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## **Being a third-country national in the European Union : How simple things have become complex and complex things have become simple**

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Prof.dr. R.C. Tobler

## Being a third-country national in the European Union.

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# Being a third-country national in the European Union.

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Oratie uitgesproken door

**Prof.dr. R.C. Tobler**

bij de aanvaarding van het ambt van hoogleraar op het gebied van

het Europees Recht

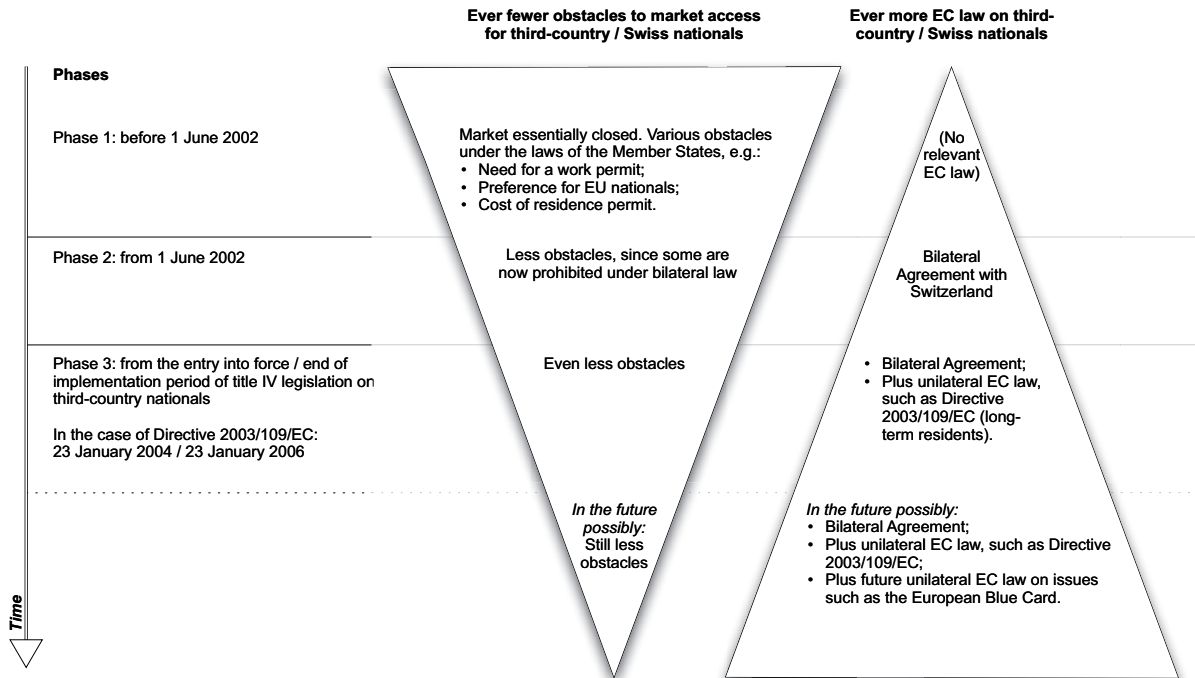
aan de Universiteit Leiden

op vrijdag 7 november 2008



**Universiteit Leiden**

How complex things have become simple and simple things have become complex



This chart has been modelled after:  
Tobler/Beglinger, *Essential EC Law in Charts*, Budapest: HVG Orac 2007; see [www.eur-charts.eu](http://www.eur-charts.eu)

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Art. 3(3) of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44: ‘This Directive shall apply without prejudice to more favourable provisions of: [...] (b) bilateral agreements already concluded between a Member State and a third country before the date of entry into force of this Directive; [...]’

***Please note:***

As a long-term resident in the Netherlands, I do speak Dutch. However, I teach in international law programmes, and therefore most of my Leiden students do not understand Dutch. My students are my first ‘clients’ at Leiden University; it is for their benefit that this lecture is given in English.

**Important provisions of EC law**

Art. 2 of 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, OJ 2002 L 114/6: ‘Nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III of this Agreement, be the subject of any discrimination on grounds of nationality.’

## Introduction

At the beginning of this inaugural lecture, I feel that I should be honest about its subject matter. I must admit that the main reason as to why I chose to talk about third-country nationals in the EU is my own situation. As most of you will know, I am a Swiss national working in the Netherlands. While the Netherlands is a Member State of the European Union, Switzerland is not. Accordingly, I am what in the EU context is called a 'third-country national'. So, I have decided to talk about being a third-country national in the EU. What is more, I have decided that in doing so I would use myself as a case study. In the table of contents on your handout, you can see this part of the lecture under Roman IV, entitled - somewhat ironically, as I hope you will realise - 'Me, myself and I'.

4 What, then, is it that I wish to illustrate by telling you about my own case? It is, essentially, what is indicated in the subtitle of this lecture. In the case study, I will show you how, since the time when I first came to work in the Netherlands in the mid-1990s, things have become increasingly complex from the perspective of European law. On the other hand, I will explain that as far as the rights of certain third-country nationals are concerned, things have become increasingly simple. It seems to me that there is an interesting dialectic in this situation, to which I will return at the end of the lecture.

