CHAPTER IV

Some foreigners more equal than others under EU law

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Introduction

European Union (EU) competence for the construction of a European immigration policy\(^1\) raises some questions regarding the application of the principle of non-discrimination on the grounds of nationality to third country nationals (TCNs)\(^2\) for at least two reasons.

First, the European Council’s political objectives allow for a comparison of the situation of TCNs and EU citizens and, eventually, an assessment of the proportionality of the remaining differences in treatment. Indeed, during the Tampere Council of October 1999, the European Council affirmed its will to approximate “the legal status of third country nationals to that of Member States’ nationals” (European Council, 1999, § 21) granting TCNs legally residing in the EU for a certain period of time “a set of uniform rights which are as near as possible to those enjoyed by EU citizens” (European Council, 1999, § 21). The European Council repeated this intention during its meeting on 30 November and 1 December 2009 through the adoption of the Stockholm Programme. In fact, the Council affirmed that the EU “must ensure fair treatment of third country nationals legally residing in the territory of its Member states” and that TCNs should be granted “rights and obligations comparable to those of EU citizens” (European Council, 2009, § 6.1.4).

Secondly and in the opinion of many authors (Cholewinski, 2002, p. 40-41; Groenendijk 2006, p. 84; Bell 2001, p. 54), the material extension of the scope of application of EU law resulting from the Amsterdam Treaty to an area concerning TCNs (EU immigration and asylum policy, i.e. former Title IV of the Treaty on the

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\(^1\) Already introduced by the Maastricht Treaty (1992).

\(^2\) Nationals of non-member countries of the EU.
European Community (ECT)) raises the question of the application of Article 18 of the Treaty on the Functioning of the European Union (TFEU) (former Article 12 ECT) to TCNs. This article prohibits discrimination on the grounds of nationality. Within the scope of application of EU law, could Article 18 TFEU be invoked to challenge differences in treatment among TCNs? For example, on the basis of Article 7 (2) of the Family Reunification Directive (Directive 2003/86)\(^3\), Germany and the Netherlands have both conditioned the granting of a family reunification visa on the successful completion of an integration examination, testing host society language, history and culture. Certain nationalities are, however, exempt from this obligation. The result is a difference in treatment of TCNs on the basis of their nationality. Could that difference in treatment be challenged under Article 18 TFEU? Could Article 18 TFEU even be invoked to challenge differences in treatment between TCNs and European citizens within the scope of application of the Treaty? For example, as regards the right to family life, conditions for family reunification are very different if the sponsor is a European citizen or a TCN (Bribosia, 2003). Could the legitimacy of these differences in treatment be assessed in light of the principle of non-discrimination on the basis of nationality enshrined in Article 18 TFEU?

Article 18 TFEU was originally included in the 1957 Treaty of Rome to improve market integration\(^4\). It was not included as a means to address human rights considerations. Most likely as a result of its economic rationale, and even after the EU was granted competence in immigration policy, Article 18 TFEU has classically been interpreted as applying only to differences in treatment amongst European citizens\(^5\).

This chapter will first discuss the legal arguments that could be advanced to challenge such a classic interpretation. The chapter will also discuss the recent unambiguous confirmation by European Court of Justice (ECJ) of this interpretation of Article 18 TFEU. The final section will analyze the consequences of this interpretation for the protection of TCNs against discrimination on the grounds of their nationality and will discuss other potential means of protection under EU law. Particular attention will be given to the European Charter of Fundamental Rights, the European Convention on Human Rights which according to the European Court of Justice should be considered general principles of EU law, and to the general principle of equal treatment. This chapter will also address the prohibition of indirect racial, ethnic or religious discrimination as an alternative way of protecting TCNs against nationality-based discrimination. As illustrated later in the chapter, none of these potential means of protection are an effective remedy for TCNs fighting discrimination on the basis of nationality.

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\(^3\) Taken on the basis of Article 79 (2) (a) TFEU (former Article 63 (3) (a) EC)).

