7

The Uneven Evolution of Association Agreements

7.1 The Unstoppable(?) Social Orientation of the Court

In its early case-law on free movement of workers, the Court extended the protection of migrants falling under the scope of Regulation 1612/68 by teleological interpretations, related to the need to remove obstacles to free movement and to assist workers in migrating in dignity. With an emphasis on the economic considerations behind personal rights, the Court pioneered the protection of rights of migrant workers in ways that could not have been envisioned under a literal reading of the text of the relevant provisions. From the 1980s onwards, the Court followed a similar approach as regards the rights of migrants falling under Association Agreements. This chapter will review the relevant case-law starting from the EEC–Turkey Agreement in Section 7.1.1 and moving to other Association Agreements in Sections 7.1.2 and 7.1.3, and it will highlight the extensive protection of social rights demanded by the Court. Section 7.2 will look at how Member States tried to bypass the relevant interpretations for fear that the extensive granting of social rights would prove unsustainable. Section 7.3 turns the focus to Association Agreements developed with full extension of the free movement framework to migrants of associated counties. That was the case when the relevant economic and demographic situation of the associated states showed no risk for the continued development of the EU project from the migrant populations. Overall, this chapter demonstrates first how social sustainability considerations have appeared behind an extensive interpretation of the relevant framework in the case-law. Second, Association Agreements provide the ideal example of how rights are attributed, extended, or limited depending on the economic sustainability challenges posed by the associated states.

7.1.1 *Economic and Social Considerations behind the Attribution and Consolidation of the Rights of Turkish Workers*

The EEC–Turkey Agreement created a special status for Turkish workers, which distinguished them from other third-country national workers. The adoption of the Agreement and its implementing decisions took place in years characterized by significant socio-economic changes. Throughout these years, the presence and importance of Turkish workers on Member States' territory was massive for the economic development of the EU. This allowed a better negotiating position for Turkey during the development of the Association. The aim of the Agreement and the initial – yet never materialized – purpose of eventual accession has been acknowledged as a basis of analogous interpretation in the case-law.[1] However, this aim has not been the only consideration in the reasoning of the Court. Before going into the relevant analysis, a reminder is due: the EEC–Turkey Agreement did not affect Member States' competence in regulating entry of migrants, nor did it impose obligations regarding family reunification. Rather, under different implementing decisions, the Agreement sought to advance the social position of Turkish workers and their families by ensuring the consolidation of their position after a certain time in the national labour market.

The most crucial part of the Decisions implementing the Agreement, and one which differentiates Turkish workers to this day, when the EU has put in place a separate migration policy, is the standstill clauses that were included in them. Specifically, Decision 1/80, which specified the rights that should be granted to migrant workers and their families, included a standstill clause under Article 13. The clause provided that Member States should not introduce new restrictions on the conditions of access to employment of Turkish workers and their families who are legally residents and employed in the Member States. Early on, the Court held that Article 13 of Decision 1/80, much like the similar clause of Article 41 of the Additional Protocol to the Agreement, had direct effect and could grant rights to individuals.[2] The Article was interpreted as meaning that Member States were not allowed to adopt new measures having the object or effect of making the conditions of access to

[1] See, however, mentions to a purely economic or essentially economic aim of the Agreement in Cases C-371/08, *Ziebell*, ECLI:EU:C:2011:809 and C-221/11, *Demirkan*, ECLI:EU:C:2013:583.

[2] See C-37/98, *Savas*, ECLI:EU:C:2000:224, paras 54, 71. On Article 13, see Case C-192/89, *Sevince*, ECLI:EU:C:1990:322, para 26.

employment for Turkish nationals more restrictive.[3] The Court further held that the standstill was intended to protect Turkish nationals who were not already lawfully employed and residing in the host state.[4] Those who were lawfully employed were protected via the provision of Article 6 of Decision 1/80.[5] What is more, the Court held that this also applied to Turkish workers and their families who were not in paid employment.[6] How to reconcile this with the fact that the wording of the provision refers to 'legally resident and employed' Turkish nationals? The Court held that this should be taken to mean that the provision benefited Turkish nationals only if they complied with the host state's rules on entry, residence, and employment.[7] The similar standstill clause of Article 41 of the Additional Protocol to the Agreement also shaped the Court's case-law on practices of Member States which could limit family reunification rights.[8]

Overall, the standstill clause was interpreted as follows: the adoption of new rules by Member States would either have to benefit the Turkish workers or, if these were more restrictive, they would have to apply equally to both Turkish and EU nationals, and would have to be proportionate in light of the pursuit of a reason of overriding public interest.[9] The Court has found several legitimate reasons falling under this concept: the aim of preventing illegal entry and residence, the prevention of forced marriages, ensuring successful integration, effective management of migration flows, and preventing and combatting entry fraud.[10]

[3] Joined Cases C-317/01 and C-369/01, *Abatay and others*, ECLI:EU:C:2003:57, paras 74, 80. This was taken to mean more restrictive compared to what the framework was when the Agreement was adopted. See, however, Joined Cases C-300/09 and C-301/09, *Toprak and Oguz*, ECLI:EU:C:2010:756, where the Court found that the standstill prohibited more restrictive measures also compared to more lenient practices adopted by Member States after the adoption of Decision 1/80.

[4] C-317/01 and C-369/01, *Abatay and others*, para 81.

[5] Ibid, para 78; Case C-242/06, *Sahin*, ECLI:EU:C:2009:554, para 51.

[6] C-317/01 and C-369/01, *Abatay and others*, para 81.

[7] Ibid, para 84; C-242/06, *Sahin*, para 53.

[8] Case C-138/13, *Dogan*, ECLI:EU:C:2014:2066; Case C-561/14, *Genc*, ECLI:EU:C:2016:24; Case C-379/20, *Udlændingenævnet*, ECLI:EU:C:2021:660.

[9] In all cases it should not lead to a situation where a Turkish national would be in a position more advantageous than an EU one. See Article 59 of the Additional Protocol interpreted in conjunction with Article 13, Case C-228/06, *Soysal and Savatli*, ECLI:EU:C:2009:101, para 61; C-242/06, *Sahin*, paras 67 and 71. Similarly, in Case C-92/07, *Commission/Netherlands*, ECLI:EU:C:2010:228.

[10] Case C-225/12, *Demir*, ECLI:EU:C:2013:725 para 41; C-138/13, *Dogan*; C-561/14, *Genc*, paras 43–44, 55; C-379/20, *Udlændingenævnet*; Case C-652/15, *Tekdemir*, ECLI:EU:

The system set up by Decision 1/80 and the progressive attribution of rights to migrant workers under Article 6 allowed the Court to infer a residence right from an effective protection of a right to work.[11] Specifically, the Decision set up a system of progressive attribution of rights to Turkish workers on access to employment. Turkish workers were entitled to renewal of their permit to work for the same employer after one year of legal employment. After three years of legal employment, they could respond to any offers of their choice for the same occupation, subject to priority for Community workers. After four years of employment, they were entitled to free access to any paid employment. This Article regulated the conditions under which Turkish workers would progressively enjoy greater access to employment in the Member States. By engaging with the different criteria that needed to be met for a Turkish national to acquire the relevant EU law rights, the Court extended the scope of protection of the Decision and consolidated the rights of Turkish workers to security of residence.

Overall, for Turkish nationals to enjoy rights under Decision 1/80, they would have to be workers, duly registered in the labour force of a Member State, and in legal employment for a specified period of time. The Court aligned the interpretation of 'worker' with that provided under the free movement case-law.[12] Specifically, the Court held that the Agreement aimed at progressively extending access of Turkish nationals to the EU labour market, and that this was similar to the aim pursued by free movement of workers. The result was that the scope of the Decision was aligned with the extensive scope of protection under the free movement framework.[13] Migrant workers who continuously contributed to a national labour market ought to enjoy full protection of the rights granted in Decision 1/80, and those who could no longer do so

C:2017:239, para 39; Case C-123/17, *Yön*, ECLI:EU:C:2018:632, para 77; C-70/18, *A and others*, ECLI:EU:C:2019:823, para 49.

