU.

Trend 1: Increasing sectoral divergence within the Europeanized fields of legal migration

There is a trend toward increasing sectoral divergence within the Europeanized fields of legal migration – that is, in immigration policy in the narrow sense as defined in Art. 79 TFEU. This is the result of the approach taken by the EU legislature to defining immigration statuses. The EU's approach features a number of aspects, the combined effect of which is the risk of maintaining, or actually creating, distinctions among classes of migrants that lack a reasonable foundation.

First, the EU has enacted incomplete or 'shallow' harmonization by, inter alia, inserting optional clauses, laying down discretionary requirements, or choosing an approach of partial non-regulation. The prime example of this approach is the Family Reunification Directive (Directive 2003/86/EC; see Chapter 5). This legislative approach is often a result of political disagreement within the Council, where Member States governments have pursued the goal of limiting the impact of particular legislative acts on existing domestic laws. This weakens the horizontal convergence or even contributes to new divergence. This, in turn, involves the risk of maintaining arbitrary distinctions among holders of residence permits whose immigration statuses are partly defined by EU law.

Second, the EU has followed a piecemeal approach to defining new immigration statuses based in EU law. This increases the risk of inconsistent outcomes of legislative processes that are insufficiently coordinated. This trend is even more marked since the Commission switched to a sectoral approach in the field of labor migration, after the political failure to garner sufficient support in the Council for a horizontal approach to European

446 Strumia, 'European Citizenship and EU Immigration', 22 *European Law Journal* (2016) 417, at 423–426.

labor migration policy.[447] The EU has failed to develop a meaningful body of law that lays down cross-sectoral standards and procedures applicable to all immigration statuses defined by EU law, or at least to broad classes thereof. The 'general body' (*Allgemeiner Teil*) of EU migration law is rather slim.[448]

Third, the EU's incremental legislative activity lacks a clear *Leitbild* – a model or overall concept – that could serve as a template for defining the immigration statuses of third-country nationals.[449] In the first period of legislation after the entry into force of the Amsterdam Treaty, the Tampere Program agreed by the European Council had raised expectations that the status of Union citizens would serve as such a *Leitbild* for the future statuses of third-country nationals. The ensuing negotiations led to the adoption of the Long-Term Residents Directive (Directive 2003/109/EC), which in turn served as a point of reference for other legislation (e.g., the Blue Card Directive 2009/50/EC). However, ten years later the Tampere *Leitbild* of near-equality between Union citizens and third-country nationals had all but disappeared, as many critically observed.[450] In the absence of such a model, the EU does not have a yardstick to distinguish unprincipled proliferation of statuses from sectoral differentiation that is reasonably related to the respective purposes of admission.

Because of this unprincipled approach, the EU's legislative activity in defining immigration statuses has maintained or created distinctions that seem to reflect little more than the ad hoc political compromises found in dealing with the latest dossier. This inconsistency causes a major challenge to EU migration policy. While a certain degree of inconsistent outcomes is inherent in any political decision-making that involves various actors and

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447 B. Fridriksdottir, *What Happened to Equality?* (2017), chapter 3; von Harbou, 'Arbeits- und Ausbildungsmigration', in Wollenschläger (ed.) *Europäischer Freizügigkeitsraum: Unionsbürgerschaft und Migrationsrecht (EnzEuR vol. 10)* (2021) 621, at para. 97–98.

448 According to H. Tewocht, *Drittstaatsangehörige im europäischen Migrationsrecht* (2017), at 411–412 and 449, it consists of the Family Reunification Directive, the Long-Term Residents Directive, the Return Directive, and the Single Permit Directive. Only the latter provides rights that apply to a range of immigration statuses.

449 On the function of a *Leitbild* in immigration policy, see Gusy and Müller, 'Leitbilder im Migrationsrecht', *Zeitschrift für Ausländerrecht (ZAR)* (2013) 265.

450 Halleskov Storgaard, 'The Long-Term Residents Directive: A Fulfilment of The Tampere Objective of Near-Equality?', in E. Guild and P. Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (2011) 299; A. Wiesbrock, *Legal Migration to the European Union* (2010).

stretches over time, at some point the increasing sectoral divergence within the Europeanized fields of migration law encounters legal limits posed by Human Rights law.

Trend 2: Contradictory policy choices in respect of the asylum status in the EU

We observe a high degree of inconsistency in respect of the asylum status of persons enjoying international protection in the EU – that is, of refugees in the broad sense of the term. On the one hand, this is a particular case in point of the EU's unprincipled approach to defining immigration statuses, since to some extent it results from incomplete, incremental, and unguided decision-making. On the other hand, it is also – and perhaps primarily – a result of contradictory policy choices. This policy inconsistency unfolds on two levels: among the persons enjoying asylum in the EU, and between them and other migrants legally residing in the EU.

First, the EU legislature decided to create a uniform protection status called 'international protection (in the EU)', thereby fusing the protection of refugees as defined in the Geneva Refugee Convention with other Human Rights-based grounds of protection ('subsidiary protection').[451] The status of Convention refugees according to international law served as the template for the immigration status defined by EU law for all grounds of international protection. The choice in favor of equality of status includes the prospect of long-term residence according to the Long-Term Residents Directive. However, in certain instances the EU legislature deviates from that template and assigns an inferior status to people eligible for protection on subsidiary grounds. Such instances include the validity of the (renewable) residence permit and access to social assistance. The distinction between the two subgroups of migrants enjoying international protection is most pronounced in respect of the right to family reunification; persons enjoying subsidiary protection are excluded both from the privileged regime applicable to Convention refugees and from the standard regime applicable to migrants legally residing within the EU. The question thus arises as to whether this inequality of status is justified in light of Human Rights law (see below, section 4.2.4).

451 Bast, 'Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff', *Zeitschrift für Ausländerrecht (ZAR)* (2018) 41.

Second, the EU legislature has elected to establish a privileged status for persons enjoying international protection in the EU. This is in line with the basic rationale of refugee law, which regards refugees as persons whose decision to migrate (or not to return) is non-voluntary and who thus cannot avail themselves of the citizens' rights in their home country. Accordingly, they deserve equal, or at least similar, treatment to the citizens of their host country as long as their need of protection persists. The EU (then still called the European Community) applied this rationale in 1958 when Regulation No. 3 on the coordination of social security systems granted refugees the same rights as nationals of the Member States. However, in certain respects the asylum status defined by EU law is less favorable than the immigration status of other, 'ordinary' migrants residing in the EU. This is particularly true in respect of mobility rights within the Union. Such rights are granted, albeit to a limited degree, to persons who are admitted as researchers, students, or highly qualified non-EU nationals. In contrast, such rights to relocate voluntarily are notably absent for refugees and other persons enjoying asylum in the EU. Their 'secondary movement' is even seen as a threat to the asylum system and is actively discouraged (on this issue, see Chapter 6). Here again, at some point the inequality of status created by the EU legislature may constitute a Human Rights violation.