\(^4\) Prohibition of nationality discrimination is required in order for individuals to exercise freedom of movement.

\(^5\) Nationals of EU Member States.
The personal scope of Article 18 TFEU: an evolution at last?}
Article 18 TFEU reads as follows:

“Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. (...).”

While the ECJ has been very generous in its interpretation of this provision in order to give full weight to the fundamental EU right of freedom of movement (Dony, 1999; O’Leary, 1997, p. 105-136), it has done so only for the benefit of European citizens. According to Bell, this limited personal scope of application of Article 18 TFEU could be explained by its association with the personal scope of freedom of movement (2002, p. 37-38) which has always been granted to European citizens only. This is exactly the reason why the ECJ has been unable, until now, to criticise cases of reverse discrimination (cases in which nationals of a Member State, having never made use of their free movement right, are disadvantaged by their own national State as compared to the situation of European citizens), given that prohibition of discrimination on grounds of nationality does not apply to purely internal situations (Dautricourt & Thomas, 2009), the “free movement element” being absent. Instead of providing some protection at the EU level, the ECJ has always relegated the solution of such discrimination to the national legal system.

In a sense, this association could be perceived as logical since the need to be protected against discrimination on the basis of nationality can only arise when there is movement of an individual to a country other than his or her own, exposing him or her to potential discrimination on the basis of nationality. Nevertheless, arguments can be made against the association of the personal scope of application of Article 18 TFEU with the personal scope of freedom of movement and, thus, against the resulting inapplicability of Article 18 TFEU to TCNs.

As regards the right to freedom of movement, it is incorrect to assert that movement from one Member State to another is required in order for the principle of non-discrimination on grounds of nationality to be relevant. Rather, an element of “foreignness” is required but, as the case of reverse discrimination demonstrates, a national could be discriminated on the basis of nationality within his or her own country. As for TCNs, they have moved from their country of origin to the EU and, therefore, could potentially be exposed to discrimination on the basis of nationality without actually moving from one Member State to another within the EU.

Moreover, the scope of the right to freedom of movement is not cast in stone. Initially accorded only to European citizens who moved for work in another Member State, under certain conditions it has been extended to economically inactive citizens (Carlier, 2007, p. 58). Its scope has even been expanded to include TCNs. In addition to “privileged foreigners” (family members of European citizens, TCNs working

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for a European company providing services in another Member State, and those coming from a country which has signed a cooperation agreement with the EU), long term resident TCNs benefit, under very strict conditions, from a limited “freedom of movement” (Carlier 2007, p. 77) or more accurately, from a right to reside in another Member State (see Chapter III of the Long Term Resident Directive). One can reasonably expect that the personal scope of application of the right to freedom of movement will continue to evolve since it has already done so. An important indication that the scope of this right may eventually include TCNs is the fact that, while former Article 63 (4) EC referred to the right of TCNs who are legally resident in a Member State to reside in another Member State, Article 79 (2) (b) TFEU now refers to “the rights of third country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States”.

Furthermore, the association of the scope of the prohibition of nationality-based discrimination with that of the right to freedom of movement is not convincing. Indeed, Article 18 TFEU applies “within the scope of application of the Treaties” and this scope is not limited to the freedom of movement as the EU’s competences have broadened since 1957. In fact, the scope of application of EU law was extended by the Treaty of Amsterdam (Articles 77-79 TFEU, i.e. former Title IV ECT) to immigration and asylum policies. Since these “new” EU policies apply principally to TCNs, the material extension of the scope of application of the Treaties creates an extension of the personal scope. There is a need for a link with the Treaties in order to fall “within the scope of application of the Treaties”. Without a doubt, a new EU competence constitutes such a link to EU law. Therefore, there is no legal reason to limit the personal scope of Article 18 TFEU to the personal scope of the right to freedom of movement. The extension of the material and personal scope of EU law, and the fact that Article 18 TFEU should not be limited to the scope of the right to free movement, strongly suggest the need for a reinterpretation of Article 18 TFEU such that it could apply to TCNs the moment they find themselves in a situation governed by EU law, for example within the scope of application of Articles 77-79 TFEU.