[11] Case C-192/89, *Sevince*; Case C-237/91, *Kus*, ECLI:EU:C:1992:527 paras 22–25; Case C-268/11, *Gülbahce*, ECLI:EU:C:2012:695; Case C-187/10, *Unal*, ECLI:EU:C:2011:623, para 50; Case, C-294/06, *Payir and others*, ECLI:EU:C:2008:36; Case C-36/96, *Günaydin and others*, ECLI:EU:C:1997:445, paras 37–38; Case C-98/96, *Ertanir*, ECLI:EU:C:1997:446, paras 31, 25; Case C-14/09, *Genc*, ECLI:EU:C:2010:57, para 40.

[12] See Opinion of AG Fennelly in Case C-1/97, *Birden*, ECLI:EU:C:1998:262, para 23.

[13] See Case C-355/93, *Eroglu*, ECLI:EU:C:1994:369; Case C-188/00, *Kurz*, ECLI:EU:C:2002:694, para 44; *Genc*, C-14/09, paras 23–28; Case C-1/97, *Birden*, ECLI:EU:C:1998:568 where the Court differentiated from Case 344/87, *Bettray*, ECLI:EU:C:1989:226 and found that work under publicly subsidized scheme also fell under the agreement.

could not secure a right to remain.[14] With no EU competence on regulating entry of TCN migrants, the admission and residence of Turkish nationals were based on national law and the sovereign right of states to manage population. However, once Turkish nationals were engaged in economic activity that fulfilled the criteria of the decisions implementing the Association Agreement, they proved themselves worthy of rights attributed under EU law. Due to this, security of residence should be guaranteed in order to allow them to continue their engagement in the activity, by which they personally contributed to the EU development project. The Court drew both on the purpose of the Agreement and on the agency and contribution of the individual migrant as a way to secure residence rights for Turkish migrants. A need to secure the effective exercise of the right to work became the basis for attribution of residence rights to Turkish workers who could not secure such residence under national law. The significance of the functional role of Turkish workers for the EU development project became a basis for attribution of rights in ways very similar to EU workers. Similar considerations of economic and social sustainability as expressed in the parallel pursuit of economic growth and social progress underpin the rights of both these categories of migrants.

As regards the protection of family life, the Court has been very explicit about the social purpose served by family reunification and has ensured an extensive protection for family members. The EEC–Turkey Agreement did not establish a right to family reunification. Rather, the implementing decisions secured rights for family members, who were authorized under national law to join the Turkish worker in the host state.[15] Article 7 of Decision 1/80 secured rights for family members of Turkish workers in the following way. Family members were entitled to respond to offers of employment after residing in the host state for more than three years. After five years of residence, they could enjoy an autonomous employment right and a corresponding residence right, flowing from EU law. After the establishment of such an autonomous right, family life need not be maintained.[16] The Court's case-law has

[14] Opinion of AG Elmer delivered on 28 March 1995 in Case C-434/93, *Bozkurt*, ECLI:EU:C:1995:86, para 31 and C-434/93, *Bozkurt*, ECLI:EU:C:1995:168, para 40.

[15] Case C-451/11, *Dülger*, ECLI:EU:C:2012:504, 62; Case C-467/02, *Cetinkaya*, ECLI:EU:C:2004:708.

[16] Case C-329/97, *Ergat*, ECLI:EU:C:2000:133, para 40 with reference to C-192/89, *Sevince*, paras 29, 31; Case C-171/95, *Tetik*, ECLI:EU:C:1997:31, paras 26–31 by analogy, as regards the third indent of Article 6(1), Decision No 1/80; C-355/93, *Eroglu*, para

engaged at great length with the purpose served by the rights granted to family members and has held that this gradual attribution of rights pursued a dual objective.[17]

The first objective of Article 7 Decision 1/80 (for the first three years of common residence) was to support migrant workers by means of family reunification in their employment and residence in the host state.[18] During these first three years, family members played a supportive function to the worker, and their rights promoted cohesion in the host societies.[19] In light of this function of family as conducive to the enjoyment of the worker's life in the host state, the Court interpreted the notion of family under Article 7 Decision 1/80 in ways similar to Regulation 1612/68. The analogous interpretation stemmed from an understanding that the purpose of Article 7 Decision 1/80 and Regulation 1612/68 was similar, that is, protecting family unity as conducive to the enjoyment of the worker's life in the host state.[20] This led to a significant limitation of restrictions on entry and residence in light of the importance of family life for the enjoyment of work-related rights.

The second objective of the protection of family life appears in relation to free access to any employment and the corresponding residence rights for family members after a period of five years. These rights were conferred in order to consolidate the social integration of the Turkish worker's family in the host state by allowing family members to earn their own living and become independent of the migrant worker.[21] The individualization of protection of the family member is put forward by

20 and Case C-210/97, *Akman*, ECLI:EU:C:1998:555, para 24 as regards Article 7(2), Decision 1/80.

17 Case C-303/08, *Bozkurt*, ECLI:EU:C:2010:800, para 32.

18 Ibid, para 33; Case C-351/95, *Kadiman*, ECLI:EU:C:1997:205 33–34; Case C-65/98, *Eyüp*, ECLI:EU:C:2000:336; C-467/02 *Cetinkaya*, para 25; Case C-484/07, *Pehlivan*, ECLI:EU:C:2011:395, 54.

19 C-451/11, *Dülger*, para 42. The Court has been lenient in interpreting the common residence condition; see C-351/95, *Kadiman*, paras 48–49; C-467/02, *Cetinkaya*, para 32.

20 Case C-275/02, *Ayaz*, ECLI:EU:C:2004:570, paras 46–47. In some cases, the Court went even further than the interpretation it had given to Regulation 1612/68. See C-65/98, *Eyüp*, where cohabitation could also qualify for protection under family life going further than Case 59/85, *Netherlands v Reed*, ECLI:EU:C:1986:157. This extensive interpretation could be attributed to the circumstances of the family in question rather than in an attempt of the Court to extend the rights of Turkish workers further than those of Community workers.

21 C-351/95, *Kadiman*, para 35; C-303/08, *Bozkurt*, para 34 with reference inter alia to C-65/98, *Eyüp*, para 26; C-467/02, *Cetinkaya*, para 25; C-373/03, *Aydinli*, para 23; Case C-325/05, *Derin*, ECLI:EU:C:2007:442, paras 50, 71.

the Court in light of the purpose of Decision 1/80 to improve the social situation of Turkish migrants by promoting the gradual integration of those covered by the Decision in the Member State.[22] In this regard, the Court held that residence rights of family members who have been residing with the worker in a host state for a period of five years should be maintained in cases where such family members were not actively pursuing employment. In *Er*, the Court held that the grounds for exclusion from the rights granted under Decision 1/80 were specific: they referred exhaustively to public policy limitations and absence from territory.[23] Member States no longer enjoyed discretion in adding restrictive conditions on the exercise of the relevant rights.[24] The reasoning for proceeding in such a finding followed the acknowledgement of a link between the unconditional right to access employment and the right of residence.[25] The right of free access to employment was granted to family members of Turkish workers in order to ensure their permanent integration in the host state.[26] Such permanent integration would be jeopardized where family members did not enjoy an effective right to reside and thereby to eventually exercise employment.[27]

In developing this case-law, the Court put a lot of emphasis on the objective of Decision 1/80 to improve the situation of migrant workers in the social field. Does this mean that economic considerations should not affect the attribution of rights to family members? This seems to be the approach followed by the Court. Although not explicitly acknowledged by the Court, AG La Pergola, in his Opinion in *Eyüp*, suggested that a balancing of interests between protection of family life and protection of national employment markets had already taken place in the design of the provisions of Decision 1/80.[28] Thus, it was assumed that no further restrictions should be imposed in a system designed to progressively attribute rights to family members of migrant workers.