Having said this much in terms of introduction, let us now get down to some serious work.

### On legal categories and why they matter

Although it may not be evident from what I have said so far, this lecture will be about categories in law, and more specifically about categories of persons in European law. When I say 'European law', I mean one particular aspect of this very large and varied field, namely European Community or EC law. For those of you who are not specialists in this field, I might add that EC law is a particularly important sub-part of European Union or EU law. In respect of legal categories, let me recall a

very basic fact, namely that the law is very much about the making of categories. In EC law as in other legal orders, a person's rights and obligations will depend on the category under which he or she falls. Categories are, very simply, essential to legal systems as well as to legal minds. It is for this reason that many lawyers find it difficult to join the post-modern enthusiasm for deconstruction, which questions the usefulness of categories of persons and aims at abolishing them. Well, EC law for one is far from doing so. Indeed, when it comes to third-country nationals, an increasing number of sub-categories were developed over time, as I will demonstrate in a moment.

However, before doing so I have to say a word about the basic distinction under Community law between nationals of the Member States and third-country nationals. This distinction has existed from the very beginning, when the Treaty on the European Economic Community - as it was then called - was signed. It is of fundamental importance, though how much it matters may depend on the area of law. Let me give you an example. Recently, the European Commission proposed a Regulation according to which children in the EU are to receive free fruit and vegetables at school, in order to tackle the rise of obesity among children.<sup>1</sup> In such a context, the nationality of the children does not matter in the least. It is not so that children with the nationality of a Member State get their apples and bananas for free whilst children with other nationalities - Mexican, for instance, or Turkish or Swiss - have to pay. Or, even worse: that children with the nationality of a Member State get the treats for free whilst children with *certain* other nationalities pay a symbolic price and children with yet other nationalities pay a higher price. You may find this example strange, but I will show you later that this is indeed how it works in other contexts.

However, in many other areas of EC law the distinction between nationals of EU Member States and third-country nationals matters a great deal. The most important example is undoubtedly migration, that is, the right of people to enter an

EU Member State in order to work or study or simply to live there. In this respect and as a general rule, nationals of the Member States enjoy many more rights than third-country nationals. However, there are important differences within the latter group. Indeed, the extent of the rights of third country nationals depends heavily on the specific sub-category in which they fall. This has not always been an issue, since originally there were virtually no significant sub-categories. I will now turn to the development of EC law in this regard.

### **Brief overview on the development of EC law in relation to third-country nationals**

#### *The EEC Treaty and rights of third-country nationals*

Let me begin in 1957, when the EEC Treaty was signed. In fact, this Treaty envisaged one particular sub-category of third-country nationals, namely those established within the Community and seeking to provide a service. Article 59 of the EEC Treaty, which is now Art. 49 EC, concerns the free movement of services. According to its first part, this freedom is reserved to nationals of the Member States. However, according to the second part, the EC institutions are empowered to extend the benefit of the free movement of services to cover 'services supplied by nationals of any third-country who are established within the Community'. In 1957, this was the only Treaty provision to mention third-country nationals. However, nothing came from it. When the European Commission finally presented a proposal for a directive on this issue in 1999,<sup>2</sup> it was not adopted. Also, the Directive on services in the internal market of 2006<sup>3</sup> does not cover services provided by third-country nationals. If third-country nationals nevertheless play a certain role in the context of services, it is only because of the European Court of Justice. The Court held in the case *Rush Portuguesa*<sup>4</sup> that a company operating in a Member State other than that of its origin may benefit from the freedom to provide services when it employs third-country nationals in that other Member State.<sup>5</sup>

However, apart from this rather special case, the effect of many provisions of the Treaty is quite simply to exclude third-country nationals from the rights granted by the Treaty. Articles 43 and 49 EC, on free movement of services and freedom of establishment respectively, are explicit examples. In the case of Article 39 EC, on free movement for workers, the limitation to nationals of the Member States is stated in Regulation 1612/68.<sup>6</sup> Conversely, there is no such clarifying legislation in relation to Article 12 EC, which generally prohibits discrimination on grounds of nationality. My Leiden colleagues Pieter Boeles,<sup>7</sup> Piet Jan Slot and Mielle Bulterman<sup>8</sup> have argued that this provision prohibits discrimination on grounds of any nationality, not only nationality of a Member State. However, so far Article 12 EC has only been applied in situations where nationals of Member States were at issue.

All of this shows that under the legal system set up by the original Treaty, third-country nationals occupied a very modest place. It also shows that apart from the special case of posted workers mentioned briefly, third-country nationals formed one large and, from the perspective of Community law, homogenous group in which it made no difference where a person came from. In later years, this would change quite dramatically because Community law introduced sub-categories of privileged third-country nationals coming from certain countries. Before I mention some important examples, let me say that the reasons for granting privileges were not considerations of humanity, but rather that this was seen as beneficial for the European Community itself, for example in view of the economic need for labour.

