

Third Country National

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1. Abstract

This chapter analyses the individual status of a Third Country National (TCN) from a standpoint which highlights the creation and the conditioning of this status by European institutions and laws. It is divided into two sections. The first discusses TCNs under European Union (EU) law, to determine how this individual status has been established through the formation of the EU and is today formally recognised and regulated through EU law. The interplay between EU nationals' and TCNs' rights and freedoms is then examined further in the second section which focuses on TCNs' right to marry in the member state of Malta. This section broadly addresses the clear tension between the universal character of human rights and the systems for their implementation and enforcement within member states; which are mainly national in character and addressed to citizens and this notwithstanding the EU's accession to the European Convention of Human Rights (ECHR). More specifically, the interrelationship between TCNs' rights to marry and to exercise freedom of movement within member states, as well as the constraints which condition their access to such rights, provide a deeper understanding of the juridical implications of the individual status of TCN within the EU.

Keywords: Third Country National, Union Citizenship, Family Members, Freedom of Movement, Right to Marry.

1.1 Third Country Nationals in European Union Law

1.1.1 Creation and Regulation

The 1992 Maastricht Treaty was the first to introduce citizenship of the EU, which was later extended by the Treaty of Amsterdam. The Treaty on the Functioning of the European Union (TFEU) established that every person holding the nationality of a member state shall be a citizen of the union. EU nationals as citizens of the member states are afforded rights, freedoms and legal protections by EU law, which are conferred on all citizens of the union.ⁱ As a primary and individual right, citizens of the union enjoy freedom of movement; the right to move and reside freely within the territory of the member states. This right is extended to the European Economic Area (EEA)ⁱⁱ and, through a series of bilateral agreements, to Swiss citizens.ⁱⁱⁱ Freedom of movement is one of EU's 'four economic freedoms', together with free movement of goods, services, and labour and capital, which allow nationals of an EEA country to reside and work in another member state on the same conditions as its own citizens.

The formation of the EU and the granting of freedom of movement to nationals of the member states, has created the individual status of TCNs; individuals who are not nationals of the EEA and Switzerland and hence, excluded from freedom of movement. The individual status of TCN was initially constructed as the flipside of EU laws and agreements that produced a dichotomy between individuals who are union citizens and those who are nationals of states which are 'outsiders' in relation to the EU, EEA and European Free Trade Association (EFTA) agreements. As a result of the continual process of defining and redefining the EU borders and concomitant negotiations with

EEA and EFTA member states, the EU (re)configures and (re)defines the individual status of EU nationals and TCNs. The scope and meaning of the status of TCN is in fact dependent on this process.^{iv}

The EU has also passed numerous directives that expressly recognise and in the process, regulate this individual status;^v particularly laws dealing with TCNs' entry to and movement within the EEA member states.^{vi}

1.1.2 Residence and Freedom of Movement

EU legislation regulates TCNs' residence and mobility within the EU; TCNs already residing within the EU are granted preferential treatment over TCNs who are entering the EU for the first time. For instance, Directive 2003/109/EC provides that TCNs who are long-term EU residents, may apply for permission to reside in a second member state after they have acquired long-term residence status in the first member state. And, Directive 2009/50/EC, which concerns highly skilled workers, establishes that once they obtain a Blue Card^{vii} in the first member state of residence, they may be allowed, after 18 months, to move to a second member state. Nevertheless, a second Blue Card in the second member state must be applied for and they must meet the same conditions that were required in the first member state. Similarly, *inter alia*, Directive 2005/71/EC and Directive 2004/114/EC target TCN researchers and students respectively and Directive 2014/36/EU establishes the conditions of entry and stay of TCNs for the purpose of employment as seasonal workers.

All directives allow member states considerable discretion in setting the requirements that must be met by TCNs in order to move and reside in a second member state, albeit being allowed to reside in the previous member state. When TCNs stay in the EU for longer than three months and their status does not fall within any of the established EU laws, such as the abovementioned regulating their position by virtue of their activities, national immigration rules apply. Consequently, some member states allow free entry and certain exemptions to TCNs possessing valid work permits or residence statuses in the member states of previous residence, other member states offer a facilitated process, whilst others require full new applications satisfying all the requirements despite the valid permit issued by the member state of previous residence. In all cases, TCNs must go through national immigration procedures. In a nutshell, their mobility rights and freedom of movement are restricted.