Relatedly, in the case of children of Turkish workers, we see how access of a specific cohort of migrant children to vocational education

[22] C-303/08, *Bozkurt*, para 39 with reference inter alia to C 329/97, *Ergat*, paras 43 and 44; C-325/05, *Derin*, para 53; C-337/07, *Altun*, paras 28–29.
[23] Case C-453/07, *Er*, C-453/07, ECLI:EU:C:2008:524, para 30.
[24] Ibid, para 27.
[25] Ibid, para 29.
[26] Ibid, paras 29, 34.
[27] No matter how unlikely the prospect of finding employment would be. See the referring court's framing of the factual background in C-453/07, *Er*, para 23.
[28] Opinion of AG La Pergola in C-65/98, *Eyüp*, ECLI:EU:C:1999:561, paras 17–24.

becomes the basis for autonomous residence rights. Children of Turkish workers who had completed vocational training in the host state were granted a right to respond to offers of employment independent of the length of their residence there, as long as one of their parents had been already legally employed in the Member State for at least three years. This autonomous right, granted under Article 7(2) Decision 1/80 to children trained in the host country, was linked to the presumption that they had the expertise necessary to immediately participate in the labour market of the state that had trained them.[29] Children of Turkish workers are not only significant as family members. They are also significant as part of a future labour force that is trained in the host state at its expense.[30]

In addition to these rights, Article 9 Decision 1/80 required that children of Turkish workers be granted access to education, apprenticeship, and vocational training under the same conditions as children of Community nationals. In *Gürol*, the Court held that Article 9 Decision 1/80 is an application of the general principle of non-discrimination in the sphere of education and vocational training. Specifically, the Court held that this provision is a specific iteration not only of the principle of non-discrimination laid down in Article 9 of the Agreement but also of the general non-discrimination principle of Article 7 of the EC Treaty.[31] The right to equal access to education is independent of residence with the parents during the period of education.[32] What is more, children also have access to advantages related to education.[33] Essentially, the purpose of Article 9 Decision 1/80 is to guarantee equal opportunities to Turkish children and nationals of the host state.

Overall, in the relevant case-law, the Court consolidated the rights of Turkish workers and their families. The consistently broad interpretations

[29] C-355/93, *Eroglu*, para 22. The fact that the right to enter might have been given for the purpose of study and not for the purpose of family reunification is irrelevant. Further, in C-210/97, *Akman*, para 38, the Court held that this right could also be granted to children of migrant workers, even after the Turkish worker was no longer employed or resident in the host country. See also Case C-462/08, *Bekleyen*, ECLI:EU:C:2010:30 on the residence rights of a child born in Germany in a family of Turkish workers, where the family returned to Turkey, and then upon adulthood, the child returned to Germany and attended higher education courses.

[30] See also Opinion of AG Léger in C-210/97, *Akman*, ECLI:EU:C:1998:344, paras 33, 37 with reference to Case 197/86, *Brown*, ECLI:EU:C:1988:323 and Joined Cases 389/87 and 390/87, *Echternach and other*, ECLI:EU:C:1989:130, paras 48–52.

[31] C-374/03, *Gürol*, ECLI:EU:C:2005:435.

[32] Ibid, para 30.

[33] Ibid, para 44.

took place not only in light of the purpose of the Association Agreement, whose main elements shifted over the years, for reasons that are related to geopolitical evolutions and circumstances external to legal reasoning. The interpretation of the Court was also driven by the function of migrant workers for the host state and the corollary need for social advancement of migrants in host societies. These considerations implicitly convey the pursuit of economic and social sustainability in the regulation of migration. To what extent similar considerations play out in relation to Agreements signed by the EU, where eventual accession was never foreseen, will be traced in Section 7.1.2.

7.1.2 Non-discrimination in the Field of Social Security

In the field of social security, *Kziber* stands out as the case which provided the foundation for a full extension of equal treatment to migrant workers and their families covered by Association Agreements.[34] The case concerned the refusal of Belgian authorities to grant an unemployment allowance to the daughter of a Moroccan pensioner in Belgium. She claimed that she was entitled to this allowance as a family member of a former Moroccan worker under the equal treatment provisions of the EEC–Morocco Association Agreement.

The benefit at stake was also the subject of the *Deak* case, where a family member of a former Community migrant worker claimed access to it.[35] There the Court held that the specific benefit could not be attributed to family members of migrant workers as a derived right. It was rather granted to former workers due to their own personal situation. Despite this, the Court found that the children of Community workers, to the extent that they were dependent on the Community worker, were entitled to this benefit under Article 7(2) Regulation 1612/68 as a social advantage.

Contrary to the conservative approach of AG Van Gerven,[36] the Court resolved the case with reference to the provisions of the Cooperation Agreement. It found that the principle of non-discrimination as provided for in Article 41(1) of the Agreement had direct effect.[37] What is more, it

[34] Case C-18/90, *Kziber*, ECLI:EU:C:1991:36.
[35] Examined in Section 2.2, Case 94/84, *Deak*, ECLI:EU:C:1985:264.
[36] Opinion of AG Van Gerven delivered in C-18/90, *Kziber*, ECLI:EU:C:1990:447, para 18; See also Case 40/76, *Kermaschek v Bundesanstalt für Arbeit*, ECLI:EU:C:1976:157.
[37] C-18/90, *Kziber*, paras 20–22.

found that social security benefits under Article 41(1) of the Agreement were identical to those provided under Regulation 1408/71 and that the unemployment benefit at issue fell under them. By basing the attribution of the respective rights directly on Regulation 1408/71, the Court took the social rights of TCN workers and their families a step further than those of Community workers. The findings of the Court in *Kziber* have been consistently applied in a series of cases covering various social security benefits, Association Agreements, and family members.[38]

The extensive application of non-discrimination in the field of social security was also confirmed with regard to Turkish workers. Decision 3/80 regulated the application of social security schemes to Turkish workers.[39] Article 3 of the Decision provided for equal treatment of Turkish workers and nationals of the Member State. The Court established the direct effect of provisions of the Decision and held that its purpose was similar to that of Regulation 1408/71, which applied to Community workers.[40] In *Sürül*, the Court addressed the question of whether a Turkish national covered by Decision 3/80 would have to hold a specific residence permit in order to be granted family allowances in a case where residence was the only requirement applicable to nationals of the state.[41] In resolving the case, the Court aligned the application of non-discrimination to Turkish workers and their families to the interpretation it had provided on other Association Agreements.[42] Specifically, the Court found that non-discrimination, as it appears in

[38] See Case C-58/93, *Yousfi*, ECLI:EU:C:1994:160; Case C-23/02, *Alami*, ECLI:EU:C:2003:89; Case C-276/06, *El Youssfi*, ECLI:EU:C:2007:215; Case C-103/94, *Krid*, ECLI:EU:C:1995:97 on Article 39 (1) of the EEC–Algeria Agreement; Case C-113/97, *Babahenini*, ECLI:EU:C:1998:13 where the Court rejected the Belgian government's attempt to reopen the question of distinguishing between personal and derived rights as in the case-law on Community workers; Case C-126/95, *Hallouzi-Choho*, ECLI:EU:C:1996:368; Case C-179/98, *Mesbah*, ECLI:EU:C:1999:549.