If legal arguments plead for an application of Article 18 TFEU to TCNs, then the question of its range arises. Indeed, could it be applied to the differences in treatment between TCNs and European citizens, or, only to the differences in treatment among TCNs? Some authors suggest that, since Article 18 TFEU applies “without prejudice to any special provisions contained [in the treaties]”, it could not, in any way, be applied to the differences in treatment between European citizens and TCNs (De Bruycker, 2003, p. 46; Cholewinski, 2002, p. 41). Indeed, in this opinion, former Title IV ECT (Articles 77-79 TFEU) on immigration policy would have to be understood as such a special provision because it is based on the very distinction between TCNs and European citizens. However, if immigration policy is indeed based on the distinction between the national and the foreigner, it must be stressed that it is not based on their discrimination. Distinction or difference in treatment as such do not constitute discrimination. Discrimination is an unjustified difference in treatment (not having a legitimate aim or using disproportionate means). In reality, as the ECJ has
explicitly stated in Cowan, the special provisions referred to in Article 18 TFEU are implementations of the principle of non-discrimination on grounds of nationality in a particular area. In fact, several provisions of the Treaty put the general principle of Article 18 TFEU into practice in a particular area, for example with regard to the freedom of movement of workers. Once a Treaty article implements the principle in a particular area, and in a particular way, that article will be applicable. The identification of the applicable provision has consequences on the justifications that can be offered for the differences in treatment based on nationality. Thus, for example, Article 45 (2) TFEU prohibits discrimination on the basis of nationality within the area of free movement of workers. Article 45 (3) TFEU limits the justifications that can be invoked in order to justify a difference in treatment among workers of the Member States. In cases where the right to free movement of workers applies, only reasons relative to public order, public security or public health can be invoked to justify a difference in treatment (Schengers, 2004, p. 98-99). Could it be claimed that application of Article 18 TFEU “without prejudice to any special provisions of the Treaties” means that the principle of Article 18 TFEU does not apply the moment the Treaties create discrimination on the basis of nationality? Martin (1995, p. 22) rightly states that it should not. Indeed, the contrary would deprive the principle of much of its useful effect, as it would apply only as far as the authors of the Treaty wanted it to apply, i.e. most likely not in sensitive situations, including the migration field. What would be the value of a principle that could be so simply eluded? Besides, given the general character of the principle of equality in EU law (see infra), it seems reasonable to stipulate, at the very least, that the exception to the principle of non-discrimination on the basis of nationality must be explicit (Constantinesco et al., 1992, p. 67-68). Articles 77-79 TFEU do not include the possibility for discrimination against TCNs, only the possibility for differences in treatment, which is not the same.

Until recently, the ECJ did not explicitly contradict the potential application of Article 18 TFEU to TCNs. Its position was rather vague. In fact, many cases dealing with Article 18 TFEU concerned European citizens. If the Court did not extend the principle to TCNs, it was simply because they were not involved in these cases. Moreover, various cases referred to in the literature as illustrations of the classic interpretation of Article 18 TFEU did not, in reality, deal with Article 18 TFEU but with one of the special provisions or regulations of EU law implementing the principle contained in Article 18 TFEU and applying explicitly to European citizens only. For example, Denis Martin (1995, p. 24) relies on the Buhari Haji case to justify the classic interpretation of Article 18 TFEU as only applying to European nationals. But, in reality, this case dealt with the application of Regulation 1408/71, which stated, in Article 2 §1, that it applied only to persons who were citizens of a Member State. It can therefore be argued that this restricted personal scope of application is not ipso

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8 See, for example, Articles 45 TFEU (free movement of workers), 49 TFEU (freedom of establishment), and 56 TFEU (freedom to provide services).
facto destined to define the personal scope of application of Article 18 TFEU in other fields of application of the Treaty.