#### *Introducing sub-categories of privileged third-country nationals*

##### Family members of migrant EU nationals

The most important group of privileged third-country nationals is family members of migrant nationals of Member States. It was felt that migrating from one Member State to another would not be very attractive if the workers were not able to

take their families with them. Accordingly, family rights were needed in order to make free movement for workers effective. The first Regulation on this issue was adopted in 1961 and related to the family members of migrant *workers* only,<sup>9</sup> but this was subsequently broadened. At present, the relevant measure is Directive 2004/38 on movement and residence of EU citizens.<sup>10</sup> We will encounter this directive again, in the case study later.

6 What are family rights about? When a national of an EU Member State moves to another Member State, he or she is entitled to bring along certain family members. In particular, this includes the partner, children and dependent parents. Importantly, the nationality of these family members does not matter. Unlike the person from whom they derive their rights, they do not have to be nationals of an EU Member State. Family members enjoy the right to enter into and to reside in the host country, the right to work there and more generally the right not to be discriminated against on grounds of their nationality. How far these rights extend is illustrated by the recent judgment of the Court of Justice in the case *Metock*,<sup>11</sup> where the Court held that a third-country family member can join the EU national in the EU even if this third-country national had not previously been a lawful resident in another EU Member State. All of this means that third-country nationals who happen to be family members of a national of an EU Member State are greatly privileged when compared to other third-country nationals. As for the latter, it may be far more difficult if not impossible to lawfully enter the EU and to stay here.

Sub-categories of privileged third-country nationals created through Treaties

Let me now turn to a second group of sub-categories of privileged third-country nationals, which were created through specific treaties concluded by the EC with certain countries or groups of countries. Closest to EC law in terms of substance is the European Economic Area Agreement of 1992.<sup>12</sup> Third-

country nationals falling under this Agreement enjoy largely the same free movement rights as do nationals of the Member States and their family members. The EEA Agreement links the EU Member States and three of the four EFTA states, namely Norway, Iceland and Liechtenstein. Switzerland originally wanted to join - that is, the Government wished to do so, but the people voted against it.

Instead, Switzerland continues to pursue what it refers to as the 'bilateral approach', which had started in the 1950s. This approach consists of the conclusion of so-called sectoral agreements with the EC, the EU and its Member States. At present, some 120 agreements are in force. Particularly important is the Agreement on the free movement of persons of 1999,<sup>13</sup> which grants very far-reaching free movement rights to persons. This Agreement will play an important role in our case study.

Next, let me mention the Ankara Agreement, concluded by the EEC and Turkey in 1963.<sup>14</sup> The Ankara Agreement is the strongest of a group of Mediterranean agreements. Article 12 of the Ankara Agreement envisages the introduction, step-by-step, of free movement of persons. Subsequently, this was realised through decisions by the Council of Association set up under the Agreement, though only to some extent.<sup>15</sup> The Ankara Agreement is of particular relevance because it has led to important case law on the effect of agreements with third countries within the legal order of the Community. This will also play a role in our case study.

As a final example, I would like to mention the Partnership and Co-operation Agreement signed by the EC with Russia in 1994.<sup>16</sup> This Agreement, too, prohibits discrimination on grounds of nationality. However, it should be noted that neither the Russian nor the Mediterranean Agreements provide for free movement within the far-reaching meaning of this term in EC, EEA or Swiss bilateral law. Accordingly, different sub-categories of third-country nationals falling under an international agreement must be distinguished.

Further privileged sub-categories created through title IV legislation

More recently, further sub-categories of privileged third-country nationals were created through secondary legislation adopted in the framework of title IV of the EC Treaty. Besides family reunification,<sup>17</sup> this notably concerns issues such as the admission to the EU of researchers<sup>18</sup> and the status of long-term residents from third countries.<sup>19</sup> As for the latter, you will hear more in our case study. Further, the creation of an important new sub-category is under way, namely those entitled to a so-called 'European Union Blue Card'. The aim of the blue card system is to facilitate the admission into the EU of third-country nationals for the purposes of highly qualified employment. At present, the Commission's proposal for a European Union Blue Card Directive<sup>20</sup> is under discussion in the European Parliament.

### Me, myself and I - a case study

#### *Learning from Oscar Wilde*

So far, we have seen how over time EC law has introduced more and more specific sub-categories of third-country nationals who are privileged over nationals from other third countries. However, you may not yet have a very clear idea of what this can mean in practice. I am therefore now turning to my case study. As already mentioned, I have entitled this part of the lecture 'Me, myself and I'. In choosing this title, I was inspired by a booklet on the works of one of my favourite authors. The booklet - which is written in German by Kerstin Decker - is called 'Oscar Wilde for those in a hurry' (or, in the original German language: 'Oscar Wilde für Eilige').<sup>21</sup> It gives a brief but extremely interesting analysis of Oscar Wilde's work. About the famous novel 'Dorian Gray', Ms Decker writes that it reflects the author's favourite subject matter, namely the 'Wildesian trinity of Me, Myself and I' (in German: 'die Wildersche Trinität Ich, Ich und nochmals Ich'<sup>22</sup> - with the word 'Ich' always beginning with a capital letter). Oscar Wilde once said that 'to love oneself is the beginning of a life-long

romance'. According to Ms Decker, the three main characters in the novel 'Dorian Gray', namely beautiful young Dorian Gray, the painter Basil Hallward and decadent Lord Henry, each reflect different aspects of Oscar Wilde's personality. I found it a fascinating thought.