[39] Decision no 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families.

[40] Case C-277/94, *Taflan-Met and others*, ECLI:EU:C:1996:315, paras 37–38, where the Court held that provisions of the decision might have direct effect but found that Articles 12 and 13 of the Decision which were applicable did not have direct effect. Then the direct effect of Article 3(1) was established in Case C-262/96, *Sürül*, ECLI:EU:C:1999:228, para 64.

[41] C-262/96, *Sürül*, para 64.

[42] Ibid, paras 62–74 where the Court held that in light of the aim of the EEC–Turkey Association Agreement, its relevant findings from the interpretation of Association Agreements with Mediterranean neighbours should apply *a fortiori*.

Article 3(1) of Decision 3/80, was a specific expression of the general non-discrimination principle laid in Article 9 of the EEC–Turkey Agreement, which referred to the general non-discrimination principle under Article 7 of the EEC Treaty.[43] As a result, it held that national legislation requiring Turkish workers to possess specific residence document to access family allowances, where such documents were not required for Germans, constituted an unjustified discrimination under the Decision.[44]

The extensive protection of migrant workers under the principle of non-discrimination is not limitless. Rather its limits should be seen in relation to the purpose served by its attribution. In this respect, in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, the Court held that the prohibition of discrimination regarding access to social security did not cover workers who returned home and claimed child allowance benefits for children who studied in the state of origin.[45] Article 41(3) of the EEC–Morocco Agreement, which was applicable to the facts of the case, provided that family allowances were granted for family members who resided in the Community. In light of this, and the fact that the purpose of the Agreement was to consolidate the positions of workers and their families living in the Member States, the Court found that the right to non-discrimination could not extend as far as providing access to entitlements to those outside its territory.[46] After all, non-discrimination ensures the social advancement of the migrant worker and the members of their family in the host state, and is granted to support the migrant in the provision of their work. If the migrant worker is no longer engaged in economic activity in the EU, there is no reason why non-discrimination should apply and support their life outside the exercise of such activity.

After an overview of the relevant case-law, one is left wondering why equal treatment as provided under all the different Association Agreements examined in this section is protected by the Court in such an extensive manner. The special purpose of the EEC–Turkey Agreement is always emphasized by the Court, but the Association Agreements with Mediterranean countries did not foresee eventual accession and, unlike the EEC–Turkey Agreement, did not make any reference to guidance by the provisions of the EU free movement framework. Despite this, the

[43] Ibid, para 64.
[44] Ibid, paras 103–104.
[45] Case C-33/99, *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, ECLI:EU:C:2001:176.
[46] Ibid, para 56.

Court made the link between non-discrimination in all the relevant Agreements and the general non-discrimination principle enshrined in the Treaty. What the Court added by its interpretation is that, regardless of state competence on the regulation of migration, whoever falls within the scope of EU law must not be discriminated against in the specific economic activity that they pursue. Based on this, it can be argued that the significant advancement of the social position of the migrant workers covered under these Agreements by the interpretation of the Court is closely connected to the migrants' contribution to the EU development project, which is also the reason why they fall under social security schemes in the first place. This close connection reveals the interdependence of economic development and social progress behind the rights of migrants in a way which would be demanded today by economic and social sustainability in the regulation of migration.

7.1.3 A Permanent Safeguard: Non-discrimination behind a Limited Right to Remain

The significance of the principle of non-discrimination for migrant workers is further highlighted through the case-law of the Court in *El Yassini*.[47] In this case, the Court addressed non-discrimination regarding working conditions as the source of legal certainty, which demanded that a residence right should be ensured for as long as someone was granted a right to employment, subject to clearly construed limitations. El Yassini, a Moroccan national, entered the UK as a visitor and was granted leave to remain, due to a subsequent marriage to a British national. The marriage was eventually dissolved, and he was engaged in lawful employment in the UK. Upon refusal by the UK authorities to grant him leave to remain, El Yassini claimed that the equal treatment provision of the EEC–Morocco Agreement should guarantee his right to continue his employment, by the creation of a derivative residence right for the remaining time of his employment contract.

In his Opinion, AG Léger set out to compare three types of legislation that were relevant for migrant workers' rights, and the different purposes non-discrimination served in each of them, namely the Community free movement framework, the EEC–Turkey Agreement and the EEC–Morocco Agreement.[48] In light of the purpose of the EEC–Morocco

[47] Case, C-416/96, *Eddline El-Yassini*, ECLI:EU:C:1999:107.
[48] Opinion of AG Léger in C-416/96, *El-Yassini*, ECLI:EU:C:1998:243, paras 36–50.

Agreement to contribute to the economic and social development of Morocco and of the absence of any rights regulating the personal situation of Moroccan workers in the Agreement, the AG suggested that Community law had no relevance in the specific dispute as to the treatment of Moroccan workers, who belonged to the labour force of Member States.[49] The AG supported this exclusion from Community law not only on the basis of the sovereign right of states to decide their immigration policy, but also on the EU law obligation to ensure priority access to national labour markets for Community workers in the first place and Turkish workers in the second.[50] The Opinion could have concluded at that stage. But it did not. Instead, the AG held that the principle of non-discrimination demanded that when a worker was authorized by a Member State to take up employment for a specific period of time, the effectiveness of that principle implied that he should have a right to reside in the host state during that time.[51] In light of this, he suggested that, while Member States can in principle terminate a residence permit before an employment contract has expired, they cannot do so in order to address economic problems.[52]

The Court, following the AG Opinion, acknowledged the distinction in terms of purpose and rights of migrant workers under the different schemes and held that the Agreement did not in principle prohibit the refusal of Member States to grant a right to reside despite the existence of paid employment.[53] It then qualified the statement by holding that such discretion on the part of Member States was allowed only if the initial reason for granting leave to remain no longer existed by the time the right to reside expired.[54] If, however, a person was granted a work permit for a specific duration of time and a residence permit for a shorter period, then potential non-renewal of the residence permit would have to be justified by the protection of legitimate national interest, such as public policy, public security, or public health.[55]

In so doing, the Court construed a limited right to reside from the effective enjoyment of non-discrimination regarding working conditions. This right exists only if legitimate employment is ongoing, and only for

[49] Ibid, paras 51–54.
[50] Ibid, para 60–61.
[51] Ibid, para 64 with reference to C-237/91, *Kus*.
[52] Ibid, para 66.
[53] C-416/96, *El-Yassini*, paras 57–62.
[54] Ibid, para 67.
[55] Ibid, paras 65, 67.

migrants who initially entered the host state as workers. In practice, this means that Member States are allowed to terminate the right to reside of workers covered by Association Agreements who are in ongoing employment, but only where this termination is unrelated to economic considerations. Where Member States proceed in premature termination of the right to reside, non-discrimination leads to the application by analogy of the case-law on Turkish workers, as there is nothing differentiating foreign workers engaged in gainful employment of the same kind in a host state.[56] Non-discrimination cannot be a basis of the right to remain on its own, but, as the Court held, in specific circumstances it might have effects on the right to remain by imposing specific limits on state discretion as regards migration.[57]

7.2 The Backlash to Extensive Judicial Protection

This emphasis of the Court on safeguarding the effective application of equal treatment for migrant workers and their families in the field of social security was not welcomed by Member States. A potential application of the *Kziber* line of case-law to TCN workers coming under other Association Agreements could have significant financial repercussions for the social security systems of the Member States, as AG La Pergola insinuated in his Opinion on a case related to similar issues under the EEC–Turkey Agreement.[58] For this reason, all the Agreements negotiated and concluded after *Kziber* was issued avoid providing for the application of non-discrimination in the field of social security. *Kziber*, next to the EEC–Turkey Agreement case-law, showed the teeth of the non-discrimination principle. The Member States tried to limit the power of this principle by drafting the Agreements that were concluded in the 1990s a lot more carefully. Sections 7.2.1 and 7.2.2 investigate the evolution of different Association Agreements in light of the preceding

[56] Opinion of AG Léger in C-416/96, *El-Yassini*, para 68.