4.2 Legal evaluation

4.2.1 General framework: Three objectionable grounds of distinction among migrants ('race', nationality, immigration status)

The section will develop the standards of determining which distinctions in immigration and asylum law constitute Human Rights violations. We have identified three grounds of distinction that are particularly relevant: distinctions that constitute direct or indirect discrimination on *racial grounds*, distinctions based on the *nationality* of the migrants concerned, and distinctions that relate to their *immigration status*. In the following, we shall set out the respective sources as well as the elements of the legal test for whether such distinctions constitute a discrimination prohibited by Human Rights law.

(1) First, Human Rights law prohibits any distinctions that amount to racial discrimination, including indirect discrimination on racial grounds. 'Race' – that is, any attribution of presumably unalterable characteristics

of human beings such as their skin color or ethnic origin – is a ground of distinction that Human Rights law most strongly condemns.[452] It is an 'objectionable' ground in the sense that such distinctions cannot be justified.[453]

Various sources of universal and regional Human Rights law unequivocally reject 'race' as a legitimate ground of distinctions. In EU law, the prohibition of racial discrimination is mirrored in Art. 21(1) EU-CFR and Art. 19 TFEU. The most general non-discrimination clause is Art. 2 UDHR, stating that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as, inter alia, 'race' or 'colour'. It is reproduced almost verbatim in Art. 2(1) ICCPR and Art. 14 ECHR. Various other Human Rights sources confirm and specify the right to non-discrimination on racial grounds within their respective scope of application (see, e.g., Art. 2(2) ICESCR and Art. 2(1) CRC). The right to non-discrimination on racial grounds is generally regarded as a norm of customary international law, even one of preemptory character (*ius cogens*).[454] This view is confirmed by numerous soft-law instruments, including the Global Compact for Migration (see, inter alia, Objectives 15 [para. 31] and 16 [para. 32]).

The most comprehensive prohibition of racial discrimination is laid down in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). In this Convention, the term 'racial discrimination' means 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms' in any field of public life (Art. 1(1) ICERD). The Convention lays down

452 On the historical context, see Van Boven, 'The Concept of Discrimination in the International Convention on the Elimination of all Forms of Racial Discrimination', in W. Kälin (ed.), *Das Verbot ethnisch-kultureller Diskriminierung: Verfassungs- und menschenrechtliche Aspekte* (1999) 9.

453 Cf. ECtHR, *Biao v. Denmark*, Appl. no. 38590/10, Grand Chamber Judgment of 25 March 2014, at para. 94.

454 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion), General List No. 53 [1971], at para. 131; *Case Concerning the Barcelona Traction, Lights and Power Company Ltd. (Belgium v. Spain)* (Judgment), [1970] ICJ Reports 3 [32], at para. 33–34. For references to scholarly opinions, see V. Chetail, *International Migration Law* (2019), at 147, note 378.

various negative and positive obligations of States Parties to eliminate racial discrimination.

However, certain limitations as to the scope of ICERD apply. According to Art. 1(2) and (3) ICERD, this Convention does not apply to distinctions between citizens and non-citizens, and it does not affect provisions concerning nationality, citizenship, or naturalization, provided that such provisions do not discriminate against any particular nationality. It is noteworthy here that 'immigration law' is not excluded from the scope of ICERD. Moreover, the Committee on the Elimination of Racial Discrimination (CERD, the treaty body entrusted with the supervision of this Convention) has developed a consistent jurisprudence according to which non-equal treatment based on citizenship or immigration status may constitute racial discrimination.[455]

We recognize that this 'intersectional' approach of the CERD is not free from criticism, as evidenced by the judgment of the International Court of Justice in the case of *Qatar v. United Arab Emirates*.[456] However, it is generally acknowledged that Art. 1(1) ICERD prohibits not only direct discrimination but also measures that expose persons to indirect discrimination, as evidenced by the wording of the provision ('purpose *or* effect').[457] Developing the relevant legal test is not without its difficulties. The starting point of any indirect discrimination is a norm or practice characterized by distinctions based on apparently neutral criteria. The decisive factor is whether a specific group is particularly affected by the relevant measure, irrespective of the intention to expose it to discriminatory treatment.[458] CERD, in particular, is critical of the assumption that, when claiming

455 CERD, General Recommendation No. 30: Discrimination Against Non-Citizens, CERD/C/64/Misc.11/rev.3, at para. 4.

456 ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (Provisional measures), Judgment of 4 February 2021, at para. 101. The ICJ held that the term 'national origin' in Art. 1(1) ICERD does not encompass current nationality, but it did not rule out that a measure targeting a particular group of non-citizens may constitute an 'indirect' racial discrimination; see ibid., at para. 112.

457 See CERD, General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/32, at para. 7. In EU law, cf. Art. 2(1) and (2) of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

458 O. de Schutter, *International Human Rights Law* (3rd ed. 2019), at 722 et seq.; P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination* (2016), at 114.

discriminatory treatment, it is necessary to demonstrate discriminatory intent.[459] The empirical examination of the prejudicial effects of such norms and practices is decisive in order to establish a discriminatory effect.[460] The proof of indirect discrimination can only ever be provided by considering the context and all relevant circumstances.[461]

Given the postcolonial conditions of global inequality, where 'race' and class are closely linked, it could be argued that many of the socio-economic selection criteria (such as income or skill requirements), frequently used in current immigration law in the Global North, are biased toward 'race' because they objectively affect the ethnic composition of the migrant population, to the disadvantage of certain groups defined by their 'race'. Such a line of reasoning would fundamentally challenge the mode of operation of immigration law, since States (and the EU) would have to demonstrate that their seemingly neutral socio-economic selection criteria do not entail discriminatory effects as defined in ICERD. While this line of reasoning seems perfectly logical according to established jurisprudence, we accept that it would amount to a 'progressive development' of the law, for which we do not find sufficient support in existing authorities.

(2) The second 'objectionable' ground in distinguishing among migrants relates to nationality. These distinctions are not prohibited per se, unless they constitute a hidden racial discrimination (see above). However, distinctions based on the nationality of a migrant must be justified by 'very weighty reasons', according to the case-law of the ECtHR.

'Nationality' is a technical term of international law that refers to a legal bond, established by national law, between a natural person and his or her State (or States, in the case of multiple nationalities). Note that none of the non-discrimination clauses referred to above explicitly lists nationality as a prohibited ground. Pursuant to the dominant understanding, the term 'national origin' mentioned in Art. 2 UDHR, Art. 2 ICCPR and Art. 2 CESCR pertains to particular groups within the citizenry of the relevant State, rather than foreign nationals.[462] In any event, nationality constitutes 'other

459 CERD, Concluding Observations on the fourth, fifth and sixth periodic reports of the USA, 8 May 2008, CERD/C/USA/CO/6, at para. 35.

460 O. de Schutter, *International Human Rights Law* (3rd ed. 2019), at 723. Cf. ECtHR, *Biao v. Denmark*, Appl. no. 38590/10, Grand Chamber Judgment of 25 March 2014, at para. 103.