In this lecture, allow me to follow Oscar Wilde's example by using myself as the focus point for the following case study, though I do not represent three different persons in one story, but rather one person finding herself in three different legal situations over time. As we will see, these situations also correspond to different and increasing levels of legal complexity. I hope that in this manner I will be able to explain some of the legal complexities involved in the position of third-country nationals under the present EC law.

#### *Three situations and three levels of complexity*

1995: need for a work permit

Our case study begins in the year 1995, when I first came to the Netherlands in order to work as an academic coordinator for 'The Leiden LL.M. Programme in EC Law'. At that time and from the point of view of EC law, I was an ordinary, non-privileged third-country national. There was no particular sub-category for my type of case. After all, I had not come to the Netherlands as the family member of an EU citizen, but by myself. I was a Swiss national, and at that time there was no EC - Swiss Agreement that would facilitate the movement of persons. In a sense, my situation was simple.

However, it was complex on another level. Given the lack of EC law regulating my situation, it was left to the Member States to set up rules on the admission of people like me to their territory. The Netherlands did so in a law called *Wet arbeid vreemdelingen* (Law on the work of foreigners).<sup>23</sup> According to this law, in order to be able to take up the job offered to me by the University of Leiden, I needed a work permit.<sup>24</sup> That, however, I could only obtain if my future

employer succeeded in convincing the authorities that there was no EEA national who would be equally suitable for the job. This is, of course, a very formidable hurdle. Indeed, in many cases it is difficult to imagine how this condition could ever be met. However, in practice it depends very much on the nature of the job in question. Let me tell you how I got my work permit: the director of our Europa Institute, Piet Jan Slot, asked me to draft a letter in which I would describe my qualifications, abilities and achievements in such a manner that the unavoidable conclusion would be that no other person could possibly be equally qualified for the job. I did, the university sent the letter to the authorities, and the argument was accepted. Quite clearly, I happened to belong to a group of people who were in fact, though not in law, privileged in view of the nature of their work. Once I was in, everything was easy. I got a residence permit, which cost a bit of money, though not too much at that time. I purchased a small house - buying real estate is something that would have been much more difficult for a foreigner in Switzerland. After some years, I was even allowed to vote on the communal level - something that in the Swiss system of direct democracy only the most progressive Cantons dare to offer to their foreign residents.

Summarising my findings in relation to this first stage of my employment in the Netherlands, I would conclude that things were both simple and complex. They were simple when it comes to EC law, since I fell in a category of third-country nationals for which there were no beneficial EC rules. However, things were complex on a different level because of the conditions to be satisfied under Dutch law to be allowed to work in the Netherlands, at least in principle.

As of 1 June 2002: no need for a work permit any longer

Let us now turn to the second situation. Seven years later what used to be complex - namely the conditions precedent to being allowed to work in the Netherlands - became simple. On the first of June of 2002, a package of seven EC - Swiss bilateral agreements entered into force. One of them was of direct

relevance to me, namely the previously mentioned Agreement on the free movement of persons. As a consequence of this Agreement, I no longer needed a work permit. I now fell in a sub-category of privileged third-country nationals who in some respects enjoy the same right to equal treatment as nationals of EU countries.

However, like EU nationals, I still needed a residence permit. I remember how in March 2003 I asked for an extension of my old permit, how it was granted - and how I was asked to pay a bill of 169 Euros. The bilateral Agreement on the free movement of persons indeed provides that the host state issue residence permits, though it does not say anything about the costs. However, the Agreement contains a clause that prohibits discrimination on grounds of nationality in relation to all issues covered by the Agreement. Obviously, this means that the costs of a residence permit in the Netherlands cannot be higher for a Swiss person than for a national of an EU Member State. When I found out that in the latter case a residence permit cost only 28 Euros, I protested against the bill of 169 Euros. I told the authorities that because of the non-discrimination clause in the Agreement my residence permit could not cost more than 28 Euros. Much to my satisfaction, the authorities accepted my argument and revised the bill.

I should perhaps add that this does not mean that since then the Dutch authorities have fully understood the meaning of a non-discrimination clause in an agreement concluded by the EC with a third country. In 2007, the European Commission brought an action to the Court of Justice complaining about the discriminatory costs charged for residence permits for Turkish citizens staying in the Netherlands in the framework of the Ankara Agreement.<sup>25</sup> The case is pending - although I would think that the outcome is clear.

All in all, we may conclude that through the entry into force of the bilateral Agreement on the free movement of persons things became easy for Swiss people coming to the

Netherlands in order to work here. At the same time, the Agreement led to a certain increase in the legal complexity through the introduction of a new and additional sub-category of third-country nationals.

At present: at the crossroads of an international agreement and an EC directive

From a legal perspective, things changed again when the EC adopted Directive 2003/109 on long-term residents from third countries, that is, one of the title IV measures mentioned earlier. According to this Directive, persons who have resided at least five years in an EU Member State and who have behaved themselves during this time can be regarded as well-integrated into the society of their host state. The aim of the Directive is to provide a more secure status for such people. They can apply for the special status of long-term resident, if they can prove they have adequate resources and health insurance. In addition, the Member States may require them to comply with integration conditions valid under national law. Once the special status has formally been granted, the individual third-country national benefits from a number of rights, including in particular equal treatment with the nationals of the host Member State in a number of areas. These include for example - and this will be interesting for the non-discrimination lawyers among you - the core benefits of social assistance and social protection.