[57] See also Case C-97/05, *Gattoussi*, ECLI:EU:C:2006:780, para 43.

[58] Opinion of AG La Pergola in C-262/96, *Sürül*, ECLI:EU:C:1998:55, para 45. See also Daniel Thym, 'Constitutional Foundations of the Judgments on the EEC-Turkey Association Agreement' in Daniel Thym and Margarite Zoeteweij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff 2015) 35, who claimed that this was the effect of the case-law on Turkish workers according to discussions with the German negotiating Team; Jan Niessen, 'European Community Legislation and Intergovernmental Cooperation on Migration' (1992) 26 International Migration Review 676, 680.

case-law, showing that the scope of equal treatment was renegotiated in Agreements with Mediterranean countries and construed in a limited manner in the Europe Agreements signed with the CEECs.

7.2.1 *Renegotiating Cooperation to Limit the Scope of Equal Treatment*

Given the economic and political circumstances of the 1990s, new objectives of regulation of migration in the Euro-Mediterranean region were formulated in the Barcelona conference.[59] These sought to reduce migratory pressures through assistance to the host states, to ensure the rights of all migrants legally residing in the territories of Member States and to address illegal immigration.[60] At this stage, the contribution of the migrant workers to the development of the EU meant that their rights could not be sidelined where they were employed in the Member States.[61] However, this economic contribution was no longer enough to allow support for the attribution of more extensive rights.

Against this backdrop, the new generation of Agreements signed with third countries in the region aimed at cooperation that would support 'harmonious economic and social relations' between the parties.[62] Among the agreements concluded, the ones with Morocco, Tunisia, and Algeria were the only ones including clauses that attributed rights

[59] The future of relations between the Community and the Maghreb, SEC(92)401 final; Strengthening the Mediterranean Policy of the European Union: Establishing a Euro-Mediterranean Partnership COM(94)427 final; HAEU, GJLA-246, Commission, DG External Relations, Task Force Enlargissement, Enlargement and the Community's Relations with its Mediterranean Neighbours, Brussels 2 March 1992, RDM/m, 4.

[60] Euro-Mediterranean Conference, 27 and 28 November 1995, Working Programme.

[61] Chris Patten, Javier Solana, and Romano Prodi (2003), Strengthening the EU's partnership with the Arab world, Paper for the attention of Franco Frattini, President of the Council, 4 December 2003 D(2003) 10318.

[62] Art 1(2) Euro-Mediterranean Agreement with Tunisia [1998] OJ L 97/2; Article 1(2), Euro-Mediterranean Agreement with Morocco [2000] OJ L 70/2; Article 1(2), Euro-Mediterranean Agreement with Algeria [2005] OJ L 265/2; Article 1(2), Euro-Mediterranean Agreement with Jordan [2002] OJ L 129/3 with reference to balanced economic and social relations and improving living and employment conditions; Article 1(2), Euro-Mediterranean Agreement with Lebanon [2006] OJ L 143/2 with reference to the prosperity of Lebanon and its people; Article 1(2), Euro-Mediterranean Agreement with Israel [2000] OJ L 147/3 and improvement of living and employment conditions; Article 1(2), Euro-Mediterranean Agreement with Egypt [2004] OJ L 304/39 on balanced economic and social relations.

to migrant workers.[63] This was due to the fact that these were the main countries of the region that supplied migrant labour to the EU.[64] Much like the previous Cooperation Agreements, the Euro-Mediterranean Agreements maintained the provisions on non-discrimination for all migrant workers as regards working conditions, remuneration and dismissal, and the equal treatment for them and their families in the field of social security.[65] Further, the Agreements stated that their provisions would only cover lawfully residing TCN workers, and they must not apply to migrants working illegally in the territories of the host countries.[66] Hence, illegality of residence was included explicitly as a condition which stripped an individual of rights.[67] Furthermore, under a Joint Declaration to the Agreements, the parties declared that they would examine issues related to access to the labour market for the spouse and children of migrant workers.[68] In the same Declaration they stated that equal treatment ought not to be invoked to obtain a renewal of a residence permit.[69] This Declaration must have been made to dissociate any potential extension of the interpretation of *El Yassini* to the new Agreements of cooperation with the Mediterranean countries.

The Court has confirmed the direct effect of the equal treatment provisions of the new Agreements. In *Echouikh*, the Court held that Article 65 of the Euro-Mediterranean Agreement with Morocco should be interpreted in the same way as Article 41(1) of the Association Agreement that predated it.[70] The Court also held that this Article was a specific expression of the principle of non-discrimination under Article

[63] The Euro-Mediterranean Agreement with Jordan did not contain provisions on equal treatment of migrant workers but rather a declaration of the Parties that they are willing to set up such rights in case Jordan so wished. Similar wording was inserted in Article 62 in the Euro-Mediterranean Agreement with Egypt. No such clauses were included in the Euro-Mediterranean Agreement with Lebanon. The Euro-Mediterranean Agreement with Israel mentions arrangements on social security issues but no equal treatment provisions.

[64] Demographic information in Commission, Information DG, The countries of the Greater Arab and Maghreb and the European Community. DE68, 1991.

[65] Articles 64, 65, Euro-Mediterranean Agreement with Morocco and Tunisia; Articles 67, 68, E Euro-Mediterranean Agreement with Algeria.

[66] Article 66, Euro-Mediterranean Agreement with Morocco and Tunisia; Article 69, Euro-Mediterranean Agreement with Algeria.

[67] This was the case also in the EEC–Turkey as interpreted in Case C-285/95, *Kol*, ECLI:EU:C:1997:280. See, however, Case C-311/13, *Tümer*, ECLI:EU:C:2014:2337.

[68] Joint Declaration relating to Article 64 of the Agreement.

[69] Ibid, para 2.

[70] Case C-336/05, *Echouikh*, ECLI:EU:C:2006:394.

12 of the EC Treaty.[71] As to the Declaration, it was invoked in the case of *Gattoussi*, which concerned the rights of Tunisian nationals under the Euro-Mediterranean Agreement.[72] Despite its invocation, the analysis of *El Yassini* was fully confirmed by the Court, which maintained that the effective application of non-discrimination could not leave Member State discretion on migration unaffected. The Court found that, in principle, Member States were not prohibited from taking measures against the right to remain of TCN workers whom they had authorized to enter their territory for the purpose of employment.[73] After all, immigration policy comes with a wide margin of discretion. But, as AG Ruiz-Jarabo Colomer suggested, this margin is limited by obligations of the Member States under Community law, as they cannot use migration measures as a justification for infringement of the free movement of workers framework or of international obligations of the Community.[74]

The Member States' obligation to guarantee the effectiveness of non-discrimination demands the protection of legitimate expectations of the worker and, relatedly, legal certainty.[75] This is why in cases where a Member State has granted migrant workers specific rights in relation to employment that are more extensive than the rights of residence conferred on them by that State, it cannot then reopen the question of that worker's situation on grounds unrelated to the protection of a legitimate national interest such as public policy, public security, or public health.[76] Overall, what we see in the Euro-Mediterranean Agreements is a more careful drafting and limitation of rights granted to migrant workers to avoid the potential extension thereof by rulings of the Court.[77]

In parallel to these evolutions, the cooperation with the ACP evolved by the transition from Lomé IV to Cotonou. Article 13 of the Cotonou Agreement referred more broadly to migration cooperation between the parties. Under Article 13(3), equal treatment was granted to legally employed migrant workers from ACP countries as regards working

