Chapter 9

Effective Remedies under EC Immigration Law

“Even though the constitutional traditions of all Member States and the jurisprudence of both the Strasbourg and Luxembourg courts underlines that the right to an effective remedy for all within the jurisdiction of Member States (which includes decisions made in embassies and consulates) is an important legal and human right, it would appear that the preference is to pay lip-service to important principles and cite relevant human rights instruments rather than to move towards the construction of a modern legal framework guaranteeing the application of the rule of law in the enlarged EU of the 21st century.”

1. Introduction

The Treaty of Maastricht of 1992 added a new objective of the Union to Article 2 of the EU Treaty (hereafter TEU): “to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.1 One of the central goals of this Area of Freedom, Security and Justice is to safeguard the legal protection of individuals.2 In the Tampere Conclusions of 1999, including a five-year programme for the Area of Freedom, Security and Justice, the European Council stated that this freedom should not be regarded as the exclusive preserve of the Union’s own citizens. According to the heads of states, it “would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.”3 The Tampere Conclusions further state that common policies on asylum and immigration “must be based on principles which are both clear to our own citizens

4 Recital 2 of the Tampere Conclusions.
and also offer guarantees to those who seek protection in or access to the European Union.”5 With this phrase, the European Council explicitly recognised the obligation of the EU legislator to provide procedural guarantees not only for those residing lawfully in the EU, but also for those applying for a residence permit or visa in one of the EU Member States. What has been achieved since the Tampere Conclusions with regard to the right of judicial protection in the different instruments adopted in the field of immigration and asylum law?6 Do individuals have a right to access to courts with regard to immigration law decisions, which applies indiscriminately to third-country nationals residing in or seeking access to the EU? Or is it fair to state, in the words of Cholewinski, that compared to EU citizens and their family members, third-country nationals are still “subject to an underdeveloped legal regime at the EU level”?7

This Chapter describes to what extent the right to effective remedies is embedded in EC immigration law. Does this right apply indiscriminately to third-country nationals residing legally on the territory of one of the EU Member States or seeking access to the EU, or is there differentiation between different categories of persons? To answer these questions, I will describe in the following sections the relevant provisions of the different immigration law instruments adopted on the basis of Title IV TEC and compare these provisions with the rules which apply to more privileged categories of persons, including EU citizens and their family members and Turkish migrant workers.8

2. Directive 2004/38/EC on the Right of Citizens and their Family Members to Move and Reside Freely within the EU

2.1. Protecting the Free Movement of EU Citizens and their Family Members

One of the fundamental principles of Community law is the freedom of movement of EU citizens. This principle was laid down at an early stage in Directive 64/221/EC, including rules on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health in the EC.9 Based on case law of

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5 Recital 3. Italic is mine, EB.
7 Cholewinski (2005), p. 238.