The ECJ’s position in Vatsouras and Koupatantze

In June 2009, in its case Vatsouras, the ECJ affirmed very clearly that Article 18 TFEU was not meant to be applied to TCNs. The case concerned two Greek nationals who had come to Germany for work. Mr Vatsouras had worked for almost a year before being unemployed for five months after which he found another job. The wage earned during his first job was, however, not enough to assure him a minimum standard of living resulting in a successful request for a supplement from German social security. This supplement was, however, withdrawn upon his dismissal. Mr Koupatantze, on the other hand, had been working for a much shorter period before being unemployed for reasons independent of him. He then requested an unemployment allowance which was also granted. Four months later, however, this allowance was withdrawn retroactively. Six months after his dismissal Mr Koupatantze found another job.

In both cases the withdrawal of social benefits were justified on the basis of section 7, paragraph 1, second sentence of Book II of the German Code of Social Law regarding benefits for job-seekers (Sozialgesetzbuch II), which states that “foreign nationals whose right of residence arises solely out of the search for employment, their family members and those entitled to benefits under Paragraph 1 of the Asylbewerberleistungsgesetz (Law on the benefits to be granted to asylum-seekers)” are excluded from those benefits. Both Vatsouras and Koupatantze challenged the withdrawal of benefits before the national social court. Section 7, paragraph 1, second sentence of the Sozialgesetzbuch II had been amended when transposing the Union Citizens Directive (Directive 2004/38). Citing Article 24 (2) of the Directive, allowing Member States to make exceptions to the principle of equality in matters of social security for persons other than workers (Minderhoud 2009, p. 225-227), the Sozialgesetzbuch II introduced that exclusion. The national judges identified a question of conformity with EU law and referred a preliminary ruling to the ECJ including three questions. The questions sought to confront the validity of Article 24 (2) of the Union Citizens Directive with the principle of equal treatment.

This chapter will not focus on the first two questions (see Fahey, 2009 on this matter) but only on the third one which is of particular interest. Indeed, the third question asked whether the principle of non-discrimination on the basis of nationality enshrined in Article 18 TFEU precludes national rules which exclude nationals of Member States of the EU even from the receipt of the social assistance benefits which are granted to irregular immigrants.

It did not receive much attention from either the Advocate General or the Court, each of whom dedicated only a few paragraphs to their response.

Indeed, the answer to the question was not necessary for the solution of the case. In my opinion, it was meant not so much as a question but rather as an additional argument for the national judge pleading for the non-conformity of Article 24 (2) of

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Directive 2004/38 with primary EU law. Most likely, he wanted to highlight the fact that social assistance could be denied to European citizens while “even” irregular migrants were afforded some assistance.

Nonetheless, the question was answered by both the Advocate General and the Court. It is interesting to note that this question poses the issue from the opposite angle than the one referred to in the introduction of this paper. Here, in the eyes of the German judge, European citizens are placed in a more disadvantageous position than TCNs. However, there is no reason to think that the Court’s response would have been different had the disadvantageous position been occupied by a TCN. Indeed, the Court formulated its response in a very general way making it difficult to argue from then on, that, when appropriate, Article 18 TFEU could be applied to TCNs. The Court reformulated the question in § 50 of its judgment in a more general way by asking “whether [Article 18 TFEU] precludes national rules which exclude nationals of Member States from receipt of social assistance benefits in cases where those benefits are granted to nationals of non-member countries”. Following the conclusions of its Advocate General, the Court replied that Article 18 TFEU does not prohibit excluding European citizens from the benefits of social allowance afforded to TCNs (§ 53) because:

“[Article 18 TFEU] concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries” (§ 52).

The classic interpretation of Article 18 TFEU was thus confirmed. It can only be applied to European citizens and can therefore only be invoked by them.

After such an unambiguous and general statement, it is hardly arguable that Article 18 TFEU could still potentially be applied to TCNs. This ECJ statement is welcomed for its clarity, as, to my knowledge, it is the first time the Court looks at the application of Article 18 TFEU to TCNs without a more specific provision of the Treaty being invoked at the same time. This statement raises further questions however.

