



MASARYK UNIVERSITY
FACULTY OF LAW



European Immigration and Asylum Law

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Erasmus Teaching Staff Mobility

Universiteit Antwerpen

European Immigration and Asylum Law 2011-12
Prof. dr. Dirk Vanheule



- immigration
 - Oxford Dictionary: 'the process of coming to live permanently in a country that is not your own'
 - in law and policy: measures related to the movement of non-nationals from one country to another
 - temporary migration
 - permanent immigration
 - regular migration
 - irregular migration
 - free movement within EU context

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- asylum
 - Oxford Dictionary: 'protection that a government gives to people who have left their own country, usually because they were in danger for political reasons'
 - in law and policy: measures related to protecting persons who have been forced to leave their country out of fear for life or freedom
 - non-refoulement
 - temporary protection
 - permanent protection
 - individual risk
 - group risk
 - particular reasons for insecurity or not



- how are immigration and asylum regulated in the EU?
 1. The institutional framework of asylum and immigration policy in the European Union: jurisdiction under the TFEU
 2. Citizenship and free movement of EU citizens and their families
 3. Voluntary migration: entry into the EU; family reunification; students and researchers; migrant workers; long term residents
 4. Forced migration: asylum and subsidiary protection; temporary protection
 5. Irregular migration, detention and return



- course materials
 - slides
 - reader (electronically available)
 - volume I: legislation and policy documents
 - volume II: case law from CJEU and ECtHR
- assessment: essay



1. The Institutional Framework of Immigration and Asylum Policy in The European Union



1. The Institutional Framework

- importance of international law
 - international treaties concerning migration
 - Geneva Refugee Convention 28 July 1951
 - UN Convention of 18 December 1990 on the Rights of All Migrant Workers and Members of Their Family
 - ILO Conventions nos 97 and 143 on migrant workers
 - EC/EU Association Agreements
 - international treaties with effects on migration
 - European Convention Human Rights (1950): specific provisions on detention and collective deportation; impact of articles 3, 8 and 13
 - UN Convention against Torture (1987)
 - UN Convention on the Rights of the Child (1989)



1. The Institutional Framework

- EU law
 - free movement of citizens of the EEC/EU and their family
 - EEC-Treaty, regulations, directives and further elaborated by Court of Justice
 - Article 45 Charter: '1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.'
 - citizens EEC/EU, broadened to EER (Iceland, Liechtenstein and Norway) and Switzerland
 - workers, independent workers, economically non-active persons
 - movement between Member States is precondition



1. The Institutional Framework



1. The Institutional Framework

- since 1990: also EU measures with regard to immigration of third country nationals (TCN)
 - intergovernmental approach first; later at community level
 - why is an immigration and asylum policy towards third country nationals needed at the EU level?
 - Single European Act (1986)
 - new objective of the Single Market, defined as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'
 - abolition of internal borders requires common measures on immigration and asylum



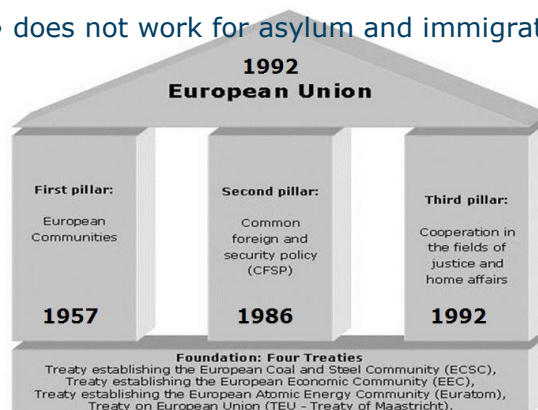
1. The Institutional Framework

- intergovernmental attempts: Schengen Agreement (1985) and Schengen Treaty (1990)
 - 5 Member States (Benelux, Germany and France)
 - external border control, visa policy for short stay and freedom to travel for 3 months



1. The Institutional Framework

- Maastricht Treaty (1992)
 - confirmation of the intergovernmental approach
 - Justice and Home Affairs in the 'Third Pillar'
 - does not work for asylum and immigration





1. The Institutional Framework

- Amsterdam Treaty (1997)
 - new objective: area of freedom, security and justice
 - the Schengen acquis is incorporated (partially in the first, partially in the third pillar)
 - immigration and asylum become community matters (first pillar)
 - Title IV EC Treaty (Articles 61 to 69)
 - no genuine common policy like other EU matters
 - transitional period of five years (1 May 1999 till 1 May 2004) with a more minimal approach
 - UK and IRL remain outside Schengen (border control) and outside asylum and immigration unless they opt in
 - DK remains in Schengen (intergovernmental) but outside asylum and immigration (no opt in)