1.1.3 Family Members of Union Citizens

Directive 2004/38/EC establishes freedom of movement and residence within the territory of the member states to all union citizens. The European Parliament and Council, clearly with the intention of securing full freedom of movement for union citizens, have extended this right to TCNs who are family members of union citizens. The subtitle of the directive provides that its provisions have 'EEA relevance', hence, it applies to all citizens of the EEA states as well as their TCN family members. TCNs, generally excluded from the enjoyment of freedom of movement, enjoy freedom of movement inasmuch as they are 'family members' of EEA citizens as defined under Article 2 of the directive.^{viii}

In the important case of *Metock v. Minister of Justice Equality and Law Reform*, the European Court of Justice (ECJ), interpreting the extension of freedom of movement to family members of union citizens, decided that TCN family members could enjoy freedom of movement even if they had previously been in EU territory without a legal status.^{ix} The ECJ ruled that member states cannot impose additional conditions to the directive. In accordance with the treaty, movement may be restricted on the grounds of public policy, public security or public health. Moreover, Article 3(1)

of the directive establishes that its provisions apply only to those family members that fall within the abovementioned definition, who either accompany union citizens or move in order to join them.

The directive establishes that whilst union citizens can practice freedom of movement by making use of either a passport or an identity card, their TCN family members must possess valid passports in order to leave their EU country of residence. Moreover, on entry into the territory of a member state, TCNs who are family members of union citizens are not exempt from observing the visa requirements established by Regulation (EC) No 539/2001, which lists which TCNs must possess a visa when crossing the union's external border. The difference between TCNs who are and who are not family members of union citizens is that the former must possess a valid visa to enter EU territory, but will subsequently be exempted from visa requirements if they possess a valid residence card showing that they are family members of union citizens.

In conclusion, the individual status of TCN does not transmit absolute freedom of movement; nor is the freedom granted self-sustainable. It is clear that TCNs are not the main interest of the directive; the main purpose of the directive is to promote, facilitate and implement full free movement of all union citizens, and hence indirectly, in the process, rights were given to family members of union citizens who fall under the definition imposed by the directive. TCNs' freedom of movement is strongly correlated with the movement of the related union citizens. As a result, the directive does not apply to movements of TCNs which are not connected with the movements of the union citizens' family members; any rights conferred to the status of TCNs are rights derived from the exercise of freedom of movement of union citizens.

1.2 Third Country Nationals in Malta

1.2.1 Entry, Residence and Citizenship

Since Malta is a union territory, TCNs' entry is regulated by visa requirements based on Regulation (EC)No539/2001; however, the precise entry requirements differ from one TCN to another on the basis of his or her nationality and diplomatic relations between the country of nationality and Malta. As already established, the issue of residence and work permits, and mobility rights when TCNs move to Malta from another member state, is generally regulated by EU legislation. In cases where TCNs' activities are not covered by any of the established EU legislation, their position is regulated by national legislation; national laws merely fill in the gaps permitted and left by EU directives. In the Maltese context, in alignment with the foregoing analysis, there are various transformations which occur to an individual who acquires a lawful status; new rights and duties are made contingent to acquiring a status of a lawful residency. TCNs who successfully obtain Maltese citizenship also acquire lawful residency, however the principal vehicle of obtaining citizenship is through marriage; access to which is itself, as will be shown below, dependent upon proof of a lawful status in Malta.

There are three possible routes for TCNs to obtain Maltese citizenship, which are: (1) citizenship through naturalisation. This takes place when TCNs, who have long-term residency status in Malta, successfully apply for and obtain citizenship after legally residing for a minimum of five consecutive years in Malta prior to the date of application. However, this route relies heavily upon the discretion of the Minister and entails satisfaction of national requirements. (2) citizenship through the Individual Investor Programme; applicants who satisfy the criteria must, *inter alia*, pay 650,000 Euros to obtain a Maltese passport.^x (3) citizenship by contracting with a Maltese citizen a recognised marriage acquiring civil effects; this is the main route availed of by TCNs which neither involves large monetary investments nor depends heavily on Ministerial discretion.^{xi} Married TCNs must supply proof of continuous residency in Malta with the Maltese spouse for at least five consecutive years following the celebration of a civil marriage.

1.2.2 *Right to Marry*

The ECHR was the first legal instrument to give effect to certain rights established in the Universal Declaration of Human Rights (UDHR), by making such rights, *inter alia* the right to marry, binding in Europe. The right to marry prescribed under Article 12 of the ECHR is drafted differently to Article 16 of the UDHR; allowing for some restrictions by national laws and raising questions on the extent of the margin of appreciation enjoyed by member states in relation to this right.^{xii} However, from early days, the right to marry has been described as fundamental, and numerous legal opinions and judgements have clearly provided that only limited scope is afforded to national laws to restrict its exercise.^{xiii}

In the Maltese Constitution of 1964, the right to marry is not specified as a fundamental right and Malta only formally recognised and bound itself to protect the right to marry upon ratifying the ECHR in 1967. Moreover, as the convention did not form part of ordinary Maltese law, it was only through the enactment of the European Convention Act 1987^{xiv} that the protection of the right to marry was clearly extended to individuals as part of Maltese law.^{xv}