It is striking that no explanation of the Court’s interpretation is given in the reasoning of either the Court or the Advocate General. It seems that the original economic rationale of Article 18 TFEU, namely assuring market integration, still remains powerful enough to justify the fact that only European citizens can rely on the principle of non-discrimination on the basis of nationality, even at a time when the EU is trying to strengthen its legitimacy by developing a political integration process respectful of human rights.

It can also be asked whether the Court’s ruling can be explained by the fact that the social benefit at stake, the one afforded to TCNs, was not within the material scope of application of the Treaty. The Advocate General’s brief reasoning concerning the third question could be utilized to plead in such a direction. Indeed, in § 66 of his opinion, he states that “Community law does not provide rules for resolving issues of difference in treatment between Community citizens and citizens of non-member countries who are subject to the law of the host Member State”. However, it is indisputable that TCNs are not always governed by national law. They are sometimes subject to EU
law as, for example, within the scope of application of the European asylum and immigration policies (Articles 78 and 79 TFEU). It can therefore be argued that in the situation at hand, Vatsouras and Koupatantze were not within the scope of application of European law but were governed by German social assistance law. If this is the case, the Court’s affirmation could be different in a situation concerning TCNs falling within the scope of application of EU law. However, the general character of the affirmations by the Advocate General and the Court makes it difficult to support such a view. If the reason for the non-application of Article 18 TFEU to TCNs was that the issue was outside the material scope of application of the treaty, the Court would have said so. On the contrary, it intentionally answered the third question with a general statement that Article 18 TFEU is “not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries”. General statements are meant to be applied in any situation, even when a difference in treatment arises in a situation whereby both the European citizen and the TCN are within the material scope of the treaty.

Finally, the Court’s statement does not make it clear if Article 18 TFEU could be applied to differences in treatment among TCNs. While it is certain that differences in treatment between European citizens and TCNs cannot be challenged on the basis of Article 18 TFEU, the potential to challenge differences in treatment amongst TCNs is not definitively exhausted. Indeed, while asserting that Article 18 TFEU concerns situations in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State, it concludes by affirming that it is not intended to apply to differences in treatment between European citizens and TCNs. This conclusion leaves the door open for the possibility of applying Article 18 TFEU to differences in treatment among TCNs.

As this case illustrates, there is a huge reluctance to apply the principle of non-discrimination on grounds of nationality to TCNs. The fact that Article 18 TFEU has been interpreted so widely and generously to the benefit of European citizens helps to explain this reluctance. In addition, the fact of its eventual application to the domain of immigration and asylum policy (Articles 77-79 TFEU in which TCNs are indisputably within the scope of application of European law) seems to frighten not only policy-makers but also the Court. There is however no reason to be frightened of the application of the principle of non-discrimination on the basis of nationality to TCNs. The “only” consequence of such an application is to provide a manner to assess differences in treatment in order to abolish discrimination, not the justified differences which could remain in place (Boeles, 2005, p. 502).

The consequences of Vatsouras on the protection of TCNs against discrimination on grounds of nationality

As ECJ case law is fixed for now until such time as it is overturned, TCNs cannot rely on Article 18 TFEU to challenge differences in treatment based on nationality, at least not in any case between them and European citizens. One can ask whether TCNs are therefore deprived of any protection under EU law. If so, they would have to appeal to national and international legal orders in order to be protected against discrimination on the basis of nationality. In my opinion, the application of Article 18
TFEU to TCNs could have increased their protection from discrimination because it has “direct effect” (it does not need to be implemented in national legislation before it can be invoked before national judges) and can be seen as a direct way to access legal control over the differences in treatment they face. But other means can be mobilised at the EU level to protect TCNs. These means should be elicited from human rights law, in particular from the European Charter of Fundamental Rights, the European Convention on Human Rights, the general principle of equality, and the prohibition of discrimination on the basis of race, ethnic origin and religion.