461 CERD, *L. R. et al. v. Slovakia*, Communication No. 31/2003, CERD/C/66/D/31/2003, at para. 10.4.

462 V. Chetail, *International Migration Law* (2019), at 151.

status' according to the cited provisions (on this open-ended concept, see below).[463]

Seemingly an outlier in this regard is the EU Charter of Fundamental Rights. According to Art. 21(2) EU-CFR, any discrimination on grounds of nationality shall be prohibited within the scope of application of the EU Treaties. A historically informed construction of this provision (and of Art. 18(1) TFEU, its template) reveals that it merely establishes a prohibition of discrimination of nationals of other EU Member States, and not of third-country nationals. This traditional understanding has more recently been confirmed by the CJEU,[464] rejecting scholarly proposals to expand the meaning of the clause.[465] Distinctions based on the nationality of third-country nationals are therefore measured against the yardstick of Art. 21(1) EU-CFR, rather than Art. 21(2) EU-CFR. The wording of the former provision slightly differs from the cited non-discrimination clauses of Human Rights law, as it does not include a reference to 'other status'. However, while it lists additional grounds not mentioned in these sources, the omission of the phrase 'other status' was not meant to reduce the substantive scope of the guarantees or establish an exhaustive lists of discrimination grounds (see the wording 'such as' introducing the listed grounds).[466]

The most developed jurisprudence relating to discrimination based on nationality stems from the ECtHR's case-law on Art. 14 ECHR, which is the main source of inspiration for Art. 21(1) EU-CFR. The relevant line of reasoning was founded in 1996 with the judgment *Gaygusuz v. Austria*, when the Court for the first time held that excluding certain classes of migrants from a particular social welfare benefit constitutes discrimination based on nationality and therefore violates Art. 14 ECHR.[467]

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463 HR Committee, *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, CCPR/C/35/D/196/1985, at para. 9.4.

464 CJEU, Case C-291/09, *Francesco Guarnieri & Cie* (EU:C:2011:217); Case C-42/11, *Lopes de Silva* (EU:C:2012:517); Case C-45/12, *Hadj Hamed* (EU:C:2013:390).

465 See, e.g., Brouwer and De Vries, 'Third-country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the Context of Article 14 ECHR and EU Migration Law: Time for a New Approach', in M. van den Brink, S. Burri and J. Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble?* (2015) 123.

466 Opinion of AG Cruz Villalón, Cases C-443/14 and C-444/14, *Alo and Osso* (EU:C:2015:665), at para. 98.

467 ECtHR, *Gaygusuz v. Austria,* Appl. no. 17371/90, Judgment of 16 September 1996.

The legal test to determine a violation of Art. 14 ECHR consists of five elements.[468] First, the contested measure must affect the enjoyment of a right set forth in the ECHR or in one of its Protocols, and therefore falls within the ambit of the Convention. Second, the measure must be based on a discrimination ground covered by Art. 14 ECHR. Third, to establish prima facie discrimination against the person concerned, a relevant class of persons must be identified who are in analogous, or relevantly similar, situations but not adversely affected by the tested measure (comparability test). Fourth, the standard of review by the Court must be determined – that is, the extent to which States enjoy a margin of appreciation in making distinctions relating to the subject-matter concerned. Fifth, provided that comparable groups are treated differently according to the first three elements, the defending State must provide an objective and reasonable justification supporting the difference in treatment. That element essentially entails a proportionality test. A difference in treatment is discriminatory if it does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized. This proportionality test is to be conducted according to the standard of review determined in step four.[469]

In respect of legal distinctions made in migration law, it follows from the *Gaygusuz* judgment that 'nationality' is a discrimination ground covered by Art. 14 ECHR, although the Court never finally clarified why this is the case (it may fall under the rubric of 'national origin' or 'other status'). In any case, the applicable standard of review is high, since the Court requires the State to provide 'very weighty reasons' to justify distinctions based exclusively on the ground of nationality. The *Gaygusuz* case and the ensuing case-law also demonstrate that difference in treatment may be considered 'based exclusively' on nationality if a State discriminates against certain classes of non-nationals while other foreign nationals enjoy

468 See Arnardóttir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention of Human Rights', 14 *Human Rights Law Review* (2014) 647; Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights', 13 *Human Rights Law Review* (2013) 99.

469 For a summary of the Court's approach to Art. 14 ECHR, see ECtHR, *Pajic v. Croatia*, Appl. no. 68453/13, Judgment of 23 February 2016, at para. 53–60.

equal treatment with the citizens of that State.[470] The comparability test conducted by the ECtHR usually enquires whether the claimant is in a like or analogous situation to a national of the responding State, irrespective of the treatment of other classes of migrants.[471] This doctrine is particularly noteworthy since immigration legislatures almost always distinguish between different classes of non-nationals, whereas rules and regulations that apply to all non-nationals without distinction are very rare.[472]

(3) A third layer of protection against discrimination in migration law relates to difference in treatment based on immigration status per se. As is the case with nationality, distinctions based on immigration status are unlawful unless the differentiation is duly justified, that is, supported by a legitimate aim and proportionate to achieve that aim. However, States usually enjoy a larger degree of discretion in making these types of distinctions.

Again, the most developed jurisprudence is provided by the ECtHR in its case-law on Art. 14 ECHR. This layer of protection against discrimination was added in several rulings of the ECtHR in 2011 and 2012.[473] The Court held that distinctions based on immigration status, either exclusively or in combination with the nationality of the person concerned, can amount to unlawful discrimination.

In *Ponomaryovi v. Bulgaria* (2011), the ECtHR held that the irregular immigration status of the claimant did not provide sufficient grounds to exclude him from access to a social benefit in the educational field. The case shows obvious similarities to the landmark *Plyler* case decided by the US Supreme Court.[474] In respect of the relevant discrimination ground, the ECtHR pragmatically acknowledged that in the instant case the exclusion of Mr. Ponomaryovi was based on a 'personal characteristic',

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470 See, e.g., ECtHR, *Okpisz v. Germany*, Appl. no. 59140/00, Judgment of 25 October 2005; *Niedzwiecki v. Germany*, Appl. no. 58453/00, Judgment of 25 October 2005.

471 See, e.g., ECtHR, *Andrejeva v. Latvia*, Appl. no. 55707/00, Grand Chamber Judgment of 18 February 2009, at para. 87.

472 For a critical discussion on the actual impact of *Gaygusuz*, see Dembour, 'Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda', 12 *Human Rights Law Review* (2012) 689.

473 ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011; *Bah v. UK*, Appl. no. 56328/07, Judgment of 27 September 2011; *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012.

474 Cf. H. Motomura, *Immigration Outside the Law* (2014), at 105 et seq.

without making a clear distinction between 'nationality' and 'immigration status'.[475]

In *Bah v. UK* (2011), the Court confirmed its view that the legal position defined in immigration law constitutes a 'status' for the purposes of Art. 14 ECHR, irrespective of the fact it does not amount to an immutable or innate characteristic.[476] In the instant case, the difference in treatment was based purely on a distinction established in national immigration law (the irregular status of the applicant's son), which would have prevented Ms. Bah's family from having access to housing assistance even if she were a British national.

In *Hode and Abdi v. UK* (2012), the ECtHR reviewed a difference in treatment between different groups of refugees in respect of the right to family reunification. Again, the test conducted by the ECtHR enquired as to whether the State had provided objective and reasonable justification supporting the distinctions made in its asylum legislation, which resulted in non-equal treatment among different classes of non-nationals.