1. The Institutional Framework

- different institutional approach

COMMUNITY METHOD	ARTICLES 67 AND 68
•qualified majority in Council	•unanimity in Council (= veto right of Member States) unless otherwise stipulated
•co-decision by EP	•consultation of EP (non binding, till 1 December 2005)
•initiative for legislation: Commission	•initiative for legislation shared between Commission and Member States for 5 years
•review by Court of Justice	•preliminary rulings only available for courts of final appeal



1. The Institutional Framework

- Lisbon Treaty (2007)
 - full community method (qualified majority and common co-decision procedure) for all measures of asylum, legal immigration and intra-European mobility of TCN
 - exception: quota for immigrant workers
 - Title V Treaty on the Functioning of the European Union (TFEU): Area of Freedom, Security and Justice
 - Article 67, 1: 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.'



1. The Institutional Framework

- Article 67, 2 TFEU: '[The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.'
- further elaborated in Chapter 2 'Policies on border checks, asylum and immigration' (Articles 77-80 TFEU)
 - » border checks (Article 77 TFEU)
 - » asylum (Article 78 TFEU)
 - » immigration (Article 79 TFEU)
 - » solidarity (Article 80 TFEU)



1. The Institutional Framework

- current EU policy areas

- Article 77 TFEU: border checks

1. The Union shall develop a policy with a view to:

- (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;
- (b) carrying out checks on persons and efficient monitoring of the crossing of external borders;
- (c) the gradual introduction of an integrated management system for external borders.



1. The Institutional Framework

- Article 78 TFEU: asylum

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.



1. The Institutional Framework

- Article 79 TFEU: immigration policy

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.



1. The Institutional Framework

- Article 80 TFEU: solidarity

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.



1. The Institutional Framework

- translation in policy
 - numerous Commission documents and EP resolutions
 - important: Council Conclusions
 - Tampere conclusions 1999 (period 1999-2004)
 - Laken conclusions 2001
 - The Hague Programme 2004 (period 2005-2010)
 - Stockholm Programme 2009



2. Citizenship and Free Movement of EU Citizens and Their Families



2. EU Citizens and Their Family

- legislation
 - TFEU
 - citizenship: Articles 18 to 25
 - free movement of persons, services and capital: Articles 45 to 62
 - Charter
 - Article 45
 - secondary legislation
 - Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States
 - Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union



2. EU Citizens and Their Family

- principles
 - applies to EU citizens
 - transition for new Member States (BG and RO)
 - family members, also when they are TCN
 - who's in the family?
 - legal entry before?
 - what in the event of disruption of family ties?
 - entry and short stay in other MS
 - residence for more than three months in other MS
 - means of existence?
 - permanent residence
 - expulsion
 - legal protection



2. EU Citizens and Their Family

- case law
 - ECJ C-60/00, Carpenter, 11 July 2002
 - ECJ C-200/02, Zhu en Chen, 19 October 2004
 - ECJ C-127/08, Metock, 25 July 2008
 - CJEU C-34/09, Ruiz Zambrano, 8 March 2011
 - CJEU C-434/09, McCarthy, 5 May 2011



3. Voluntary Migration



3. Voluntary Migration

A. Entry

- is a visum required?
 - Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement
- how to obtain a visum?
 - Visa Code: Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas



3. Voluntary Migration

- crossing the border: border checks
 - Schengen Borders Code: Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders
 - case law on the Borders Code
 - ECJ C-241/05, Bot, 3 October 2006
 - ECJ C-261/08 and 348/08, Zurita Garcia et al., 22 October 2009
 - CJEU C-188/10 and C-189/10, Melki and Abdeli, 22 June 2010
- External Border guard: Frontex Council Regulation (EC) No 2007/2004 of 26 October 2004



3. Voluntary Migration

B. Family Migration

- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
 - diversity in rules: 'may' and 'can'
 - who's in the family?
 - conditions: financial, integration, ...
 - loss of right
- Case law
 - ECtHR, Rodrigues Da Silva and Hoogkamer v. The Netherlands, 31 January 2006
 - ECJ C-540/03, European Parliament v. Council, 27 June 2006
 - CJEU C-578/08, Chakroun, 4 March 2010



3. Voluntary Migration

C. Student and Researcher Migration

- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service
- Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research



3. Voluntary Migration

D. Labour Migration

- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment
- Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State



3. Voluntary Migration

E. Long Term Residents

- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents



4. Forced Migration



4. Forced Migration

who do we want to allow on our territory?