[71] Ibid, para 63.
[72] C-97/05, *Gattoussi*, para 33.
[73] Ibid, para 36 with reference to C-416/96, *El-Yassini*, paras 58–62.
[74] Opinion of AG Ruiz-Jarabo Colomer in C-97/05, *Gattoussi*, para 58 with reference to Case 104/81, *Kupferberg & Cie.*, ECLI:EU:C:1982:362, paras 11–14, where it was held that the effects of the provisions of agreements must not be diminished by national measures.
[75] C-97/05, *Gattoussi*, paras 39–41.
[76] Ibid, para 40.
[77] The main fear of the Member States was that the extensive interpretations of the EEC–Turkey Agreement would find analogous application in this case; Thym (n 58) 35.

conditions, remuneration, and dismissal. There is no longer reference to equal treatment of migrant workers and their families as regards social security, which was previously found in the Declarations attached to Lomé. What is more, respect for human rights and the elimination of discrimination was reaffirmed under Article 13(1) based on existing obligations of international law. Finally, Article 13(2) of the Cotonou Agreement mentioned fair treatment of TCNs who are legally resident in EU Member States, and the objective of granting them rights and obligations comparable to citizens by integration policy; enhancement of non-discrimination in economic, social, and cultural life; and the development of measures against racism and xenophobia.[78] Even if at first glance this provision seems more extensive, it can be argued that this is not the case. First of all, the fair treatment mentioned in Article 13(2) of the Cotonou Agreement is not equal treatment. Second, as regards the objectives of granting extra rights to migrants, these are framed more like guidelines in the cooperation between the parties, rather than clauses that could be directly invoked by individuals under EU Law.

7.2.2 Structuring Europe Agreements to Avoid Extensive Interpretations by the Court

Shortly after the fall of the Iron Curtain, and with the expressed will of the post-Soviet states to accede to the EU, the latter progressively entered into Association Agreements with most of the CEECs.[79] These Agreements, which were called Europe Agreements to mark their political importance in reuniting Europe, were prepared so as to assist the economic reform of CEECs and to create closer political relations with the Community.[80] The Agreements sought to establish a free trade area

[78] These are the provisions relevant to labour migration. There are also paragraphs which deal with other categories of migration, like para 4 on the aim of reducing poverty and improving living conditions with a view to creating employment opportunities at home and hence 'normalizing' migration flows, and para 5 on illegal migration, return, and readmission.

[79] Europe Agreement with Poland [1993] OJ L 348/2; Europe Agreement with Hungary [1993] OJ L 347/2; Europe Agreement with the Czech Republic [1994] OJ L360/2; Europe Agreement with Slovakia [1994] OJ L 359/2; Europe Agreement with Romania [1994] OJ L 357/2; Europe Agreement with Bulgaria [1994] OJ L 358/3; Europe Agreement with Latvia [1998] OJ L 26/2; Europe Agreement establishing with Lithuania [1998] OJ L 51/2; Europe Agreement with Slovenia [1999] OJ L 51/3. Estonia was the only country with which a Europe Agreement was not concluded.

[80] Communication, Association Agreements with the Countries of Central and Eastern Europe, A General Outline, COM(90)398 final, Annex Association Agreements 2–3.

between the Community and the associated states, and were adopted in order to prepare the latter for their eventual accession to the Community.[81] A ten-year transitional period split into two five-year stages was envisaged in most of the Agreements.[82] The central focus of the Agreements was to assist the CEECs in their transition to market economy.[83] Free movement of workers was not provided for in these Agreements. The liberalization of free movement would only be considered after the social and economic conditions of the acceding Member States was brought in line with those of the Community.[84] Rather, certain minimum measures were put in place to improve the situation of migrant workers legally resident in the Member States.[85] Specifically, the Agreements provided for the application of equal treatment regarding working conditions, remuneration, or dismissal.[86] The Agreements did not impose an obligation to grant residence rights to family members of workers, and the right of family members to access the labour market was explicitly limited to the spouse and children of the worker during the worker's stay.[87] These limited rights of family members excluded seasonal workers or workers covered by bilateral agreements.[88]

[81] While this was not the initial purpose of the agreements as expressed ibid, the preambles of all the Europe Agreements mentioned the eventual aim of accession to the EU.

[82] One year in case of Latvia and Lithuania and six years divided in periods of four and two for Slovenia.

[83] Avis du Comité économique et social sur l'élargissement futur de la Communauté [1992] OJ C 313/40, point 3.1; Communication de la Commission au Conseil au-delà des Accords européens: Préparation des pays d'Europe centrale et orientale à l'adhésion COM(94)320 final 5.

[84] Association Agreements with the Countries of Central and Eastern Europe, A General Outline, COM(90)398 final, Annex Association Agreements 2–3.

[85] For a detailed analysis of the rights of migrant workers under the EA Agreements, see Iris Goldner Lang, *From Association to Accession: How Free Is the Free Movement of Persons in the EU* (Eleven 2011) 70–92.

[86] Article 37, EA with Poland, EA with Hungary, EA with Latvia, EA with Lithuania; Article 38, EA with the Czech Republic, EA with Slovakia, EA with Slovenia, EA with Romania, EA with Bulgaria. See also Case C-162/00, *Pokrzeptowicz-Meyer*, ECLI:EU:C:2002:57; Case C-438/00, *Deutscher Handballbund*, ECLI:EU:C:2003:255; Elspeth Guild, 'Workers' in Andrea Ott and Kirstyn Inglis (eds), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (TMC Asser Press 2002).

[87] Declarations by the European Community 1, Chapter I of Title IV, included in all the EAs but the ones concluded in the late 1990s with Bulgaria, Latvia, and Slovenia; Article 37, EA with Poland, EA with Hungary, EA with Latvia, EA with Lithuania; Article 38, EA with the Czech Republic, EA with Slovakia, EA with Slovenia, EA with Romania, EA with Bulgaria.

[88] Ibid.

The Agreements also left a great deal of discretion to Member States to take into account their labour market situation in the context of progressive attribution of rights to labour migrants from associated countries. Specifically, the only obligation for Member States was to preserve access to employment accorded under bilateral agreements for already legally resident workers.[89] Potential improvements of the treatment of such workers or attribution of more rights could be considered by the Member States 'if possible'.[90] The Association Council had discretion to examine the granting of improvements, taking into account both the national labour market situation and the Community one.[91] Finally, following the end of the foreseen transitional period, the Association Council would examine other ways to improve the movement of workers in light of the social and economic conditions in the associated countries and the employment situation in the Community. These agreements, together with the identical provisions of the Stabilisation and Association Pact in the case of Croatia, set the basis for cooperation between the candidate countries and the EU until the conclusion of the enlargement, which is examined in Chapter 8.[92]

Similar protection for migrants is afforded by the Partnership and Cooperation Agreements concluded with Russia and several states from Southern Caucasus and Central Asia. These Agreements provide a basis for economic, social, financial, and cultural cooperation. They all provide for equal treatment as regards working conditions, remuneration, or dismissal of TCN workers originating from these states.[93] However, they do not grant any rights of access to the labour market for the workers' family, nor do they foresee a potential progressive attribution of more

[89] Article 41(1), EA with Poland, EA with Hungary, EA with Latvia, EA with Lithuania; Article 42(1), EA with the Czech Republic, EA with Slovakia, EA with Slovenia, EA with Romania, EA with Bulgaria.

[90] Ibid.

[91] Article 41(2), EA with Poland, EA with Hungary, EA with Latvia, EA with Lithuania; Article 42(2), EA with the Czech Republic, EA with Slovakia, EA with Slovenia, EA with Romania, EA with Bulgaria.