In *Bah v. UK*, however, the Court distinguished that type of case from the jurisprudence established in *Gaygusuz.* To justify a difference in treatment based on immigration status, the State need not necessarily provide 'very weighty reasons'. The Court explained that in order to determine the relevant standard of review, the 'nature of the status' is particularly relevant. Accordingly, in respect of immigration status the States enjoy a larger margin of appreciation; the Court will usually enquire only whether the difference is 'manifestly without reasonable foundation'.[477] As we will discuss in more detail below, this lower standard of review does not apply in all circumstances, particularly where migrants in vulnerable situations are concerned.

Having outlined the general jurisprudence on evaluating distinctions in immigration and asylum law in light of Human Rights, we shall proceed to apply this yardstick to the relevant trends and patterns of EU migration policy.

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475 ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011, at para. 50 and 63.

476 ECtHR, *Bah v. UK*, Appl. no. 56328/07, Judgment of 27 September 2011, at para. 43–46.

477 Ibid., at para. 37.

4.2.2 Specific issue: Privileged and non-privileged nationalities in EU migration law

(1) According to our assessment, the existing immigration *acquis* of EU law does not make use of distinctions that amount to racial discrimination as defined in ICERD. As explained above, according to current jurisprudence the high-income requirements laid down, for example, in the Blue Card Directive 2009/50/EC in order to obtain the favorable status defined in this Directive do not amount to indirect discrimination on grounds of 'race', irrespective of the objectively biased effects that such criteria probably entail.

As a singular incident of what amounts to indirect racial discrimination, we identify the inclusion of Union citizens in the scope of Regulation 2019/816 to establish a centralized system for the exchange of criminal record information on convicted third-country nationals and stateless persons (ECRIS-TCN).[478] According to Art. 2 of this Regulation establishing a large-scale EU database, its provisions apply to citizens of the Union who also hold the nationality of a third country and who have been subject to convictions in the Member States, apart from minor exceptions. In effect, Union citizens with multiple nationalities are subject to a system that represents a typical instrument of 'aliens police' (*Fremdenpolizei*, in German) subordinating foreigners to a special layer of supervision.[479] While dual nationality is a seemingly neutral criterion in terms of 'race', in practice the majority of dual nationals are non-European migrants or their descendants and hence marked by their ethnic origin.[480] Commentators have convincingly argued that this difference in treatment between groups of Union citizens may constitute indirect racial discrimination.[481]

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478 Regulation 2019/816 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN).

479 On this older layer of immigration law, see J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (2011), at 75–78.

480 See, e.g., CERD, *D.R. v. Australia*, Communication No. 42/2008, CERD/C/75/D/42/2008; Concluding observations on the eighteenth to twentieth periodic reports of Rwanda, 10 June 2016, CERD/C/RWA/CO/18–20.

481 Meijers Committee, *Policy Brief on 'Differential treatment of citizens with dual or multiple nationality and the prohibition of discrimination'* (CM 2016), 6 December 2020; Meijers Committee, *Creating second-class Union citizenship? Unequal treatment of Union citizens with dual nationality in ECRIS-TCN and the prohibition of discrimination* (CM 2104).

(2) The EU immigration *acquis* rarely uses 'nationality' as a factor in legal distinctions. The EU legislature follows the path of Member States with a developed system of immigration law in predominantly using *functional* criteria to define grounds of admission and the corresponding immigration statuses, regardless of the nationality of the persons concerned (see the introduction to this chapter). In some instances, however, the EU does draw distinctions between different nationalities in order to accord a privileged status exclusively to these nationals. This may raise issues of discrimination. We recall that 'very weighty reasons' must be provided to justify distinctions exclusively based on nationality.

The most fundamental distinction in EU law based on nationality is that between Union citizens and their family members, on the one hand, and third-country nationals, on the other hand.[482] Already in 1991 the ECtHR accepted the preferential treatment given to nationals of other Member States, on the ground that the Union (or, at the time, the European Communities) forms a 'special legal order'.[483] This rationale has been confirmed in more recent case-law.[484] However, it is important to note that the ECtHR does not understand the lawfulness of this distinction to be inherent in the concept of citizenship but, rather, requires reasonable grounds. In fact, in certain instances the ECtHR has found the drawing of a distinction between Union citizens and third-country nationals to be discriminatory for the purposes of Art. 14 ECHR.[485]

This rationale of a 'special legal order' is not readily applicable to the preferential treatment of nationals from particular third countries, which is granted in association agreements jointly concluded by the EU and its Members with those countries. While most external EU agreements do not include provisions that are immediately relevant for European immigration law, the EEA Agreement with Iceland, Lichtenstein, and Norway, and the bilateral agreements with Switzerland and with Turkey, do include far-reaching regulations concerning immigration law,[486] essentially grant-

482 On the conceptual basis, see Thym, 'The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development', in D. Thym (ed.), *Questioning EU Citizenship* (2017) 111.

483 ECtHR, *Mustaquim v. Belgium*, Appl. no. 12313/86, at para. 49.

484 ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011, at para. 54.

485 See, e.g., ECtHR, *Dhahbi v. Italy*, Appl. no. 17120/09, Judgment of 8 September 2014, at para. 50 et seq.

486 Cf. D. Thym and M. Zoeteweij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (2015).

ing the nationals of these association states free movement rights similar to those of EU citizens or, in the case of Turkish nationals residing in the EU, a denizen status that is even more favorable than the status defined in the Long-Term Residents Directive.[487] According to a traditional understanding, such distinctions are part of the unfettered discretion of States (and, by analogy, of the EU) to pursue their own migration policy. In light of modern Human Rights law, they constitute difference in treatment that requires justification. However, it is likely that the foreign policy considerations that sit at the heart of such external EU agreements would still satisfy the need to provide 'very weighty reasons'. The privileged status accorded to the nationals of the association states mirrors the privileged partnership between the respective subjects of international law and, hence, meets the requirement of objective and reasonable justification.

The critical case in respect of distinctions based exclusively on nationality is the Schengen visa regime laid down in the Visa List Regulation 2018/1806. Art. 3(1) in conjunction with Annex I to this Regulation establishes a list of States whose nationals must have a visa when crossing the external borders in order to stay in the Schengen area for up to 90 days, while nationals of States listed in Annex II are exempt from this requirement. Of course, one may take the view that the Schengen visa regime is beyond the scope of this study, since it concerns short-term travel rather than immigration. However, there are many legal and factual links between the two regimes that may bring about a situation whereby a short-term stay transforms into the first stage of an immigration process.[488]

The Visa List Regulation does not state the reasons for placing one particular State in Annex I (the 'black list'), and others in Annex II. Art. 1 of the Regulation refers to a 'case-by-case assessment of a variety of criteria relating, inter alia, to illegal immigration, public policy and security, economic benefit … and the Union's external relations with the relevant third countries …'. The actual composition of the lists seems to reflect a mixture of migration and foreign policy considerations.[489] In particular, the offer

487 Bast, 'European Community and Union, Association Agreements', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law (MP-EPIL)*, online edition, last updated August 2010.

488 See, in the context of German immigration law, J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (2011), at 233–234.