IMMIGRATION POLICY

discretionary powers

who can we not send back to their country?

ASYLUM POLICY

powers limited by human rights law



4. Forced Migration

- requires a definition of categories who are entitled to protection
 - legislative influence
 - Geneva Refugee Convention (28 July 1951): refugees
 - matter falling within EU asylum and immigration policy (Title V TFEU) → Directive 2004/83/EC
 - refugees
 - persons in need of subsidiary protection
 - judicial influence
 - ECtHR case law on article 3 European Convention Human Rights (prohibition on torture, inhuman or degrading treatment or punishment)



4. Forced Migration

- requires an answer to the question what protection is offered
 - 'asylum' = protection given by one State to citizens of another State
 - right to seek asylum in Article 14 of the Universal Declaration of Human Rights
 - different forms are possible
 - temporary entry
 - not sending back: *non-refoulement*
 - tolerating a person (*Duldung*)
 - temporary stay
 - permanent stay
 - ...



4. Forced Migration

- at a minimum temporary entry must be offered
 - for the time needed to examine if any of the risks for violation of international human rights law exists or not
 - non-refoulement = not sending a person back
 - Article 33 Refugee Convention 1951
- temporary protection
 - Temporary Protection Directive 2001/55/EC: mass influx of displaced persons from a conflict zone
- permanent residence
 - EU Qualification Directive 2004/83/EC
 - right to residence
 - accompanying (social, economic,...) rights guaranteed



4. Forced Migration

- only one Member State will examine the asylum claim
 - Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national
 - criteria
 - Case law
 - ECtHR 21 January 2011, M.S.S. v. Belgium and Greece
 - ECJ C-19/08, Migrationsverket, 29 January 2009
 - CJEU C-411/10 and C-493/10, N.S. et al., 21 December 2011



4. Forced Migration

- Qualification Directive 2004/83/EC
 - refugee
 - four positive conditions
 - outside the country of origin
 - well-founded fear of persecution
 - for reasons of nationality, race, religion, political opinion or membership of a particular social group
 - unwilling or unable to call on the protection of the country of origin
 - two negative conditions: no cessation nor exclusion
 - exclusion clauses
 - » crimes against peace and humanity, war crimes
 - » serious non-political crimes
 - » acts contrary to the principles of the UN (e.g. terrorism)



4. Forced Migration

- persons in need of subsidiary protection
 - outside the country
 - not qualifying for refugee status
 - substantial grounds shown for believing that, if returned, the person would face a real risk of suffering serious harm
 - death penalty or execution
 - torture or inhuman or degrading treatment or punishment
 - serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict
 - unable or unwilling to avail himself of the protection
 - no cessation, no exclusion



4. Forced Migration

- Case law
 - ECJ/CJEU
 - ECJ C-465/07, Elgafaji, 17 February 2009
 - CJEU C-175/08, C-176/08, C-178/08 and C-179/08, Abdulla et al., 2 March 2010
 - CJEU C-31/09, Bolbol, 17 June 2010
 - CJEU C-57/09 and C-101/09, Bundesrepublik Deutschland, 9 November 2010
 - ECtHR
 - ECtHR, Soering (1989): extradition in criminal cases
 - ECtHR, Cruz Varas (1991): asylum cases
 - ECtHR, Saadi (2008): absolute protection even when excluded from refugee or subsidiary protection status



4. Forced Migration

- Reception
 - Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
- Procedure
 - Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
 - exceptions
 - Case law
 - ECJ C-133/06, European Parliament v. Council, 6 May 2008
 - CJEU C-69/10, Diouf, 28 July 2011



5. Irregular Migration, Detention and Return



5. Irregular Migration, Detention and Return

A. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

B. Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals

C. Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air



5. Irregular Migration, Detention and Return

D. Return: Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

- principles
- case law
 - ECJ C-357/09 PPU, Kadzoeff, 30 November 2009
 - CJEU C-61/11 PPU, El Dridi, 28 April 2011
 - CJEU C-329/11, Achugbalian, 6 December 2011



5. Irregular Migration, Detention and Return

E. Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

F. Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals