Effective Remedies for Third Country Nationals in EU Law: Justice Accessible to All?

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1. Introduction

In October 1999, the heads of the EU governments adopted the so-called Tampere Conclusions, which included the programme for an ‘Area of Freedom, Security and Justice’. According to these conclusions, the challenge of the Amsterdam Treaty would be ‘to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in ‘conditions of security and justice accessible to all’. The European Council underlined that this freedom should not ‘be regarded as the exclusive preserve of the Union’s own citizens’. Common policies should, according to the Tampere Conclusions, ‘offer guarantees for those who seek protection in, but also for those seeking access to the European Union’.

In this contribution, I will evaluate how, since 1999, the Tampere principle of ‘justice accessible to all’ has been developed in the field of EU immigration and asylum law. How accessible is justice to third country nationals who are residing in or seeking access to the European Union? Is there a general accepted right of access to justice in EU law, which applies indiscriminately to third country nationals? And which criteria can be derived from EU law with regard to the content of legal remedies? These questions are in the first place relevant with regard to decisions in the field of immigration and asylum law, including refusal of entry, refusal of a visa application, expulsion, detention, or the refusal or withdrawal of a residence permit. But the availability of effective remedies is also important in the light of EU measures in the field of immigration and asylum policy involving the establishment of large data bases and the exchange of personal information. As the legal position of third country nationals will depend more and more on decisions which are based on these ‘data surveilling’ measures, it is necessary to assess whether these measures are accompanied with accessible and efficient remedies.

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2. General Principles of EU Law

2.1. From 'Justice Accessible to All' to an 'Area of Justice for EU Citizens'?

In its meeting of 5 November 2004, the European Council adopted the Hague Programme for strengthening freedom, security, and justice. This programme includes the follow up of the Tampere conclusions with regard to the new goals to be achieved in these fields, including a 'European Area for Justice'. In my view there are two important differences between this goal as described in the Hague programme and the principle 'access to justice for all' as underlined in the Tampere Conclusions.

In the first place, there is an important restriction with regard to the field of law in which the goals of 'the area of justice' programme should be achieved. As mentioned above, in the Tampere Conclusions, the heads of governments drew an explicit line between the right to seek legitimately entrance to the EU and the principle of access to justice. The paragraph on 'Strengthening justice' in the Hague Programme only deals with the fields of civil and criminal law. The same restriction appears in the five years programme of the European Commission, which is based on the Hague Programme. In this Commission programme, the development of mutual recognition of national judgments and decisions, judicial cooperation, and approximation of law, are all related to civil and criminal law matters only. Access to justice in other legal areas seems therefore no longer to be a priority of EU policy.

In the second place, the goals of the Hague Programme for the achievement of an area of justice, seem to be especially focussed on the protection of the rights and freedoms of EU citizens. In the first sentence of paragraph 3 on Strengthening justice, the EU Council underlines the need ‘to enhance work on the creation of a Europe for citizens and the essential role that the setting up of a European area of justice will play in this respect’. With regard to both the judicial cooperation in civil matters and the mutual recognition of decisions in criminal law, the Hague Programme refers only to the need to protect citizen’s rights and to secure the enforcement of these rights across European Borders. It is doubtful whether legislation to be adopted under the Hague programme, will actually exclude third country nationals from the right to judicial access. In this light, an important ‘precedent’ has been set under the Tampere programme with the Council Directive 2002/8/EC of on minimum rules for legal aid for cross border disputes in civil and commercial matters. According to preamble 10 of this Directive, all persons involved in a civil or commercial dispute must be able to assert their rights in the courts even if their financial situation makes it impossible to bear the costs of the proceedings. Preamble 13 and Article 4 of this Directive explicitly state that the right to eligible for legal aid applies to all Union citizens and third country nationals who habitually and legally reside in a Member State. Thus, although this right to judi-

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1 OJ C 53/1, 3.3.2005.
4 The Directive does not cover proceedings in revenue, customs or administrative matters.