489 Martenczuk, 'Visa Policy and EU External Relations', in B. Martenczuk and S. van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (2008) 21.

to conclude a bilateral Visa Facilitation Agreement has become a powerful tool in the EU's external relations.[490]

A scholarly debate on the legality of these distinctions based on the nationality of the traveler in light of non-discrimination law has begun only recently, drawing inspiration from the legal debate in the USA concerning selective travel bans against predominantly Muslim countries.[491] In respect of Art. 14 ECHR, one may doubt whether the matter falls within the ambit of the Convention. In instances of family-related travel, however, Art. 8 ECHR could serve as a connecting factor. Even in cases in which the more lenient standard of the general equality clause in Art. 20 EU-CFR applies, rather than Art. 21(1) EU-CFR mirroring Art. 14 ECHR, objective justification of the non-equal treatment is required under EU law. In any case, the lack of transparency regarding the 'case-by-case assessment' of the open-ended criteria laid down in the Regulation seem to originate from a tradition in which such decisions could still be taken without having due regard to the Human Rights of the persons concerned. A particular cause of concern is the fact that the placement of the large majority of countries on the 'black list' dates from the intergovernmental Schengen era and has never been properly justified.[492]

4.2.3 Specific issue: Differential treatment in respect of social assistance

It follows from the above legal analysis (section 4.2.1) that the EU must provide sufficient reasons to justify a difference in treatment between immigration statuses that are defined by EU law. This pertains, inter alia, to difference in treatment in respect of family reunification, social welfare, health care, access to the labor market, and mobility within the Union.[493]

The initial observation in this context is that it is very difficult to assess whether differences among the various categories of migrants established by the EU legislature are based on objective and reasonable justification,

490 N. Coleman, *European Readmission Policy* (2009), at 184–201.

491 Den Heijer, 'Visas and Non-discrimination', 20 *European Journal of Migration and Law (EJML)* (2018) 470, with references to earlier contributions.

492 Ibid., at 487.

493 For comparative analysis in the field of labor migration, see B. Fridriksdottir, *What Happened to Equality?* (2017). See also Farahat, 'Is There a Human Right to Equal Social Security?: EU Migration Law and the Requirements of Art 9 ICESCR', in M. Maes, M.-C. Foblets and Ph. de Bruycker (eds), *External Dimensions of European Migration Law and Policy* (2011) 529.

given that the recitals in the preamble to the Directives usually do not include any 'equality reasoning' explaining the legislative outcome in comparison to existing statuses. By way of example, we shall discuss in some detail the provisions related to social assistance. This is a crucial element of social welfare and is recognized in Art. 34(3) EU-CFR as a fundamental social right that the EU (and thus the Member States when they are implementing EU law) must respect.[494]

(1) First, we provide a brief outline of the relevant legislation, covering a selected number of immigration statuses.

A limited guarantee of access to social assistance is provided for in the Long-Term Residents Directive (Directive 2003/109/EC). According to point (d) of Art. 11(1), long-term residents shall enjoy equal treatment with nationals as regards, inter alia, social assistance. However, pursuant to Art. 11(4) of this Directive, Member States may limit the equal treatment to 'core benefits'.[495]

In contrast, in the Blue Card Directive (Directive 2009/50/EC) social assistance is not mentioned in the list of matters where EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card (Art. 14 Blue Card Directive). When the EU Blue Card holder applies for social assistance, this may even be regarded as a ground for withdrawing or not renewing the Blue Card (Art. 9 Blue Card Directive). The latter clause is mitigated in the new Blue Card Directive 2021/1883, with effect from 19 November 2023.

A very similar approach is taken in the so-called REST Directive (Directive 2016/801/EU) regarding researchers and certain other third-country nationals whose stay is mainly related to educational purposes. Researchers are entitled to equal treatment with nationals of the Member State to the extent that this is provided for in another Directive, the Single Permit Directive 2011/98/EU. The equality of treatment of researchers is subject to certain further exceptions provided for in the REST Directive. Even more restrictions are permitted regarding trainees, volunteers, au pairs, and students.

494 CJEU, Case C-571/10, *Kamberaj* (EU:C:2012:233), at para. 80.

495 Recital 13 in the preamble to this Directive explains that this possibility of limiting the benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance, and long-term care. On the construction of this derogation, see CJEU, Case C-571/10, *Kamberaj* (EU:C:2012:233), at para. 83 et seq.; Case C-94/20, *KV* (EU:C:2021:477), at para. 38–40.

The cited Single Permit Directive applies to 'third-country workers' as defined in this Directive, who are legally residing and are allowed to work in an EU Member State, including persons whose status is defined in national law. These workers enjoy a right to equal treatment in matters listed in Art. 12 of the Single Permit Directive (the clause referenced in the REST Directive). However, social assistance is not mentioned in this list. It does cover the branches of social security as defined in the relevant EU Regulations on the coordination of social security systems, but these branches usually do not include social assistance.

Yet another approach is taken by the EU legislature regarding refugees. According to Art. 29(1) of the Qualification Directive (Directive 2011/95/EU), Member States shall ensure that beneficiaries of international protection receive, in the Member State that has granted such protection, the 'necessary social assistance' as provided to nationals of that Member State. However, pursuant to Art. 29(2) of this Directive, Member States may limit social assistance granted to beneficiaries of subsidiary protection to 'core benefits'.

(2) The following legal evaluation is based on Art. 14 ECHR. Further applicable sources are Art. 2(2) ICESCR and Art. E of the revised European Social Charter. Note that in the Global Compact for Migration, States have also committed themselves 'to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services' (GCM, Objective 15, para. 31).

It is readily apparent that access to social assistance falls within the ambit of the ECHR, given that the ECtHR regards such benefits as a pecuniary right for the purposes of Art. 1 of Protocol No. 1 ECHR.[496] As discussed above, immigration status constitutes a personal characteristic within the meaning of Art. 14 ECHR. The relevant group of persons who are in a similar situation are other third-country nationals whose status is governed by EU law. Absent specific circumstances, the more lenient standard of review applies – that is, the difference in treatment must not be 'manifestly without reasonable foundation'.

The limited number of cases thus far decided by the ECtHR provides some guidance as to what arguments are sufficient to demonstrate a 'reasonable foundation'. The Court seems to accept that 'offering incentives

496 ECtHR, *Gaygusuz v. Austria*, Appl. no. 17371/90, Judgment of 16 September 1996, at para. 41.

to certain groups of immigrants' may provide such foundation.[497] More specifically, the need 'to stem or reverse the flow of illegal immigration' is explicitly recognized as a legitimate policy aim.[498] With respect to social benefits, the Court has pointed out that short-term and illegal immigrants do not contribute to the funding of public services.[499] The ECtHR acknowledges that the use of categorizations to distinguish between different groups in need is inherent in any welfare system, which may also justify distinctions between different categories of non-nationals.[500] On the other hand, the fact that the beneficial treatment of certain migrants fulfills the State's international obligations will not in itself justify the difference in treatment.[501] As to the proportionality of the differential treatment, the Court seems particularly concerned when migrants with a high level of de facto integration into the host society are excluded from certain benefits merely due to their status.[502]

To sum up the guidance from case-law, general considerations of migration policy ('offering incentives') may justify a difference in treatment with respect to the welfare system. In this context, States are entitled to use general categorizations. However, the difference in treatment must be reasonably related to the nature of the social benefit. Exclusions of migrants based on their temporary or irregular status serve a legitimate aim but may be disproportionate if they exclude migrants with strong ties to the host society.