Again, the adoption of this Directive meant that yet another sub-category of privileged third-country nationals was created in EC law. For people who already fell under an international agreement on the free movement of persons, the question arose as to what is more favourable for them, the relevant agreement or the Directive. In my case, I found that the answer is the typical lawyer's answer, namely: it depends. In some respects, the Directive is more favourable. This concerns notably the extent of the prohibition of discrimination on grounds of nationality, which includes issues not covered by the Agreement. In other respects, the Agreement is more

favourable. Most notably, the rights granted by the Agreement are not tied to conditions such as sufficient income or health insurance. Further, I have already mentioned that the Agreement contains a prohibition of discrimination on grounds of nationality that extends to the costs of a residence permit. In contrast, there is no such provision in the Directive. When the European Commission proposed the Directive, it contained a provision stating that 'a long-term resident's EC residence permit shall be issued free of charge or against payment of a sum not exceeding the charges required of nationals for the issuance of identity cards'.<sup>26</sup> However, when the Council adopted the Directive, this element was taken out. As a result, in the version now in force the Directive is not only silent about the costs of residence permits but it also does not prohibit discrimination on grounds of nationality in this context. The Agreement does. Accordingly, it is more favourable on this particular point.

Given this assessment, you will not be surprised to hear that I decided to combine the benefits of the Agreement and those of the Directive. I found the legitimacy of this attitude confirmed in Art. 3(3) of the Directive, according to which the provisions of the Directive apply without prejudice to more favourable provisions of agreements between the EC and third countries. Accordingly, in January 2007 I applied for the status of long-term third-country resident and in doing so, I specifically told the authorities that I only wished to be granted the *status*, independent of a resident permit. As for residence, I intended to rely on the bilateral Agreement. As you can see, the combination of the Agreement and the Directive lifts my case to a new level of complexity. This complexity rests on the relationship between two very different instruments of EC law, one an international agreement agreed upon by the EC with a third state and one an internal legal measure of the EC, namely a directive.

However, I am afraid that I have to mention yet another element that adds further to this complexity, even though it does

not seem relevant at first sight. A few years ago, the EC adopted a directive on the movement and residence of EU citizens and their families, namely the previously mentioned Directive 2004/38. EU citizens who fall under this Directive and who wish to stay in another Member State for more than three months no longer need a residence permit. The only thing they have to do is to register with the authorities of their host country. In the case of long-term residence, they may ask for a document certifying permanent residence. In the Netherlands, this registration is free of charge, and a long-term residence document costs 30 Euros. This means that when it comes to residence formalities, we now have three different categories of persons under EC law:

- First, EU nationals who have to do no more than to register. Under Dutch law, this registration is free of cost;
- Second, third country nationals who benefit from a non-discrimination clause under an international Agreement and who, in the Netherlands, pay 30 Euros for a residence permit;
- Finally, other third-country nationals for whom there is no specific sub-category in EC law. In the Netherlands, these people now pay the very considerable amount of 433 Euros for a regular residence permit for a worker or a self-employed person.

I have already stated that based on EC law, Swiss citizens fall under the second category. However, when the Dutch legislator implemented the Directive on movement and residence of EU citizens, it very kindly decided to extend its beneficial rules on residence formalities to Swiss citizens who wish to work or study in the Netherlands. Accordingly, they too no longer need a residence permit; they only need to register and that does not cost them anything. Should they wish to obtain a document certifying permanent residence, that will cost them just 30 Euros. From a legal point of view, it would seem that in this manner the Dutch legislator 'over-implemented' both the bilateral Agreement and Directive 2004/38. Accordingly, as far as residence formalities are concerned, the Dutch implementa-

tion of the Agreement is even more favourable than what is prescribed by the Agreement. As a consequence, I think that the argument can be made that ultimately these provisions must prevail over the Directive on long-term third-country residents.

But let me return to my request to the Dutch authorities to grant me the status of long-term third-country resident. As already mentioned, I asked for a separate status document, independent of a residence document. I must admit that when I did that, I knew that my request could not be granted under Dutch law. The reason for this is the fact that when it implemented the Directive on long-term third-country residents, the Dutch legislator had decided to unify the status document with the residence permit mentioned in the Directive. More specifically, under Dutch law the long-term residence status is granted in the form of a remark on the long-term residence permit. In other words, one cannot be had without the other. Therefore, when the Dutch authorities received my request, they checked whether I fulfilled the conditions for the status, they found that I did and therefore they eventually informed me that they granted me a long-term residence permit, which cost 201 Euros. (I say 'eventually' because it took the authorities considerably longer than is prescribed by the Directive ...)