The European Charter of Fundamental Rights, now mandatory as a result of the TFEU, includes an article prohibiting discrimination on grounds of nationality. Article 21 (2) stipulates that “within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited”. It is a repetition of Article 18 TFEU and the Explanations relating to the Charter of Fundamental Rights explicitly mention that it “must be applied in compliance with that Article”. Although those explanations do not have the status of law, they are meant to be the authoritative interpretation of the Charter. As a result, the Charter’s Article 21 (2) must be interpreted as applying under the same conditions as Article 18 TFEU, with the same classic limited personal scope. This is quite disappointing considering the Charter is clearly aligned with the objectives of fundamental rights for all human beings. One could have expected the principle of non-discrimination on grounds of nationality to have a broader personal scope than that of Article 18 TFEU, which is more clearly aligned with economic objectives. The Charter might be considered as an added argument in favour of detaching Article 18 TFEU from its economic rationale in order to give the human rights dimension of the protection from discrimination its full range. Meanwhile, it remains that Article 21 (2) of the Charter will only be applicable to TCNs if Article 18 TFEU is also applicable to them. As discussed above, this is not the path that the ECJ chose to take. Thus, the Charter will most likely not be of fundamental interest to the protection of TCNs against nationality-based discrimination.

The European Convention on Human Rights (ECHR) is another possible means by which TCNs can be protected against discrimination on the basis of their nationality as it prohibits discrimination in Article 14. As the ECHR is part of EU law\(^\text{11}\), protection afforded by the ECHR can be seen as protection under EU law. Concerning the differences in treatment on grounds of nationality, the European Court of Human Rights requires “very weighty reasons” in order for differences in treatment to be justified\(^\text{12}\). Therefore, any differences in treatment undergo strict scrutiny, making them \textit{a priori} unjustified. Nevertheless, the Court has been very keen in accepting all the differences in treatment resulting from the construction of the EU as justified by the existence, between Member States, of a “special legal order”\(^\text{13}\), “which has,\footnote{Even if the EU has not yet ratified the ECHR, the ECJ considers that its content, being common to the constitutional traditions of the Member States, can be regarded as general principles of EU law, i.e. unwritten rules of law.\footnote{Eur. Ct. H.R., \textit{Gaygusuz v. Austria}, 31 August 1996, § 42; Eur. Ct. H.R., \textit{Andrejeva v. Leetonia}, 18 February 2009, § 87.\footnote{Eur. Ct. H.R., \textit{Moustaquein v. Belgium}, 18 February 1991, § 49.}}
in addition, established its own citizenship” (for a critique of this case law see Van Droogenbroek, 1997, p. 8-12; Bribosia, 2004, p. 13.4/5-7). Since the Court did not explain why this special legal order could justify the particular differences in treatment at stake in those cases, it can be said that it does not operate any effective control over the differences in treatment between European citizens and TCNs, abdicating before the EU legal order. Therefore, TCNs will not find any solution from the European Court of Human Rights.

The ECJ has recognised the existence of a general principle of equality, which “requires that similar situations shall not be treated differently unless differentiation is objectively justified” (for a critique of this case law see Van Droogenbroek, 1997, p. 8-12; Bribosia, 2004, p. 13.4/5-7). General principles in EU law are unwritten rules of law compulsory for European institutions and for Member States implementing EU law, established by the ECJ. This general principle of equality could be argued to imply a general principle of non-discrimination on grounds of nationality under EU law, which could have a broader personal scope of application than the principle enshrined in Article 18 TFEU. However, the Court has as yet not recognised a general principle of non-discrimination, and still less, a general principle of non-discrimination on the basis of nationality. In reality, today there is no certainty of the existence of a general principle of non-discrimination, its precise difference with the general principle of equality, or the criteria that would be covered by such a principle (Martin, 2008, p. 425, 427). In 1976, the ECJ recognised the existence of a general principle prohibiting discrimination on the basis of gender (Bribosia 2008, p. 38) by affirming in Defrenne II that the “principle of equal pay forms part of the foundations of the Community” (ECJ, Case C-249/96, Lisa Jacqueline Grant v. South-West Trains Ltd, (1998) ECR I-00621, § 48).