(3) Applying these standards to the above examples from the EU immigration *acquis*, it seems reasonable to grant more favorable treatment in terms of social assistance to long-term residents and persons enjoying international protection in the EU. While the former are characterized by their strong social ties to and within the host societies, the latter are forced migrants who, by definition, cannot rely on social assistance in their

497 ECtHR, *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012, at para. 53.

498 ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011, at para. 60.

499 Ibid., at para. 54.

500 ECtHR, *Bah v. UK*, Appl. no. 56328/07, Judgment of 27 September 2011, at para. 49–50.

501 ECtHR, *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012, at para. 55.

502 See ECtHR, *Ponomaryovi v. Bulgaria*, Appl. no. 5335/05, Judgment of 21 June 2011, at para. 61; *Dhahbi v. Italy*, Appl. no. 17120/09, Judgment of 8 September 2014, at para. 52; see also ECtHR, *Biao v. Denmark*, Appl. no. 38590/10, Grand Chamber Judgment of 25 March 2014, at para. 118.

country of origin. Yet, the consistency of the detailed differences between the three groups concerned is less obvious. While the social assistance granted to long-term residents can be limited to 'core benefits', the same limitation does not apply to Convention refugees. However, in respect of the latter the social assistance from the host State must be 'necessary'. Both limitations to the right to equal treatment apply to persons with subsidiary protection status. In effect, it is difficult to see what these differences actually entail and what reasons potentially justify them. We will return to the issue of the difference in treatment between these two groups of internationally protected persons in the next section.

In respect of the other immigration statuses reported above, the striking feature is the lack of distinction made by the EU legislature in terms of social assistance. Highly qualified workers with a prospect of permanent stay and who are actively contributing to the funding of the social systems, such as EU Blue Card holders and researchers, are placed on equal footing with temporary visitors such as participants in training programs and pupil exchange schemes. Neither the validity of the residence permit, nor the actual duration of stay, nor the potential presence of social and family ties are taken into account. The same lack of regard to the actual situation of the migrants concerned pertains to third-country workers holding a 'single permit' under the Directive 2011/98/EU. This all the more surprising as the EU Charter recognizes that the right to social assistance is instrumental 'to ensure a decent existence for all those who lack sufficient resources' (Art. 34(3) EU-CFR), indicating that in various situations a Member State acts in violation of EU law (and corresponding Human Rights) when it refrains from granting the applicant the social assistance necessary to ensure a decent existence (see Chapter 6).

In sum, the scope of the right to equal treatment guaranteed in the Directives does not include all situations in which equal treatment in terms of social assistance would be required under Art. 14 ECHR. While such 'underinclusive legislation' may not per se violate EU law, since the Directives do not *oblige* the Member State to take decisions that would violate Art. 34(3) EU-CFR, such lack of consistency of EU legislation raises serious issues of compliance with the right to non-discrimination according to Art. 14 ECHR and Art. 21(1) EU-CFR.

4.2.4 Specific issue: Differential treatment among beneficiaries of international protection

A more detailed legal analysis is required in respect of the difference in treatment among beneficiaries of international protection as defined in the Qualification Directive 2011/95/EU, i.e., between Convention refugees and persons protected on subsidiary grounds. The leading authority is *Hode and Abdi v. UK*. At the time of writing, further potentially relevant cases are pending before the ECtHR.[503]

Two issues are of particular concern in light of Art. 14 ECHR. First, Member States may limit the social assistance to persons with subsidiary protection status to 'core benefits', whereas Convention refugees are entitled to equal treatment with nationals of the host State regarding 'necessary social assistance' (see above, 4.2.3). Second, in terms of the right to family reunification, Convention refugees benefit from a privileged regime laid down in the Family Reunification Directive 2003/86/EC (Art. 9–12), whereas EU law as it stands does not contain any regulations regarding family reunification of beneficiaries of subsidiary protection, since they are exempt from the scope of the Family Reunification Directive.[504] The background of this gap is that the first Qualification Directive 2004/83/EC was not yet adopted when the Family Reunification Directive was drafted.

Applying the settled doctrine regarding non-discrimination to these regulations, it is beyond dispute that they fall within the ambit of the ECHR[505] and that being entitled to subsidiary protection constitutes a 'status' for the purposes of Art. 14 ECHR. Obviously, there is a difference in the treatment of persons in comparable situations, namely other persons enjoying international protection in the EU (Convention refugees).

As to the standard of review, in view of the fact that the present case concerns a status defined in immigration law, States (and by analogy, the EU) would enjoy a wider margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify differen-

503 In ECtHR, *M.A. v. Denmark*, Appl. no. 6697/18, Grand Chamber Judgment of 9 July 2021, at para. 162, the Court did not rule on the issue of Art. 14 ECHR, after having concluded that stipulating a three-year waiting period for family reunifications requested by persons facing 'insurmountable obstacles to enjoying family life in the country of origin' breaches Art. 8 ECHR. The case *M.T. and others v. Sweden*, Appl. no. 22105/18, is still pending.

504 CJEU, Case C-380/17, *K. and B.* (EU:C:2018:877), at para. 33.

505 On family reunification, see ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, Appl. no. 9214/80, 9473/81 and 9474/81, Judgment of 28 May 1985.

tial treatment. However, we argue that very weighty reasons are required in cases involving persons in need of international protection since they are in a particularly vulnerable situation.[506] Among other things, the family life of these forced migrants cannot be maintained or established in the country of origin, nor can they rely on its systems of social welfare. In contrast, the 'element of choice' involved in obtaining an immigration status was a core argument put forward by the Court to determine that the justification required 'will not be as weighty as in the case of a distinction based, for example, on nationality'.[507] Such an 'element of choice' is notably absent where refugees or other forced migrants are concerned.[508]

Applying this standard of review, we now turn to the issue of whether the difference in treatment between the two classes of internationally protected persons has an objective and reasonable justification. The aims pursued by the EU legislature are somewhat difficult to identify, since the Qualification Directive reflects a compromise between contradictory policy approaches represented by different Member States in the Council. On the one hand, the EU legislature aimed at creating a uniform status for all beneficiaries of international protection and, therefore, chose to afford beneficiaries of subsidiary protection, as a general rule, the same rights and benefits enjoyed by beneficiaries of refugee status.[509] Accordingly, when implementing the Directive, a presumption of equality of status applies.[510] This conception constitutes a deliberate deviation from an or-

506 On this rationale for deriving a high standard of review, see ECtHR, *Alajos Kiss v. Hungary*, Appl. no. 38832/06, 20 May 2010, at para. 42: 'if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.' Note that in *Hode and Abdi v. UK* (Appl. no. 22341/09, Judgment of 6 November 2012) the ECtHR did not elaborate on this point since the responding Government even failed to proof a 'reasonable foundation' (i.e., the more lenient standard) for the difference in treatment between groups of refugees (see at para. 52–54).

507 ECtHR, *Bah v. UK*, Appl. no. 56328/07, Judgment of 27 September 2011, at para. 47; the Court expressly noted that the applicant was not granted refugee status. See also ECtHR, *M.A. v. Denmark*, Appl. no. 6697/18, Grand Chamber Judgment of 9 July 2021, at para. 145.