Naturally, I protested. I argued that by unifying the residence permit and the status provided for by the Directive, the Dutch legislator had disregarded the provision about more favourable provisions in international agreements and had, therefore, made a mistake in implementing the Directive. I further argued that, because of the non-discrimination provision in the bilateral Agreement with Switzerland, a residence permit for someone like me could in any case not cost more than a comparable document for a national of an EU Member State. Accordingly, I requested that either I be given a separate status document or that the price of the residence permit be reduced to 30 Euros. Well, the Dutch authorities found it impossible to follow my arguments and therefore denied my

request. Following this, I appealed to the administrative judge who heard the case in June of this year. It was an interesting experience. For the first time I was in court on my own account, rather than representing clients, as I did when I used to work as an attorney-at-law a long time ago in Switzerland. Not only was the experience interesting, but so too were the arguments of my opponent - and here we return to the phenomenon of the Dutch 'over-implementation': the representative of the immigration authority told the judge that she did not understand why I had a problem to begin with. After all, according to Dutch law Swiss citizens were now EU citizens and, therefore, had the same rights as EU citizens ...<sup>27</sup> Upon this, I remarked that the fact that the Dutch legislator had extended certain benefits of the Directive on movement and residence of EU citizens to Swiss citizens did not make them EU citizens. Rather, what we had before us was a complex case concerning the relationship between the Directive and the Agreement, and the Dutch law that was supposed to be in line with both. I suggested that if the judge had doubts about the meaning of the EC law involved in this case, in particular the article about the more favourable provisions, he might turn to the European Court of Justice for help.

Apparently, the judge found the case complex - at least I conclude this from the fact that our court session had to be prolonged because the judge needed a break to think. A few weeks after the session, he had made his mind up and issued a decision, without getting help from the Court of Justice. This decision was handed down on the 1<sup>st</sup> of August - which, as you may know, is the Swiss national holiday. On that august day, the judge refused my appeal, and what is more, he did so without addressing the issue of the precedence of more favourable provisions of international agreements. Instead, he focused exclusively on the unification of the long-term third-country resident status document and the residence permit under Dutch law, which he found to be in line with the Directive. Following this, I appealed to the highest administrative court in the Netherlands, which is the administrative department of

the *Raad van State*. Should this court have doubts on the meaning of the EC law on which I am relying following the *Demirel* judgment,<sup>28</sup> then it will be obliged to turn to the Court of Justice for an explanatory judgment.<sup>29</sup> The case is pending, and after all I have said so far you will understand that I am very curious to hear how this court will deal with the complex legal issues resulting from the present state of law regarding third-country nationals in my situation. In order to assure the Vice Rector and the Dean, I hasten to add that I do not plan to limit my future work at our university to thinking solely about my own case. However, the issues raised by this case fit very well into my field of expertise, which is legal equality and discrimination. Indeed, it is a field that offers many diverse and interesting research avenues.

#### *A glimpse of the future*

Ladies and gentlemen, before coming to my conclusion, let me add a remark about the future of the legal relationship between the EC and Switzerland. At the time of preparing for this lecture, certain groups of Swiss people were collecting signatures in order to hold a popular vote on the continuation of the bilateral Agreement on the free movement of persons as well as on its extension to the two most recent EU Member States, namely Bulgaria and Romania. When I finished my text, the required minimum of 50,000 valid signatures<sup>30</sup> had indeed been collected. This means that the Swiss people will have to vote on these issues in February 2009. Now you may know that the percentage of Swiss people who actually make use of their right to vote has fallen quite dramatically over the years. Should a majority of those taking the trouble to vote in February 2009 say no, then this will mean that the situation of people like me will - again - become legally less complex. In this case, the Swiss government would have to withdraw from the Agreement on free movement of persons (which - by the way - would also mean the end of six other Agreements with which the Agreement on the free movement of persons forms a package,<sup>31</sup> indirectly, this would also affect the bilateral Schengen Agreement).<sup>32</sup> People like me would then no longer

be 'bilateral migrants', but merely long-term third-country residents. Should they wish to complain about the costs of a residence permit under the Directive, they would no longer be able to rely on the non-discrimination provision in the Agreement. However, this would not mean that they would be without legal arguments, as they could still rely on general principles of EU law, such as proportionality and - possibly - even the general principle of equal treatment. In such a scenario, therefore, the legal situation would revert to a simpler level. At the same time, it would once again probably be more difficult for Swiss people to enter the EU in order to live and work there. Only for those wishing to immigrate for the purposes of highly qualified employment, would the adoption of the Directive on the European Union Blue Card make things easier.

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Conversely, should a majority of those voting in February 2009 say yes, the complexity might further increase. In this case, the bilateral Agreement would continue to exist and with it the crossroads created by the interaction of this Agreement with certain EC directives on third-country nationals. Indeed, a new crossroads will be created if the proposed Directive on the European Union Blue Card is adopted. You will not be surprised to hear that the European Union Blue Card Directive, too, contains an article on more favourable provisions in agreements with third countries ...

### **Conclusion**

After so many complexities, what is my conclusion? We have seen how with every new legal sub-category of EC law into which third-country nationals can fall, an additional level of legal complexity was created. We have also seen that the most complex situation is that where an international agreement and a unilateral measure 'meet'. My personal case is situated precisely at such a crossroads, namely that of the bilateral Agreement on the free movement of persons and of the Directive on long-term third-country residents. We have also seen how the Directive provides for a specific rule for such a situation, namely that more favourable provisions of an agree-

ment prevail. At the same time, my case shows that the Member States may have difficulties in understanding the practical application of such a rule.