However, the Court refused to recognise such a general principle on grounds of sexual orientation while it acknowledged it on the basis of age in Mangold before denying it again in Bartsch (Martin, 2008). It nevertheless recently reaffirmed Mangold case law, affirming the existence of a general principle of non-discrimination on grounds of age. As Martin highlights, Advocate Generals are taking pro and contra positions on the existence of such a principle (2008, p. 426-427). Recently, Advocate General Sharpston affirmed the existence of a general principle of “equal treatment or non-discrimination” in EU law according to which the Dutch distinction of the resource requirement for family reunification based on whether the family relationship arose

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21 ECJ, Advocate General’s Opinion, Case C-578/08, Rhimou Chakroun v. Minister van Buitenlandse Zaken, 10 December 2009, § 40.
before the sponsor’s entry into the Netherlands or later was not justified. In its judgment of 4 March 2010, the Court followed its Advocate General in its conclusions but did not refer to any general principle of non-discrimination.

By analogy to the Court’s reasoning in *Defrenne II*, some arguments plead for the existence of a general principle of non-discrimination on grounds of nationality, namely, the long and well established principle of non-discrimination on grounds of nationality in EU law (but for the benefit of European citizens only) and the direct effect of Article 18 TFEU. If such a general principle were to be recognised by the ECJ, its scope of application should be determined. It could be useful only if it had a broader material and personal scope of application than Article 18 TFEU. If so, it could be applied to TCNs. But why would the ECJ recognise such a general principle of non-discrimination on grounds of nationality applicable to TCNs when it has affirmed that Article 18 TFEU does not apply to them? The Court has not yet explicitly recognised the existence of a general principle of non-discrimination on the grounds of nationality applicable to TCNs and there is little hope that it will do so in the future given the *Vatsouras* case law. Once again, nationality-based discrimination faced by TCNs could hardly be challenged on this basis.

Finally, it can be argued that there is no “waterproof” frontier between the criteria of race, ethnic origin, and religion on the one hand and the criterion of nationality on the other hand (De Schutter, 2009, p. 20-23). As a consequence, a difference in treatment on grounds of nationality could be challenged, when appropriate, as an indirect difference in treatment on the grounds of race, ethnic origin or religion. This could be the case, for example, when the migrant population of one country is constituted, primarily, of one particular ethnic group. Thus, measures targeting “foreigners” could intentionally or unintentionally have a particular disadvantage for this ethnic group and could constitute indirect discrimination if there is no reasonable justification. However, it should be stressed that Directives 2000/43 and 2000/78, prohibiting discrimination on the grounds of race, ethnic origin and religion in various areas and adopted on the basis of Article 19 TFEU (former Article 13 ECT), explicitly mention in their common Article 3 (2) that discrimination on grounds of nationality is excluded from their scope of application. This common Article 3 (2) goes even further when it excludes conditions related to the entry of TCNs into the EU and the residence of TCNs within the EU from the directives’ scope of application. More generally, this article also excludes any treatment arising from the legal status of TCNs. This

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23 ECJ, Case C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, § 64.
24 Only with regard to employment for the criterion of religion.
25 Provision giving some capacity to act to the EU with regard to discrimination on the grounds of, *inter alia*, race, ethnic origin, and religion.
26 Common Article 3 (2): “This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned”.
exclusion has not yet been interpreted by the ECJ but it should be narrowly interpreted in order to give effective effect to Article 19 TFEU and to the directives’ objectives. As one of the directives’ objectives is to prohibit indirect discrimination, the exclusion should be construed as not covering discrimination on grounds of nationality when it can be demonstrated that this discrimination constitutes an indirect discrimination on the grounds of race, ethnic origin or religion (Hublet, 2009, p. 764-767). At the very least, the exclusion cannot be used to hide racial discrimination behind the criterion of nationality, which is supposedly “neutral” since it is not targeted by the directives. If TCNs can hope to be protected from nationality-based discrimination through the prohibition of racial, ethnic and religious discrimination, once again, there is some uncertainty as to the range of the exclusion of the criterion of nationality from the directives’ scope of application, and thus as to the concrete protection they can expect.