The Marriage Act of 1975 regulates the formalities, restrictions, validity and annulment of civil marriages in Malta, as well as giving civil effects to canonical marriages and other religious marriages celebrated according to the rites or usages of any religion or denomination recognised for the purpose of the same act.^{xvi} One of the essential formalities of the Marriage Act is that the celebration of the marriage must be preceded by the publication of banns of matrimony by the Marriage Registrar. For the Marriage Registrar to proceed with the publication of banns, the registrar requests the birth certificates of the parties to be married and a declaration on oath made and signed by each of them stating that to their best of knowledge and belief there is no legal impediment to the marriage or other lawful cause why it should not take place.

Perhaps, due to marriage being the principal route by which TCNs can acquire a status to reside long-term in Malta and/or due to pressures by EU bodies to protect the Schengen borders,^{xvii} the Marriage Registrar, relatively close to Malta's accession into EU,^{xviii} included an additional prerequisite for the publication of banns, which does not materialise from the Marriage Act. The registrar demands proof of a valid status in Malta from each of the prospective spouses. Whilst EU nationals enjoy freedom of movement in Malta as EU territory, TCNs must prove their valid status to the registrar. The Marriage Registrar may thus justify his refusal to publish the banns merely on the basis that a TCN's prospective spouse possesses an expired visa or residence permit and is therefore illegally in Malta, even if the other prospective spouse is a Maltese or an EU national. There are various cases of rejected asylum seekers whose request for publication of marriage banns was rejected on the basis of their lack of legal status in Malta.^{xix}

Maltese courts have supported the Marriage Registrar's request that the applicants, for the publication of marriage banns, must have a valid legal status in Malta.^{xx} In the case of Ogunyemi and Sandra, involving a Nigerian man and a German woman, the court explicitly decided that the requirement of a valid status does not breach the fundamental human right to marry of TCNs. The judge held that the registrar's request for proof of a valid visa because Ogunyemi is a third party national, 'does not mean that the very essence of the right is being impaired'.^{xxi} The court decided that the right to marry of both parties was still substantively respected by Maltese laws and policy even if the parties could not exercise such a right in Malta due to the parties not fulfilling the established conditions. The court highlighted that the applicants could always access their right to marry elsewhere by entering a contract of marriage in Germany or a third country.

Hence, TCNs in Malta often face a catch-22 situation as regards marriage and legal status; a recognised marriage is a principal means for a TCN to obtain a regular residence status in Malta but an irregular presence also prevents access to a recognised marriage. Ultimately, when such a scenario of refusal to publish the banns by the registrar involves transnational marriages between EU nationals and TCNs, there is arguably a breach of the right to marry of the TCN as well as of the partner, national of an EU member state.

1.3 Conclusion

The specificity of the individual status of TCNs in EU law must be understood against the background of European citizenship, as in many ways the status of TCN still stands as that of a ‘non-status’;^{xxiii} being defined in negative terms as the status of those who do not qualify as citizens of the union. The various European legislations subsequently regulating the status of TCNs remain somewhat overshadowed by this starting point. Thus, the emergence of the status of TCN on the European stage mainly took the form of an afterthought, insofar as the need was subsequently felt to regulate the status of non-union citizens. The resulting status remains one which in many ways deprives the holders of rights, rather than creating new forms of legal entitlement.

European law has however granted certain rights and duties to postulated categories of TCNs who are defined by virtue of: (a) their proximity to EU citizens, i.e. EU citizens’ family members as defined by EU law and influenced by national legislation in regards to registered partnerships; (b) the duration of their legal residence within the EU; and/or (c) their participation in specific fields of activities which are in themselves regulated by EU law. Hence, EU law grants rights to TCNs either directly by virtue of legislation aiming to regulate TCN status within the territory of the union or indirectly, in that TCNs receive subordinate rights which are auxiliary and an indirect consequence to the rights granted to union citizens. In fact, there is a strong interplay between EU nationals’ and TCNs’ rights and freedoms; the clear intention behind granting freedom of movement to TCNs, who are family members of EU citizens, is to fully secure freedom of movement to union citizens. However, the definition of ‘family members’ is restrictive and excludes *inter alia* future family members; i.e. TCNs and EU nationals who wish to contract marriage or a registered partnership where the host member state treats registered partnerships as equivalent to marriage.