[92] Stabilisation and Association Agreement with Croatia [2005] OJ L 26/3, Chapter I Movement of workers.

[93] Article 17(1), Partnership and Cooperation Agreement with Tajikistan [2009] OJ L 350/3; Article 23, Partnership and Cooperation Agreement with Russia [1997] OJ L 327/3; Article 19(1), Partnership and Cooperation Agreement with Uzbekistan [1999] OJ L 229/3; Article 20(1), Partnership and Cooperation Agreement with Azerbaijan [1999] OJ L 246/3; Article 19(1), Partnership and Cooperation Agreement with the Kyrgyz Republic [1999] OJ L 196/48.

rights to migrant workers.[94] Unsurprisingly, the similarly worded provision of the Cooperation Agreement with Russia granting equal treatment as regards working conditions has been held by the Court to be directly effective.[95]

In this we see that the cost of ensuring an extensive protection for migrants' rights, as provided by the Court, limited the scope of application of non-discrimination only to the specific field of working conditions, remuneration, and dismissal. Short-term considerations related to risks of migration flows that could be caused by the underdevelopment of the CEECs at times when Member States did not have unlimited labour demands led to the limitation of the non-discrimination clauses in International Agreements concluded during this period. This has far-reaching implications in limiting the rights of migrants. However, as we shall see in Chapter 9, these implications can be contained in light of the incremental shaping of secondary law on the rights of migrants legally resident in the Member States. Before concluding this chapter, however, Section 7.3 will turn to the cooperation of the EU with economically developed European states. The analysis will point to the extensive attribution of rights to nationals coming from countries with higher development levels and thus less prone to migrating for economic reasons.

7.3 The Non-issue of Extending Free Movement Rights to Nationals of Developed European States

In the European Economic Area (EEA) Agreement, we see how the economic and social development of all countries involved and their long-standing economic cooperation and interdependence shaped the basis for a privileged partnership, which granted labour migrants from the European Free Trade Association (EFTA) countries rights that are equally extensive to the rights enjoyed by EU migrants.[96]

[94] Unlike the SAAs which create an obligation for Member States to preserve access to employment accorded under Bilateral Agreements for already legally resident workers and to examine the possibility of improving it.

[95] C-265/03, *Simutenkov*, ECLI:EU:C:2005:213.

[96] Agreement on the European Economic Area [1994] OJ L 1/3. The Agreement initially involved Switzerland, Austria, Finland, and Sweden. Switzerland did not ratify the Agreement, whereas Austria, Finland, and Sweden eventually joined the EU. See Resolution A3-0306/92 on economic and trade relations between the EEC and the EFTA countries in the European Economic Area [1992] OJ C 305/564, points A–C.

EFTA was created in the 1960s to promote free trade and economic integration of its Member States. The relation of the EU and EFTA dates back to the 1970s, when the EFTA states concluded bilateral free trade agreements with the EEC that did not include any right to free movement of workers.[97] The completion of the single market created new impetus in the relation of EFTA states with the Community and led to the signature of the EEA Agreement in 1992.[98] The original Agreement included Switzerland, Austria, Finland, Sweden, Iceland, Lichtenstein, and Norway. Eventually Switzerland did not ratify the agreement, whereas Austria, Finland, and Sweden became EU Member States during that period. As it currently stands, the Agreement applies to EU Member States on the one hand and Iceland, Lichtenstein, and Norway on the other.

The aim of the Agreement under Article 1(1) was to promote a continuous and balanced strengthening of the economic relations of the parties in light of creating a European Economic Area. The parties included both economic and social objectives in the preamble in a framing that is very similar to the objectives of the Community as expressed in the Maastricht Treaty, which had recently been adopted at that time.[99] In light of the alignment of objectives and of the similar development level of the EFTA and the EU Member States, it should not come as a surprise that the Agreement provided for extension of free movement of workers to EFTA nationals under Article 28. The article, which is framed similarly to the provision of Article 45 TFEU, grants nationals of the parties the right to accept offers of employment made to them, to move freely within the territory of the EEA states in search of employment, to reside in those states for the purpose of employment, as well as the right to remain there after being employed. Similarly to the

[97] Agreement between the EEC and Portugal [1972] OJ L 301/165; Agreement between the EEC and Sweden [1972] OJ L300/9; Agreement between the EEC and Austria [1972] OJ L 300/2; Agreement between the EEC and the Switzerland [1972] OJ L 300/189; Agreement between the EEC and Norway [1973] OJ L 171/2. In these Agreements, the Commission thought it was not necessary to include free movement of workers; see Communication, Contenu possible d'accords éventuels avec les États de l'AELE non candidats à l'adhésion, COM(71)701 45. The Communication in 45–48 mentioned the problems of discriminatory treatment of Community workers in Switzerland and, to a more limited extent, in Sweden and Finland due to the preferential treatment of workers in the Nordic Labour market. See also Declaration concerning workers, Agreement between the EEC and Switzerland [1972] OJ L 300/189.

[98] Address by Jacques Delors to the European Parliament on 17 January 1989, Bulletin of the European Communities (1989) Supplement 1/89.

[99] Recital 6 and 11 of the EEA Agreement; Cf Article 2, TEU Maastricht Treaty.

EU framework, Article 28(2) EEA Agreement provides for the application of non-discrimination as regards employment, remuneration, and working conditions for nationals working in EEA states. While the Agreement did not provide for rights of family members, Annex V thereto referred to the EU secondary law, which is applicable in the case of free movement of workers between the parties.[100] For this reason, protection of family life for EFTA workers is guaranteed at levels equal to those guaranteed for EU workers.

The Agreement did not provide for safeguard measures specific to risks created from movement of workers, but rather had a general safeguard clause under Article 112, similar to those existing under the EU framework, which allowed the parties to unilaterally resort to the measures deemed necessary in case of economic, social, or environmental difficulties of sectorial or regional nature.[101] Iceland attached a declaration to specify its understanding of Article 112 EEA Agreement to mean that safeguard measures may be applied to address serious disturbances on the labour market caused by large-scale labour movements due to the Agreement in specific geographical areas, types of jobs, or industrial branches.[102] Iceland justified this declaration on the basis of the 'one-sided nature of its economy and the fact that its territory is sparsely populated'.[103] It can be assumed that the inclusion of this declaration by Iceland could mean that free movement of workers between EEA states was not thought of as having the potential to cause risks for Community states in general.

Switzerland signed the EEA Agreement, but it did not eventually ratify it. It rather proceeded in the signature of a bilateral Agreement, which guarantees free movement of persons between that country and the EU.[104] The Agreement regulates movement of both economic and non-economic actors, as well as the right of establishment and the provision of services. On workers, the Agreement guarantees general rights of entry

[100] See Annex V to the EEA Agreement, Free movement of workers.

[101] See Article 223, Treaty of Rome, but also Article 135, Treaty of Accession of Denmark, Ireland, and the United Kingdom [1972] OJ L 73.

[102] Declaration by the Government of Iceland on the use of safeguard measures under the EEA Agreement.

[103] Similar in Declaration by the Government of Switzerland on safeguard measures, EEA Agreement.

[104] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L 114/6.

and residence, to access employment, as well as a general non-discrimination right.[105] What is more, the Agreement provides for family reunification rights and the right of family members to take up economic activity.[106] Further, the children of migrant workers enjoy access to education under equal treatment.[107] Article 10(1) of the Agreement provided for a transitional regime, which allowed Switzerland to maintain quantitative limits for a period of maximum six years as regards access to economic activity for workers who wished to enter and reside for a period of longer than four months.[108] Moreover, for two years after the entry into force of the Agreement, the parties were allowed to maintain controls on the priority of workers integrated in the regular labour market and wage and working conditions.[109] The Agreement also included a standstill clause to prevent the introduction of more restrictive measures towards the nationals of the parties.