Apparently, TCNs are in fact not properly protected against discrimination on the basis of their nationality under EU law. They will have to turn to the national legal order (De Schutter, 2009, p. 55-75) and to the international human rights legal order. Indeed, Member States must respect their obligations undertaken with respect to human rights. In international human rights law, as well as in the ECHR, the criterion of nationality is becoming more and more a suspect criterion (De Schutter, 2009, p. 43, 49, 52). This means that judges are applying a strong level of scrutiny when evaluating the justification afforded for differences in treatment based on nationality. However, it has been illustrated that the European Court of Human Rights has not applied any effective appreciation of the differences resulting from EU integration. For its part, the Human Rights Committee qualified this position in its case Karakurt v. Austria in 2002 stating that:

“Although the Committee had found in one case (N° 658/1995, Van Oord v. The Netherlands) that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation, no general rule can be drawn from there to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts” (HRC, Karakurt v. Austria, 2002, § 8.4).

This seems a much more correct way of assessing the differences between European citizens and TCNs, looking at each specific case to see if the difference at stake pursues a legitimate aim and uses proportionate means to achieve it.

**Conclusion**

The “new” EU competence regarding immigration policy could have led the ECJ to a new construction of Article 18 TFEU, which prohibits discrimination on grounds of nationality, so that it would apply to TCNs. Indeed, as far as it applies “within the scope of application of the Treaties”, it should apply to TCNs when they are in a situation governed by EU law, for example inside EU immigration policy.

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27 The body in charge with the monitoring of the International Covenant on Civil and Political Rights.
However, the ECJ took an opposing position in the *Vatsouras* case. With no further explanation, it confirmed the classic interpretation of Article 18 TFEU stipulating that it is “not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries”. The question remains whether it could be applied to differences in treatment among TCNs.

Other possible means of protection for TCNs against nationality-based discrimination in EU law exist though they are not as straightforward as the application of Article 18 TFEU could have been. Article 21 (2) of the European Charter of Fundamental Rights prohibits discrimination on grounds of nationality but must be applied under the same conditions as Article 18 TFEU, i.e. with the same limited personal scope of application. Therefore, it will not be of any assistance to TCNs. The same can be said for protection under the ECHR, which is not efficient since the European Court of Human Rights does not operate any real control *in concreto* of the differences in treatment resulting from EU integration. Furthermore, a general principle of non-discrimination on grounds of nationality has thus far not been recognised by the ECJ. And, given the ECJ’s position on the application of Article 18 TFEU to TCNs, there is little hope that the ECJ will recognise such a principle. The prohibition of racial, ethnic and religious discrimination and the porous frontier between these criteria and the one of nationality seems a more efficient way for TCNs to challenge differences in treatment on grounds of nationality. This approach is quite weak however. Indeed, the criterion of nationality is explicitly excluded from the scope of application of Directives 2000/43 and 2000/78 prohibiting racial, ethnic and religious discrimination in various areas, with the consequence that nationality-based discrimination cannot be challenged on the basis of the prohibition of racial, ethnic and religious discrimination, or, in the best case, only the nationality-based discrimination constituting indirect racial, ethnic or religious discrimination.

As it stands, there is a gap in the protection of TCNs from discrimination on the basis of their nationality. Legally speaking, the gap could have been filled by EU law, as there is room for a new construction of the personal scope of application of Article 18 TFEU. Unfortunately, the ECJ moved in another direction with the *Vatsouras* case. This gap could be filled at the ECHR level but that would require the European Court of Human Rights to turn around its *Moustaquim* and *Chorfi* cases. Hopefully, the gap will be covered at national and international levels. It remains that the message sent to TCNs by the ECJ’s *Vatsouras* decision is exclusive of TCNs rather than moving in the positive direction of comprehensive integration of TCNs into European society.