508 This conclusion is supported by T. Gordzielik, *Sozialhilfe im Asylbereich: Zwischen Migrationskontrolle und menschenwürdiger Existenzsicherung* (2020), at 114–115.

509 CJEU, Cases C-443/14 and C-444/14, *Alo and Osso* (EU:C:2016:127), at para. 32; Case C-720/17, *Bilali* (EU:C:2019:448), at para. 55.

510 Cf. CJEU, Case C-662/17, *E.G. v. Slovenia* (EU:C:2018:847), at para. 42.

thodox approach to refugee protection, which tends to privilege refugees as defined in the Geneva Refugee Convention. This policy choice is even more marked since the reform of the Qualification Directive in 2011.[511] The central point of the new approach is that subsidiary protection is not characterized by a less urgent or otherwise reduced need for protection, which would potentially translate into an inferior asylum status.[512] Rather, subsidiary protection in the EU is based on other Human Rights-based grounds of protection and thus complements and adds to the protection of refugees enshrined in the Geneva Refugee Convention.[513] On the other hand, the traditional approach lingers on in certain provisions of the Qualification Directive and in the exemption from the scope of the Family Reunification Directive. According to this view, which is still prevalent within certain Member States, subsidiary protection is a secondary form of protection that goes beyond of what is required under international refugee law and is thus marked by a higher degree of discretion on the part of States and, consequently, by a less comprehensive set of rights for the beneficiaries. The regulations under review here, on family reunification and social assistance, are prime examples of the latter approach. The EU legislature has chosen to partially maintain this discretion, even at the cost of laying down contradictory policy choices.

However, in order for the resulting difference in treatment to be in line with Art. 14 ECHR (and Art. 21(1) EU-CFR), there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In other words, there must be objective reasons (in our view: very weighty reasons) demonstrating that the different status accorded to beneficiaries of subsidiary protection is reasonably related to the different grounds of protection that distinguish them from Convention refugees. We would like to recall that the different status under interna-

511 For a detailed analysis, see Bauloz and Ruiz, 'Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?', in V. Chetail, Ph. de Bruycker and F. Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (2016) 240.

512 Hasel and Salomon, 'Differenzierungen zwischen Flüchtlingen und subsidiär Schutzberechtigen: Zu einem einheitlichen Schutzstatus', in St. Salomon (ed.), *Der Status im europäischen Asylrecht* (2020) 113, at 147–152, discussing the relevant arguments in legal scholarship.

513 Bast, 'Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff', *Zeitschrift für Ausländerrecht (ZAR)* (2018) 41.

tional law as such does not suffice to justify the difference in treatment (see above, section 4.2.3).[514]

A single argument stands out as having the potential to demonstrate such reasonable relationship: the claim that subsidiary protection is of a more temporary nature than the protection of Convention refugees. Indeed, were subsidiary protection status conceived as a provisional status, as opposed to a more permanent refugee status, it would be plausible that Member States should have a higher degree of discretion to limit access to social assistance or postpone family reunification, although an individual assessment of the applicant's situation would be required anyway. This point has been made, inter alia, by the Austrian Constitutional Court in its evaluation of the relevant provisions of Austrian law in light of Art. 14 ECtHR.[515]

However, this argument was met with convincing critique.[516] First, the assumption that a change of circumstances in the country of origin is more likely in cases of the real risk of serious harm that led to the granting of subsidiary protection (such as civil war or systematic torture) in comparison with cases of a well-founded fear of persecution that led to recognition as a refugee, has until now not been sufficiently supported empirically.[517] Second, there is no compelling normative argument that subsidiary protection status, according to the conception of the EU legislature, is characterized by distinct temporality. Such construction of the Qualification Directive seems unduly influenced by national statuses of complementary protection, i.e., precisely the traditional approach not

514 See, again, ECtHR, *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012, at para. 55. The only difference that finds a strong explanation in international law is Art. 25 of the Qualification Directive on travel documents.

515 Verfassungsgerichtshof, E 3297/2016 (Erkenntnis of 28 June 2017, re minimum benefit system), at para. 21–22; VfGH, E 4248–4251/2017–20 (Erkenntnis of 10 October 2018, re family reunification), at para. 47.

516 Council of Europe: Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe* (2017), at 25–26 and 47; UNHCR, *Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons In Need Of International Protection* (2017), at 32; from legal scholarship, see, e.g., Immervoll and Frühwirth, 'Statusdifferenzierungen in der Familienzusammenführung', in St. Salomon (ed.), *Der Status im europäischen Asylrecht* (2020) 161, at 183.

517 See Hasel and Salomon, 'Differenzierungen zwischen Flüchtlingen und subsidiär Schutzberechtigen', in St. Salomon (ed.), *Der Status im europäischen Asylrecht* (2020) 113, at 153.

taken by the EU legislature. At first glance, the difference in respect of the validity of the first residence permit (three years for refugees, one year for beneficiaries of subsidiary protection, according to Art. 24 of the Qualification Directive) seems to provide evidence to the contrary. However, this argument apparently overlooks the fact that all persons enjoying international protection are entitled to have their residence permit renewed, as long as the need for protection persists. The relevant provisions on the cessation of the protection status are literally drafted in parallel (Art. 11 and 16 Qualification Directive). Moreover, both groups are entitled to the status of long-term residents according to exactly the same conditions (see Directive 2003/109/EC, as amended by Directive 2011/51/EU). Accordingly, the claim that the difference in treatment has a reasonable foundation in a more temporary nature of subsidiary protection must be rejected.

In sum, there is no objective justification for the difference in treatment between refugees and persons enjoying subsidiary protection, in respect of either social assistance or family reunification. Accordingly, these instances of non-equal treatment amount to a violation of Art. 14 ECHR.

The resultant legal question is: what level of European governance must provide for equal treatment – the EU legislature or the Member States? Usually, the answer to such a question is rather straightforward: the level of governance that has caused the Human Rights violation is responsible for remedying the situation. In the present instance, however, the responsibility is shared. The unlawful discrimination against persons enjoying subsidiary protection occurs in a situation of partial and underinclusive regulation by the EU legislature, on the one hand, and practices and regulations on the part of the Member States that are seemingly permitted (social assistance) or not covered (family reunification) by EU law, on the other hand. In other words, the problematic non-equal treatment is the result of the current distribution of legislative powers in the multi-level system of European migration governance.

This is a well-known problem of federal systems, which tend to produce, and constitutionally accept, non-equal treatment of comparable situations whenever the federal level has only partly exercised its shared legislative powers (or is not competent to legislate at all). In the context of EU law, this issue is familiar from internal market law that, at times, creates 'reverse discrimination' against national entities, which is not regarded as unlawful. Examples from the field of migration include family reunifica-

tion where the sponsor is an EU national who has not exercised his or her freedom of movement.[518]

However, we argue that this doctrine of reverse discrimination does not apply to persons enjoying international protection in the EU. The crucial difference here is that both the EU and its Member States have legally committed themselves to observe the Human Rights standards defined by the ECHR. From the 'outside' perspective of the ECHR, the distribution of powers between the EU and its Members is not a valid argument to justify discrimination caused by disparate decisions between the two levels. Both are simultaneously obliged to provide for equal treatment of persons in analogous situations, each within their respective scope of powers. This view finds additional support in the ECtHR judgment in *Hode and Abdi v. UK*, where the Court explicitly rejected the argument that an international obligation to grant certain rights to one group of persons could justify denying these rights to another group.[519]

Applying this doctrine to the present case of persons enjoying international protection, we hold that the EU Member States are legally bound to immediately accord non-discriminatory treatment to persons protected on subsidiary grounds in respect of social assistance and family reunification, even if the EU legislature has so far failed to establish statutory obligations to this effect. This obligation follows from international law and, in the case of social assistance, from EU constitutional law.