Ladies and Gentlemen, at the beginning of this lecture I spoke about an interesting dialectic: I said that since the time when I first came to work in the Netherlands in the mid-1990s, things have become increasingly complex from the perspective of the applicable European law. I also said that at the same time things have become increasingly simple because of the rights granted to Swiss citizens on the basis of bilateral and unilateral EC law. Must we then conclude that in order to make things easier they must become more difficult? I am not sure that I have a simple answer to this question - perhaps it is best if I leave you to ponder it yourselves.

One thing, however, is clear: compared to what other migrants suffer, the legal problems that I have right now in the Netherlands are a luxury. After all, my right of residence is undisputed. I am safe and sound in the country of my choice, where I came not out of a particular necessity but simply because I wanted to come here. Rather than facing multiple discriminations, as so many migrants do, I find myself in a situation of multiple benefits. And if I am honest, then I must admit that the legal issues arising in my case even give me some intellectual pleasure - I see EC law in action, and I am right in the middle of it. People like me are very privileged indeed. Let us not forget those who are less fortunate in their factual and legal situation.

### **Expressions of gratitude**

Ladies and gentlemen, I now turn to what is a particularly pleasant part of this lecture for me. It is the part where I am allowed to express my gratitude to all who had a hand, directly or indirectly, in bringing me where I am today: in this pulpit where inaugural lectures are held in Leiden.

My first debt of gratitude is to the authorities of our university who appointed me professor of European law at this venerable

institution. This is quite something for a third-country national, and I assure you that the honour of it is felt and deeply appreciated.

I further owe particular thanks to my present and former colleagues at the Law Faculty. You are my companions in my everyday working life in Leiden, and without you my work would be neither possible nor pleasant. Thank you for your help, inspiring discussions, critical questions and moments of laughter in the corridors of the Faculty building! Two of you were instrumental in bringing me to my present position: first, many years ago Rikki Holtmaat assisted me in gaining a research position at the European University Institute in Florence, where I was introduced to the world of high-level interdisciplinary research. Without this, I would not be able to do the work that I am doing now. Thank you, Rikki, for having been such a dedicated mentor and for being such a helpful and kind colleague now! Second, it was Piet Jan Slot who first asked me to work at Leiden University. Thank you, Piet Jan, for believing in my potential when I was not yet very experienced in the field of EC law, and thank you for your continued trust and your pleasant way of cooperating with me throughout the years!

Next, let me turn to my present and former students here in Leiden. On the handout, I call you my first clients, and I mean it. Each year, I have the privilege of teaching a new generation and of witnessing how just a few months can make a huge difference in knowledge and understanding. Your interest, your questions and comments in class make teaching rewarding. In fact, you may not realise to what extent students are decisive for a professor's wellbeing ... Thank you for having been and continuing to be an inspiration for me!

Finally, two other third-country nationals present today are of particular importance to me. One of them is Jacques, my co-author of 'Essential EC Law in Charts', my partner in many other projects, my personal internet technology helpdesk, and my love of almost precisely ten years. Thank you for what you

are and for bearing so admirably with my double life in two countries! The other very special person is my father, who, as a retired pastor, is much more used to being in pulpits than I am - after all, we are here in a former church. For me, it is without any doubt he who is my most important guest at this inaugural lecture. I have long felt that it is a blessing to have such a father. Thank you for being here and for all that you have meant for me throughout the years of my life!

Ladies and gentlemen, let me end by thanking all of you for having come to hear this lecture, and by pronouncing the ancient formula that always concludes inaugural lectures at our venerable university:

*Ik heb gezegd.*

## Notes

- 14
- 1 Proposal for a Council Regulation amending Regulations (EC) No 1290/2005 on the financing of the common agricultural policy and (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) in order to set up a School Fruit Scheme, COM(2008) 442 final; see also 'School children in EU to get more fruit and vegetables', *euobserver* of 9 July 2008.
  - 2 Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community, OJ 1999 C 67/17.
  - 3 Directive 2006/123/EC on services in the internal market, OJ 2006 L 376/36.
  - 4 Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417.
  - 5 Again, a Commission proposal for a directive on this issue was not adopted; Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services, OJ 1999 C 67/12.
  - 6 Regulation 1612/68/EEC on freedom of movement for workers within the Community, OJ English Special Edition Series I Chapter 1968(II), p. 475.
  - 7 Pieter Boeles, 'Europese burgers en derdelanders: wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?', *Sociaal-economische Wetgeving* 2005, 500-513.
  - 8 Piet Jan Slot/Mielle Bulterman, 'Harmonization of Legislation on Migrating EU Citizens and Third Country Nationals: Towards a Uniform Evaluation Framework?', *Fordham International Law Journal* Vol. 28, No. 3: April 2006, 747-789.
  - 9 Regulation 15 on the first steps for attainment of freedom of movement, OJ 57 of 26 August 1961, p. 1073 (not available in English).
  - 10 Directive 2004/38/EC on the right of citizens of the Union and their families members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77.
  - 11 Case C-127/08 *Blaise Baheten Metock and others v Minister for Justice, Equality and Law Reform*, judgment of 25 July 2008 (not yet reported).
  - 12 European Economic Area Agreement, signed on 2 May 1992, OJ 1994 L 1/3.
  - 13 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, signed on 21 June 1999, OJ 2002 L 114/6.
  - 14 Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Turkey, of the other part, signed on 12 December 1963, OJ 217 of 29 December 1964, p. 3687 (not available in English).
  - 15 The decision at present in force is Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association (not published in the Official Journal).
  - 16 Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, signed on 24 June 1994, OJ 1997 L 327/3.
  - 17 Directive 2003/86/EC on the right to family reunification, OJ 2003 L 251/12.
  - 18 Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ 2005 L 289/15.
  - 19 Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44.
  - 20 Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final.

