The Need for Effective Individual Legal Protection in Immigration Matters

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1. Introduction

State sovereignty in international law is manifested strongly in the right States possess to control admission to their territory and to remove those non-nationals deemed by governments to no longer have the right to stay there, such as irregular migrants, rejected asylum-seekers, who have exhausted all available remedies, and convicted criminals who present a continued danger to the community or those persons who threaten public order or national security. There is no general right to enter a country, with the exception of nationals of that country or, arguably also, non-citizens who have acquired a long-term or secure residence status in their adopted State.¹ Moreover, State action in this area is further constrained by international refugee law, found in the Geneva Convention relating to the Status of Refugees and Protocol² as well as regional arrangements,³ and particularly by the principle of non-refoulement,⁴ which is regarded widely as part of international customary law.⁵ Consequently, States are under an obligation to provide assistance to those who fear for their lives and freedom by not returning them to their country of origin so that they can lodge a claim for protection, either in the country whose borders they have crossed or reached, or, increasingly the practice today, in safe third countries. International

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¹ E.g. Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) 1966 ('No one shall be arbitrarily deprived of the right to enter his own country'). The Human Rights Committee interprets Article 12(4) ICCPR to encompass long-term resident foreigners, including stateless persons. See General Comment No. 27; Freedom of Movement (Art. 12), UN Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999), para. 20. Article 3(2) of Protocol No. 4 to the ECHR (16 September 1963;ETS No. 46) limits the "right to enter" to nationals ('No one shall be deprived of the right to enter the territory of the state of which he is a national').


³ E.g. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (UNTS No. 14, 691).

and regional human rights law has also acted as a bulwark against the arbitrary actions of States in the immigration field. For example, under the European Convention on Human Rights (ECHR), there is now well developed jurisprudence of the Court of Human Rights protecting non-nationals from expulsion from the territory of States parties if there is a real risk that they will be subject to inhuman or degrading treatment within the meaning of Article 3 ECHR or if they are the victims of a disproportionate interference with their right to respect for family life under Article 8 ECHR.

One of the strong features of the free movement of persons’ regime in the European Union (EU) is the legal protection afforded by EU law to EU nationals moving between Member States. Traditional State sovereignty in this area has been diluted considerably. For example, admission can only be denied to EU workers if they pose a threat to the public security, public policy or public health of the Member State concerned, terms that have been given a uniform restrictive interpretation by the European Court of Justice. Expulsion of EU workers is also subject to equivalent rules, which have now been consolidated in the EU citizens’ Directive applicable to EU nationals and their family members who move for both economic (salaried workers, the self-employed) and non-economic (non-working family members, students, retirees, etc.) reasons. Third-country nationals, however, with the exception of family members, are subject to an underdeveloped legal regime at the EU level or, in many instances, to no coherent regime at all, their legal protection in immigration matters in respect of refusal of admission or expulsion being largely dictated by national legislative and administrative rules, which in general provide considerably less protection than that afforded EU citizens by EU law.

This article discusses the scope of individual legal protection of third-country or non-EU nationals in immigration matters in EU law. The first part provides an overview of the legal protection available in the immigration measures adopted to date under Title IV of Part Three TEC and introduced in 1999 by the Amsterdam Treaty amendments. The discussion here focuses on selected migration instruments rather than the asylum measures, which have their own specific characteristics given international refugee law and the need to create a “procedural space” within which an application for protection can be fairly determined. Indeed, the controversy surrounding the Asylum Procedures Directive, which still awaits formal adoption,