Focusing on the right to marry of TCNs in the member state of Malta brings to fore the strong link between marriage and legal status, particularly within the European context. The interrelationship between TCNs’ rights to marry and to exercise freedom of movement as well as the constraints which condition their access to such rights, provides a deeper understanding of the juridical implications of EU law on the individual status of TCN as a ‘non-status’. As the Maltese courts reiterate quoting EU laws, when a TCN entering Malta from outside the EU attempts to access certain rights, he or she is required to show a valid status through a visa or some form of special permit. Specifically, in Malta the requirement of proving a valid status by TCNs who request the publication of marriage banns in order to contract marriage, illustrates that TCNs are perceived as ‘outsiders’ who can only access their right to marry once their status in Malta is regularised. Paradoxically, whilst marriage continues to be the principal route of acquiring a valid Maltese residence status, a valid status is a crucial requirement necessary to contract marriage in Malta.

In the last decade, Malta, like many other European countries, started to impose more restrictions on migration. Whilst Directive 2004/38/EC extends freedom of movement to TCNs who are already family members of union citizens, fortified by the extensive interpretation by the ECJ in the *Metock* case, the same cannot be said of individuals forming mixed couples composed of a union citizen and a TCN, who are still in the process of contracting marriage. Until these individuals marry and/or enter into a registered partnership (where the host member state treats registered partnerships as equivalent to marriage), they do not fall under the directive’s narrow understanding of ‘family

member'. In practice, EU citizens' fundamental right to marry is completely ignored when it comes to granting them access to their right to marry TCNs; which is ironical considering that the aim of EU law is to fully secure freedom of movement for EU citizens. This can only be understood in the current European political context, where national rules concerning migration, citizenship and legal status have become ever more restrictive, and the fundamental right to marry is given a secondary position, particularly in regard to TCNs due to its implications for their freedom of movement once they come to be acknowledged as family members of union citizens. Thus, TCN status can serve to allow the discriminatory exercise of national laws to exclude TCNs, and in the process, undermine other EU laws which seek to guarantee all EU citizens access to their rights.

ⁱ European Union citizenship is additional to, and does not replace, national citizenship.

ⁱⁱ Iceland, Liechtenstein and Norway are the only EEA member states outside the EU.

ⁱⁱⁱ Switzerland is the only EFTA member state which is not simultaneously also a member of the EEA

^{iv} For instance, the entry of Croatia as the 28th member state means that Croatians no longer have the status of TCNs as they did pre-2013.

^v Example, *inter alia*, Directive 2003/109/EC concerns the status of TCNs who are long-term residents.

^{vi} The EU also has funds for the 'Integration of Third Country Nationals' which aim at promoting the European Agenda for TCNs legally residing in the EU.

^{vii} A Blue Card is a work permit granted to highly-educated skilled workers to stay and work in a member state.

^{viii} Being, (a) the spouse; (b) the partner with whom the union citizen has contracted a registered partnership, on the basis of the legislation of a member state, if the legislation of the host member state treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host member state; (c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b); and, (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

^{ix} C-127/08.

^x TCNs who apply for the Individual Investor Programme must also buy a property worth at least 350,000 Euros or rent a property for 16,000 Euros per year and make an investment in stocks or bonds for 150,000 Euros.

^{xi} Zammit, D. (2012). *Consultative Assessment on the Integration of Third Country Nationals*. International Organization of Migration, 28–29.

^{xii} Article 12 of the ECHR: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

^{xiii} See Harris, D., O'Boyle, M., Bates, E., & Buckley, C. (2014). *Harris, O'Boyle & Warbrick: Law of the European convention on human rights*. Oxford University Press, USA.

^{xiv} Act XIV of 1987.

^{xv} In the case *Raymond Gilford v. Hon. Prime Minister et al.* decided by the Maltese, First Hall, Civil Court on 22 April, 1997, the Court held that for the first time, in 1987, the right to marry was included as a fundamental right under Maltese law.

^{xvi} In practice, only Church marriages produce the same civil effects as civil marriages.

^{xvii} Malta, located in the South of Europe, is the desired destination of many asylum seekers who try to reach EU territory from Libya, by crossing by boat across the Mediterranean Sea.

^{xviii} Malta joined the EU in 2004.

^{xix} See Ombudsman. (August 2009). *The Right of Immigrants to Marry* (Case no. 28). Office of the Ombudsman Malta.

^{xx} See *Desira and Eltarhuni v. Director of the Public Registry et. al.* decided by the First Hall, Civil Court on 24 February 2012 and *Dr Shields and Dong Mei v. the Attorney General and Marriage Registrar et al.* decided by the First Hall, Civil Court on 15 April 2015.

^{xxi} *Ogunyemi Kehinde Olusegum and Sandra Wetterich v. Director of the Public Registry and the Attorney General* decided by the First Hall, Civil Court on 4 May 2010.

^{xxii} Dal Lago, A. (2009). *Non-Persons: the exclusion of migrants in a global society*. Vimodrone: IPOC.