- 21 Kerstin Decker, *Oscar Wilde für Eilige*, Berlin: Aufbau Taschenbuch Verlag 2004.
- 22 Idem, p. 88.
- 23 Wet van 21 december 1994 tot vaststelling van de Wet arbeid vreemdelingen, Stb. 1994, 959.
- 24 In fact, there was (and still is) also a bilateral ‘Friendship, Trade and Establishment Treaty’ which provides for equal treatment of Dutch and Swiss citizens in relation to e.g. residence and work (Art. 1), and which was signed by Switzerland and the Netherlands on 19 August 1875 (for the Netherlands Stb. 1878, 4, for Switzerland SR 0.142.116.361). An additional Protocol signed in 1877 specifies that the contracting states are entitled to refuse equal treatment to migrants who cannot provide authentic proof of nationality, do not have sufficient means or might present a threat to public order or public security. After World War I, such Establishment Treaties have generally been interpreted under the reservation of national legislation on foreigners, which did not yet exist at the time of the conclusion of these treaties in the 19th century (for Switzerland, see the decision of the Swiss Federal Tribunal of 12 February 1993, BGE 119 IV 65). Such legislation typically imposes the obligation to hold a residence permit and, for work in employment, a work permit. However, in a judgment of 26 September 2000 the *Rechtbank ‘s-Gravenhage* held that the Swiss-Dutch Treaty precludes the Netherlands from requiring that Swiss citizens wishing to take up employment in the Netherlands must be in possession of a work permit (Case AWB 99/6851 VRWET H).
- 25 Case C-92/07 *Commission v The Netherlands*, pending; see also Case C-242/06 *Minister voor Vreemdelingenzaken en Integratie v T. Sahin*, pending.
- 26 Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001) 127 final.
- 27 Compare the brochure ‘Inschrijving bij de IND voor EU-onderdanen. IND registration for EU citizens’ (<http://www.ind.nl>), which also covers Swiss citizens.
- 28 Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719.
- 29 Art. 234(3) EC.
- 30 Art. 141 of the Swiss Federal Constitution.
- 31 Namely the Agreement between the European Community and the Swiss Confederation on air transport, OJ 2002 L 114/73, the Agreement between the European Community and the Swiss Confederation on the carriage of goods and passengers by rail and road, OJ 2002 L 114/91, the Agreement between the European Community and the Swiss Confederation on trade in agricultural products, OJ 2002 L 114/132, the Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment, OJ 2002 L 114/269, the Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement, OJ 2002 L 114/430, and the Agreement on Scientific and Technological Cooperation between the European Communities and the Swiss Confederation, OJ 2002 L 114/468 (see now OJ 2007 L 189/26), all signed on 21 June 1999.
- 32 Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, signed on 26 October 2004, OJ 2008 L 53/52.



## PROF.DR. R.C. TOBLER (born 1961)



- 1988 PhD in Swiss trade mark law, Zurich University, Switzerland
- 1988-1989 Research fellow, Kyoto Comparative Law Centre, Japan
- 1992 Zurich bar exam
- 1993-1994 Postgraduate studies in European Community law, 'The Leiden LL.M. Programme in EC Law'
- 1994 Winning Advocate General, European Law Moot Court competition
- 1995 Researcher, European Forum 1994/1995 on 'Gender and the Use of Time', European University Institute, Florence, Italy
- 2000-2004 Associate Professor of European law, Basel University, Switzerland
- 2004 Swiss Habilitation; thesis on indirect discrimination in EC law and in Swiss constitutional law
- 2005- Ordinary Professor of European law, Basel University, Switzerland
- 2007- Professor of European law, Leiden University

Prof. Tobler's research activities centre on equality and non-discrimination in European Community law, both economic and social law. Prof. Tobler is an expert with the European Commission's Network of legal experts in the anti-discrimination field (concerning Directives 2000/43/EC and 2000/78/EC) and a member of the academic directorate of the interdisciplinary Swiss National Research Project no. 60 on sustainable equality policy in the field of gender.

In her inaugural lecture, Prof. Tobler looks into the legal position within the EU of nationals of countries that are not EU Member States, in particular long-term residents such as herself. Complex questions may arise where a third-country national's situation falls under more than one legal instrument, for example under an EC directive and under an agreement concluded by the EC and its Member States with a third country. This may lead to a situation of multiple benefits, rather than multiple discrimination, which is – unfortunately – much more often experienced by migrants.



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