In respect of the EU itself, it is more difficult to argue that a positive obligation to legislate to this effect exists, given that the EU is not a party to the ECHR and that the EU is constitutionally entitled to pursue an incremental approach to establishing the Common European Asylum System (Art. 78(1) TFEU).[520] For an interim period, this necessarily implies that certain elements of the system are only partly governed by EU law, including the asylum status (Art. 78(2)(a) and (b) TFEU). However, the EU legislature must refrain from adding to the disparities that already stem from the absence of full harmonization of national legislation, and work toward a comprehensive system.[521] Accordingly, we hold that it is unlawful, from a constitutional point of view, to maintain a situation of

518 See A. Walter, *Reverse Discrimination and Family Reunification* (2008).

519 ECtHR, *Hode and Abdi v. UK*, Appl. no. 22341/09, Judgment of 6 November 2012, at para. 55.

520 See, mutatis mutandis, CJEU, Case C-193/94, *Skanavi* (EU:C:1996:70), at para. 27; Case C-233/94, *Germany v. Parliament and Council* (EU:C:1997:231), at para. 43.

521 See, mutatis mutandis, CJEU, Case 41/84, *Pinna* (EU:C:1986:1), at para. 21.

underinclusive legislation in respect of the asylum status, a situation that in effect leads to a violation of the prohibition of discrimination based on immigration status.

4.3 Recommendations

Recommendation 1: Systematically ensure non-discrimination regarding social assistance

We recommend that the EU systematically review its asylum and immigration *acquis* to ensure that any distinctions between immigration statuses defined in EU law are based on objective and reasonable justification as required by Art. 14 ECHR, in order to ensure non-discrimination among these persons. The above legal analysis revealed that non-equal treatment in respect of social assistance is a critical case in point. For most categories of migrants, whose immigration status is (partly) defined by EU law, the EU legislature apparently permits Member States to deny access to social assistance entirely or to limit the assistance to 'core benefits'. The lack of guidance provided by this 'underinclusive legislation' invites the Member State to apply arbitrary distinctions and issue unlawful decisions in individual cases. We therefore recommend that the EU enact, as a minimum guarantee, a right to equal treatment in respect of social assistance necessary to ensure a decent existence for all migrants present in the Union for more than 90 days.

In order to prepare for comprehensive reform, the European Commission should conduct a systematic review of the asylum and immigration *acquis* to identify non-justified sectoral differentiation created by the EU legislature, including distinctions exclusively based on nationality. Any distinction that fails to meet the test enshrined in Art. 14 ECHR must be eliminated. This pertains, inter alia, to difference in treatment in respect of family reunification, social welfare, health care, access to the labor market, and mobility within the Union. Such review should result, where appropriate, in initiatives to revise existing legislation, including most notably the Qualification Directive (see Recommendation 2).

We further recommend that the Commission conduct a systematic review of Member States' laws and policies making use of optional clauses or derogations that allow for less favorable treatment of third-country nationals. The Commission should institute, where appropriate, infringement proceedings according to Art. 258 TFEU, and/or propose amendments to

EU legislation that currently provides for discretion on the part of the Member States, in all cases where the review reveals that such discretion leads in practice to violations of Human Rights law.

Recommendation 2: Eliminate any discrimination among persons granted international protection

We recommend that the EU exercise its legislative and supervisory powers to ensure that any discrimination among persons granted international protection in respect of their immigration status is eliminated, most notably regarding family reunification. Upholding the current situation of non-regulation of family reunification where the sponsor enjoys subsidiary protection status would violate Art. 21(1) EU-CFR.

As to the means of achieving that aim, the EU should accord a uniform asylum status defined in EU legislation. More specifically, all beneficiaries of international protection must be granted the same rights in respect of family reunification and access to social welfare, including social assistance. Such an approach would transpose existing legal obligations of Member States under Human Rights law onto parallel obligations under statutory EU law. Accordingly, we recommend deleting Art. 3(2)(c) and amending Art. 9 to 12 of the Family Reunification Directive, and deleting Art. 29(2) of the Qualification Directive, in order to establish a uniform asylum status for all persons enjoying international protection in the EU.

Pending such amendments, EU Member States are obliged, by virtue of Art. 14 ECHR, to apply the same legal regime in respect of the right to family reunification to refugees and persons eligible for subsidiary protection. In effect, Member States participating in the Area of Freedom, Security and Justice must grant the rights laid down in Chapter V of the Family Reunification Directive (Art. 9–12) to beneficiaries of subsidiary protection as defined in the Qualification Directive.

In respect of the right to social assistance, EU Member States are obliged, by virtue of Art. 14 ECHR and Art. 20(1) EU-CFR, to apply the same legal regime to Convention refugees and persons eligible for subsidiary protection. The possibility of limiting such assistance to core benefits pursuant to Art. 29(2) of the Qualification Directive is rendered inapplicable by EU fundamental rights. We recommend that the Commission conduct a systematic review of the relevant laws and policies of those Member States relying on Art. 29(2) of the Qualification Directive

and, where appropriate, institute infringement proceedings according to Art. 258 TFEU.

Recommendation 3: Follow a legislative approach guided by the 'Leitbild' of status equality

As regards future legislation in migration law, we recommend that the EU follow a horizontal approach, in order to avoid creating new, potentially non-justified distinctions among immigration statuses. The EU should be guided by the *Leitbild* of status equality that serves as a template for the status of all third-country nationals residing in the EU.

Such an approach would not only foster consistency of legislative outcomes but also provide for conformity with the principle of non-discrimination. Defining such a *Leitbild* obviously involves political choices that are not determined by Human Rights law. The logical starting point for such determinations is the privileged status of migrants who are Union citizens. While Human Rights law does not necessarily require that the EU accord third-country nationals the same set of rights as Union citizens, the latter could nevertheless serve as a point of reference for the model immigration status of third-country nationals, in particular in respect of equal treatment in all fields governed by EU law and the freedom of movement within Union territory. Where legal and political discourse reveals that distinctions between EU citizens and non-citizens are supported by objective and reasonable justification, the status of a long-term resident as defined in the Long-Term Residents Directive could serve as secondary point of reference, providing the template for the 'general status' of third-country nationals residing in the EU.

Any deviation from this dual template should relate to the specific nature of the class of migrants at issue, in particular the purpose of admission to the EU, and to the specific right at hand. On a procedural level, the EU legislature should include explicit equality reasoning in the preamble to every new act, providing the reasons for which the immigration status of a particular class of migrants deviates from the templates.