In light of the objective circumstances of the Agreement and the fact that it regulated movement between a single highly developed country and all the EU Member States, the risks posed by migration could only materialize for the Swiss economy. It then appears understandable that there is not only an extensive attribution of rights equating EU workers and Swiss workers, but also a series of guarantees incorporated in the Agreement to protect the Swiss economy from the sudden influx of EU migrants.

The EEA and the Swiss Bilateral Agreement have not been subject to much contestation before the Court as regards the rights of migrant workers covered thereby. As to the former, the EFTA Court established under the Agreement to ensure its judicial control and interpretation in the EFTA states has produced case-law on the rights of labour migrants under the EEA agreement in the EFTA states. The Court of Justice of the EU has not been called to interpret any provision regarding worker's rights.[110] As regards the Swiss Agreement, limited case-law has addressed

[105] Ibid, Articles 2–4.
[106] Ibid, Article 3 and Annex I.
[107] Ibid, Article 3(6).
[108] Ibid, Article 10(2) on a quota system to ensure that in the first five years, certain residence permits will be guaranteed for EU workers and the self-employed, and Article 10(4) on unilateral measures to limit migration from EU Member States to a specific number in case of increased migration from the EU in the period of five to twelve years after entry into force of the Agreement.
[109] Ibid.
[110] See, however, Case C-897/19 PPU, *Ruska Federacija*, ECLI:EU:C:2020:262 on the extension of the Case C-182/15, *Petruhhin*, ECLI:EU:C:2016:630 to a naturalized Icelander (who was previously a Russian asylum seeker).

the application of the principle of non-discrimination as regards taxation, family benefits, and contributions to social security.[111]

In two cases concerning the coordination of social security systems between EU and EEA and Switzerland, the Court had the opportunity to clarify the reason behind the extensive rights attributed to EEA and Swiss nationals.[112] The UK, supported by Ireland, went against the Council, requesting the annulment of two Decisions adopted on the coordination of social security systems under these Agreements.[113] They claimed that Article 48 TFEU, which was mentioned as the substantive legal basis of the Decisions, was not appropriate, as it referred to the competence of the EU to adopt measures regarding EU workers. Instead, they argued that the relevant Decisions should have been adopted under Article 79(2)b TFEU, which referred to the competence of the EU to adopt measures as regards the rights of TCNs.

The Court confirmed Article 48 TFEU as the appropriate legal basis for the adoption of Decisions, justifying the finding with reference to the objectives of the two Agreements. Specifically, the Court repeated that the EEA Agreement had the objective of the fullest possible realization of free movement within the whole EEA, with the purpose of extending the EU internal market to the EFTA states.[114] Similarly, the Bilateral Agreement with Switzerland was concluded with the aim of bringing free movement of persons on the basis of the rules applicable at Community level.[115] The objectives pursued by the Agreements in question were emphasized by the Court as the reason behind the extensive attribution of rights. There is nothing novel in this. The objective and context of an Agreement as elements to be taken into account in its

[111] Case C-241/14, *Bukovansky*, ECLI:EU:C:2015:766; Case C-478/15, *Radgen*, ECLI:EU:C:2016:705; Case C-216/12 and C-217/12, Judgment of 19 September 2013, *Hliddal and Bornand*, ECLI:EU:C:2013:568; C-2/17, Judgment of 28 June 2018, *Crespo Rey*, ECLI:EU:C:2018:511.

[112] Case C-431/11, *United Kingdom/Council*, ECLI:EU:C:2013:589; Case C-656/11, *United Kingdom/Council*, ECLI:EU:C:2014:97.

[113] Council Decision 2011/407/EU of 6 June 2011 on the position to be taken by the EU within the EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement [2011] OJ 2011 L182/12; Council Decision 2011/863/EU of 16 December 2011 on the position to be taken by the EU in the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as regards the replacement of Annex II to that Agreement on the coordination of social security schemes [2011] OJ L 341/1.

[114] C-431/11, *United Kingdom/Council*, para 50.

[115] Ibid, para 55. See also Case C-247/09, *Xhymshiti*, ECLI:EU:C:2010:698 para 31.

interpretation are provided for by Article 31 VCLT, and this rule of interpretation has been applied by the Court in the interpretation of International Agreements in general.[116]

Similarly to the EEA Agreement, the accession of Austria, Sweden, and Finland, which were EFTA states, did not involve discussions on the risk of migration. The candidate countries were equally developed; they were EFTA members and parties to the EEA Agreement signed in 1992, whose provisions had already provided for the extension of the free movement of workers regime between them and the Member States.[117] Austria was the only candidate that already had a large amount of labour migration from Southern and Eastern Europe.[118] For this reason, mirroring the first accession, Austria attached a Declaration which recognized its right to address the EU institutions in case of difficulties arising from free movement of workers, in order to find potential solutions.[119] The general safeguard clause was also included, but provided for a shorter period of two years in case of eventual need for protective measures.[120]

The analysis in this chapter highlights that the absence of migration-related risks in the context of cooperation of the EU with third states, and relatedly the possibility of maintaining economic growth and social progress for all the parties involved at similar levels, led to full attribution of rights of migrants from specific third states. Essentially, the economic development of the host countries, their similar demographic patterns, and the lack of massive migratory movements therefrom to the EU are the reason behind such an extensive protection in the framework created by the Agreements. Similar considerations existed in the accession of Finland, Sweden, and Austria, with immediate attribution of free movement rights and incorporation of the general safeguard clause. The lack of economic risks dictates the full attribution of rights. At the same time, for the system to be sustainable, that is, to be able to address economic

[116] See Case 270/80, *Polydor and others*, ECLI:EU:C:1982:43.

[117] Austria and Sweden were founding members of EFTA, while Finland joined in 1986. On free movement of workers, see Article 28, EEA Agreement.

[118] The Challenge of Enlargement, Commission Opinion on Austria's application for membership, Document drawn up on the basis of SEC(91)1590 final, Bulletin of the European Communities, Supplement 4/92.

[119] Joint Declaration on the free movement of workers by Austria, Act concerning the conditions of accession of Austria, Finland, and Sweden (1994 Accession Treaty) [1994] OJ C 241.

[120] Article 152, 1994 Accession Treaty.

and social objectives in the long-term, safeguard clauses were incorporated, which allowed derogations if need appeared.

Overall, this second period of development of EU migration law started with the aspiration to transform the EU legal order, to breathe political elements into it, and to grant rights to all migrants resident in EU territory. The parallel pursuit of economic and social objectives guiding the development of EU law limited these aspirations. For EU migrants, the aspiration of engaging them in a political project could not lead to the granting of unlimited social rights. A full extension of social rights without economic limitations would undermine the pursuit of economic objectives and would thus be economically unsustainable. For TCN migrants, on the other hand, granting them rights was acceptable, but it was impossible to reach a consensus on admission due to the short-term approach of the Council to the economic objectives served by migration. Despite the interests of different institutions, the strong basis of equal treatment rights in relation to working conditions was not contested, as such rights acted as the minimum guarantee to ensure an economically and socially sustainable EU. The EU labour market could not effectively function without this as the outcome would be unfair competition and social dumping. National societies would also be characterized by grave injustice and exclusion, were it not for these minimum rights, and would also be socially unsustainable. The real challenge, which existed for both EU and TCN migrants and affected them equally, was access to social security rights. While granting full equal treatment on social security rights would be in line with the social objectives of the EU, it would simultaneously have the potential of disrupting the redistribution system of different Member States and it could undermine the economic objectives. Searching for economic and social sustainability behind the regulation of social rights of migrants was a challenging endeavour that would continue to tantalize the EU institutions in the next period.